

Trade Secrets

ASEAN economic community
and inward investment

The voice of business



Building a better
working world



About EY's Global Government & Public Sector Center

Around the world, governments and not-for-profit organizations are continually seeking innovative answers to complex challenges. They are striving to provide better services at lower costs and to ensure sustainable economic development, a safe environment, more transparency and increased accountability. EY combines private sector leading practices with an understanding of the public sector's diverse needs, focusing on building organizations' capability to deliver improved public services. Drawing on many years of experience, we can work with you to help strengthen your organization, deliver value for money and achieve lasting improvement. Our Global Government & Public Sector Center brings together teams of highly skilled professionals from our assurance, tax, transaction and advisory services. We are inspired by a deep commitment to help you meet your goals and enhance public value, today and tomorrow.

Foreword

Achieving regional economic integration in ASEAN by 2015. It is not just a grandiose vision or mission statement. In fact, it is critical to the future of our region and its 600 million citizens.

Yet, achieving full integration is complex.

The 2007 ASEAN Economic Community (AEC) Blueprint reflects an inspiring and thoughtful approach to its 2015 goal. However, today as we speak, it has become clear that some of the initiatives will only be accomplished after the deadlines. This is perhaps unsurprising, given the economic diversity and varying growth maturity in each of the member countries.

Notwithstanding this, the AEC's success is measured only by the level of business interest in the region. It is therefore important that we look at the AEC's progress through the eyes of business. By examining the impediments to doing business in ASEAN, we hope to offer pragmatic policy and implementation recommendations to the governments.

Indeed, governments in ASEAN have a unique challenge. But they are not alone. Often, private-public consultation holds the key to unlock the value of any transformation.

EY's Government & Public Sector teams provide integrated, cross-border service across the ASEAN region. This combination of global oversight and local execution means that we offer international leading practices enhanced by on-the-ground knowledge and insight.

We believe that our experience in serving some of the largest multinational companies in the world and homegrown ASEAN businesses, as well as government and not-for-profit organizations, offers us privileged insights into the issues that stand in the way of the AEC achieving success.

Helping ASEAN to realize its full potential in becoming truly economically integrated is also our way of helping to build a better working world.

We hope you will find this report useful and we welcome your feedback.

Sincerely,



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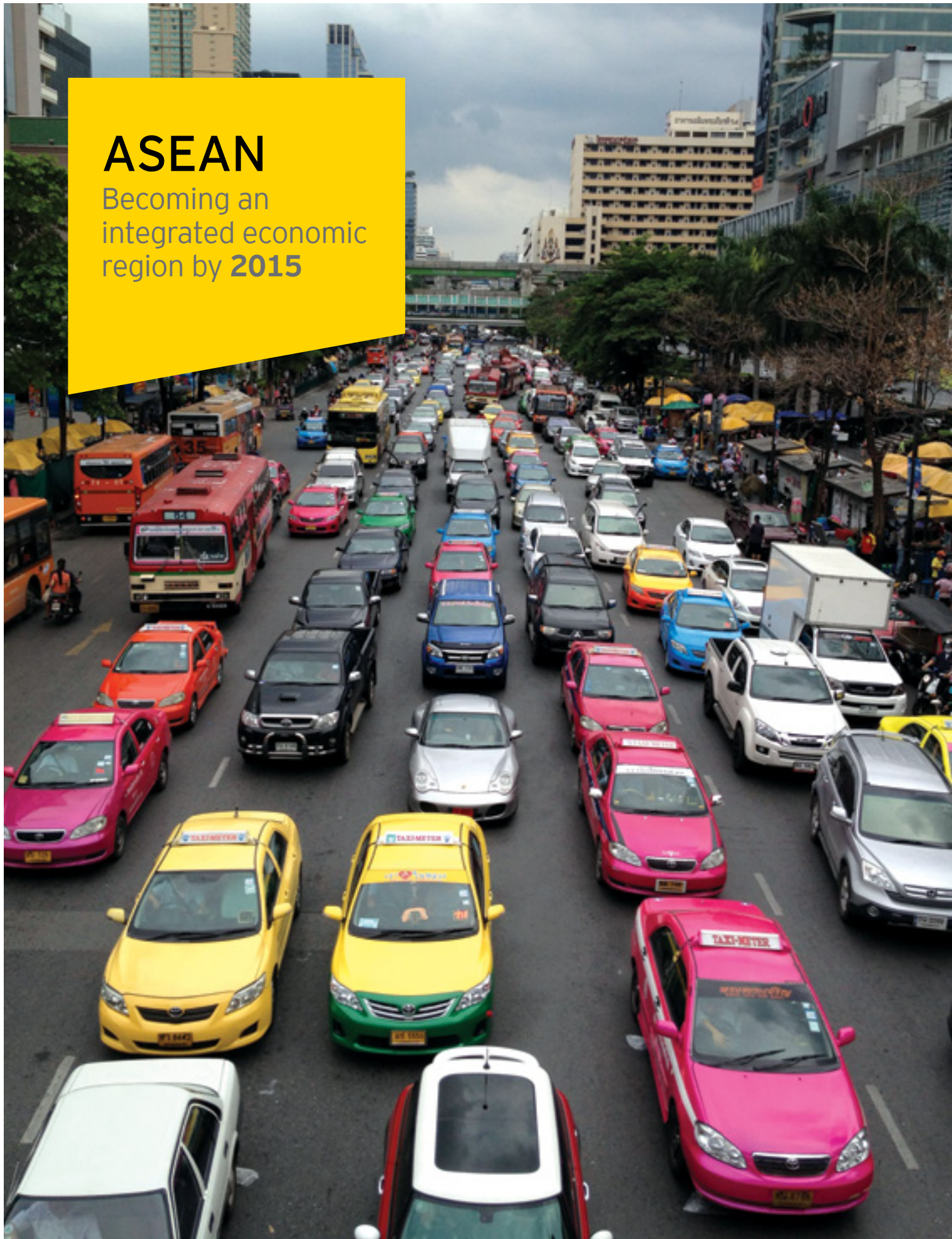


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ASEAN

Becoming an
integrated economic
region by **2015**



1 Introduction

The AEC and its integration targets of 2015

The Association of Southeast Asian Nations (ASEAN) 2007 Blueprint for the ASEAN Economic Community (AEC) envisaged an “integrated economic region by 2015.” To achieve this ambition, one that would see the free flow of goods, services and people across the borders of its member countries, it identified “four pillars” as key:

- ▶ A single market and production base
- ▶ A competitive economic region
- ▶ A region of equitable economic development
- ▶ A globally integrated regional economy

With each pillar given a set of metrics to measure progress, the most recent assessment in 2011 made clear that much remained to be done: only 67.5% of the targets had been met.¹

Some major obstacles remain largely unresolved, even today. Little progress has been made in eradicating some of the acknowledged trade

barriers. And, there have been delays in resolving crucial issues, such as the ratification of various agreements and alignment with national domestic laws. The latest report of the Asian Development Bank (ADB), *AEC Work in Progress*, also observed that “one should not expect 2015 to see ASEAN suddenly transformed, its nature and processes abruptly changed.”²

As we are now well into 2014, it has become apparent that many of the AEC measures will not be completed on time. Indeed, history has shown us that it is often the case that an economic community requires many years, even decades, before becoming relatively mature, largely operational and reasonably sustainable. It seems that the AEC is no exception. Amid the fanfare and optimism inherent in the signing of any new treaty or accord, the legal, political and organizational complexities are often underestimated. Forming an integrated economic region is far from easy, and this partly explains why many of the AEC’s 2015 targets will fall short of their deadlines.

¹ “ASEAN Economic Community Scorecard 2012,” Association of Southeast Asian Nations (ASEAN), 2012.

² “The Asean Economic Community: A Work in Progress,” a joint study by *Asian Development Bank* and *Institute of Southeast Asian Studies*, Singapore, 2013.

The importance of investment

Numerous studies have sought to identify the reason why implementing AEC goals ran into difficulties and to provide corresponding solutions. While there are many factors that determine the success of an economic pact, such as the AEC, EY believes the ability to attract investment is critical, akin to a continued supply of steam that drives the locomotive that pulls forward a series of other developments.

There is a vast volume of literature and research examining the progress of the AEC. Often looking from a high level policy-makers' perspective, the majority of these reports have thoroughly examined the structure, policies, processes and prospects of the AEC with a top-down approach. Many have given sound advice to ASEAN governments in terms of shaping their AEC policies post-2015.

Not many, however, have attempted to look at the issues and find possible solutions from the bottom up, that is, from the perspective of the companies and enterprises that are hoping to benefit from the integrated economic region. Interestingly, the latest ADB report rightly observed that despite the best official efforts, the business world takes a rather indifferent view toward the overall AEC progress. This suggests several things.

First, the inter-government collaboration on AEC is too complicated for any business to fully understand, let alone make use of. Second, the business community in general prefers to bypass any official process if possible and deal directly with each other, and in the process segregating themselves from the AEC process as a whole. Third, there is a general

lack of focus from governments on how to prioritize and solve problems they are facing on the road to integration, especially those directly relating to investment and business operations.

Nevertheless, businesses can be both the beneficiary and the facilitator of the AEC, but they need to find a way to direct their views and experiences to policy-makers, legislators and administrators alike, so that while the regional policy debate continues, some practical implementation issues can hopefully be addressed with better efficiency.

Focusing on FDI: the aim of this report

To bring about a better flow of goods, services, finance and people is the main aim of the AEC. Yet we constantly see that national and local priorities supersede regional demand and cultural differences, obscuring wider goals. While macro problems persist, on the micro level there are many areas where solutions can be applied.

Although the AEC seeks to address a wide array of issues, it is ultimately an economic pact and should be viewed as a major effort to increase investment inflow by ASEAN member states. In other words, this is a large scale but coordinated exercise for attracting foreign direct investment (FDI). If we accept that the total FDI attracted could be regarded as a general indicator of the overall progress and success of the AEC development, then by focusing our analysis on it, we may reveal some of the underlying issues and solutions to the 2015 impasse.



Statistics show developing nations that achieved high GDP growth – in China's case often double-digit growth – in the past 10 years have also seen their net inward FDI grow at a fast pace. Although there is no universally accepted significant correlation between inbound investment and GDP growth, FDI's contribution to a country's capital formation and its role in driving trade and development is undeniable.

By focusing on FDI, we recognize its vital role in driving the economy. We also understand that there is a ripple effect by which the financial benefits of FDI will drive changes in social and economic structure, and influence the way that a country is run and its interaction with its neighbors and the global community. Equally, investors and businesses will also reap rewards from their investment by expanding these economies through FDI.

The term FDI itself is a loosely defined concept, even though it is often represented in monetary terms. Studying FDI in the AEC context, however, we feel that there is a need to discuss issues that go beyond the level of inbound investment. Often neglected by discussion papers is a more micro and implementation-focused point of view, one based on some common operational issues that businesses often encounter when making an investment decision or setting up a legal entity in a country.

From this ground-up perspective, we will select a few areas that reflect typical concerns of the businesses when they make investment decisions. By raising these issues and giving a voice to business concerns, we hope to offer ASEAN governments an alternative viewpoint on the AEC problems, giving them the

“ If we accept that the total FDI attracted could be regarded as a general indicator of the overall progress and success of the AEC development, then by focusing our analysis on it, we may reveal some of the underlying issues and solutions to the 2015 impasse.”

opportunity to tailor their policies to be more business friendly.

We will first examine procedural issues encountered by firms in setting up business in ASEAN countries, before turning to cross-border trade promotion and issues of documentation and procedures. Non-tariff barriers arising out of administrative practices also fall under our spotlight, as well as the functions of various investment promotion bodies and the lessons to be learned from countries where these organizations play a vital role in attracting FDI.

After we have identified typical issues and possible solutions at the implementation level, we will be able to envisage potential next steps, including consideration of what should be done to improve various treaties and agreements, especially those governing the free movement of funds and people.

Implementation issues that businesses face today

Setting up businesses

ASEAN needs to attract investments and businesses. Firms are also looking at the ease of setting up businesses as a prerequisite of investment. However, approaching 2015, many issues such as legal guarantees, administration clarity and ownership liberalization have yet to be resolved across ASEAN member states. In this chapter, we will compare and discuss how these obstacles can be removed.

Obstacles and transparency issues in cross-border trade

As pointed out by the ADB³, even though the tariff on goods has been reduced to near zero, other non-tariff barriers have emerged as the main obstacles to cross-border trade. We will provide some typical examples of such barriers and examine trade facilitation efforts, such as self-certification and ASEAN Single Window (ASW), as well as free trade agreement (FTA) implementation issues faced by companies.

Strengthening the functions of investment promotion bodies

Economies that attract a greater proportion of FDI than others often show traces of a powerful investment promotion organization at work. From Hong Kong's InvestHK to Singapore's Economic Development Board (EDB), investment promotion bodies are playing a vital role in improving the image and machinery that channel investment into their host countries. We compare the functions of such bodies in each of the ASEAN countries to identify a winning combination of factors that enables them to source, attract and maintain inbound investment.



³ "The Asean Economic Community: A Work in Progress," a joint study by Asian Development Bank and Institute of Southeast Asian Studies, Singapore, 2013.



Looking ahead: What are the next FDI issues?

We take a look at several typical implementation questions organizations ask upon entering the ASEAN market, highlighting examples and solutions that could be replicated across the entire FDI spectrum.

The next phase of this report will look at macro-level policy challenges, encompassing laws, treaties and international agreements. This is particularly important in ensuring an integrated AEC “falls into” place. We will examine how far the laws and rules on foreign equity restrictions on priority sectors have progressed, and examine the rules allowing for the mobility of professional labor within ASEAN member states, as well as present our views on what the AEC Blueprint post-2015 should preferably focus on.

Only when these issues, on both the implementation and macro policy levels, are settled can businesses have more clarity when making inbound investment decisions. In the long run, this will only benefit all parties within ASEAN.



3 steps

Some ASEAN countries require a three-step process to legalize documents:

- ▶ Notarization
- ▶ Certification by the Ministry of Foreign Affairs
- ▶ Certification by the consulate office of the respective ASEAN country

Getting down to work in ASEAN

Challenges and solutions

By Sophia Lim

Overview

It is widely believed that the ability to attract investments and business is crucial for the development of a country's economy. Firms are also looking at the ease of setting up businesses as a prerequisite for making a major investment. However, as we approach 2015, many issues such as legal guarantees, administration clarity and ownership liberalization are still not resolved across ASEAN member states.

The purpose of this chapter is to locate, from the business point of view, the obstacles and identify specific actions governments can implement on an operational level to ease the process of setting up business. In the following sections, we will discuss the comments, common complaints and problems that businesses encounter, and the measures ASEAN governments should consider to help businesses from the implementation stand-point.

Common issues and obstacles

Language issues

Foreign investors embarking on their journey into ASEAN can face challenges that may at first appear insurmountable. The diverse local languages present one main obstacle in a region where many countries may not yet use English as the common commercial language. Besides communication, documentation and paperwork also tend to be in local languages. From Table 1, it can be clearly seen that countries such as Singapore, Malaysia, Brunei, and the Philippines have so far adopted English in terms of documentation requirements.

Screening process and pre-entry requirements

Like most jurisdictions internationally, the screening process and pre-entry requirements are pre-requisites to starting any business venture in ASEAN countries. Some countries within ASEAN also have regulations that prevent foreign investors from becoming a dominant force in the economy, such as limitations on foreign equity or ownership, and divestment requirements.

Typically, certain activities such as those involving national security, and activities that may affect the livelihoods of local citizens such as exploration and mining of oil and gas, may be prohibited in certain countries or permitted with limited foreign equity participation in other countries.

In Myanmar, for example, mining, oil and gas, and telecommunications are the sectors reserved for the State and regulated by State-owned Economic Enterprises Law. The government may, on a case-by-case basis, permit restricted activities to be carried out by any person or economic organization with the government subject to unspecified conditions. The government may also require foreign investors to find a local joint venture partner. Due to a myriad of government regulations and an opaque decision-making process, it can be overwhelming, uncertain and frustrating for foreign investors. While there have been progressive efforts to improve, the issues still persist.

Differences in laws and regulations and gaps in standards

It seems almost impossible to narrow the gap due to the differences in the laws of each ASEAN country (see Table 1). The key to easing the challenge is to strike a balance without sacrificing the sovereignty and autonomy of each ASEAN country.

Table 1: Setting up businesses in ASEAN countries

Foreign direct investment - Setting up business entities						
	Singapore	Malaysia	Thailand	Indonesia	Vietnam	
I. Regulatory environment						
Governing ministry	Accounting & Corporate Regulatory Authority of Singapore (ACRA)	Companies Commission of Malaysia (CCM)	Ministry of Commerce	Investment Coordinating Board (Badan Koordinasi Penanaman Modal, BKPM)	Ministry of Planning & Investment (but can also be other industry specific ministries or authorities)	
Applicable laws	Companies Act, Chapter 50 of Singapore	Companies Act 1965, Malaysia	Civil and Commercial Code, the Act determining offences relating to the Registered Partnership, Limited Partnership, Limited Company, Association and Foundation B.E. 2499	Law 25 Year 2007 regarding Investment; Law 40 Year 2007 regarding Limited Liability Company	Investment Law 2005, Law on Enterprises 2005	
Business or commercial license	Certificate of incorporation or registration	Certificate of incorporation or registration	Certificate of incorporation	Foreign capital investment principle license (Izin Prinsip Penanaman Modal Asing, IPPM) and business license (Izin Usaha). Exception on certain business sectors apply	Investment certificate (concurrently serves as Business Registration Certificate)	
Expiry date of business license	No expiry date	No expiry date	No expiry date	IPPM serves as a temporary document and Izin Usaha has no expiry date	Not exceeding 50 years (exception cases may be extended to 70 years)	
Foreign ownership restrictions	Generally no restriction except for national security and in certain industries	Generally liberalized for new investments, expansions or diversification except for certain specific activities and products	Must obtain foreign business license for operating business under the lists as prescribed in the Foreign Business Act 1999	Generally allowed in all areas except those specified in negative list under Presidential Regulation No. 36/2010 and permitted with conditions for certain industries	Generally allowed except for 49% cap on listed companies, other limits are set for certain industries such as banking	

Philippines	Cambodia	Lao PDR	Brunei Darussalam	Myanmar
Securities and Exchange Commission	(i) Ministry of Commerce (MOC) (ii) Council for the Development of Cambodia (CDC)	(i) General business: Ministry of Industry and Commerce (ii) Concession business: Ministry of Planning and Investment	Registrar of Companies	Directorate of Investment and Company Administration (DICA) (Ministry of National Planning and Economic Development)
Corporation Code of the Philippines; Omnibus Investments Code; Foreign Investments Act (1991)	Law on Investment & Law on Commercial Enterprise	(i) Investment Promotion Law (ii) Enterprise Law (iii) Other related laws for specific activity if applicable	Companies Act (Chapter 39)	Myanmar Companies Act or in conjunction with the Union of Myanmar Foreign Investment Law (MFIL)
Certificate of incorporation (corporation); License to transact business in the Philippines (branch)	Certificate of incorporation	(i) General business: Enterprise license (ii) Concession business: Concession license	Certificate of incorporation or registration	(i) Permit-to-trade (ii) Incorporation certificate
Maximum 50 years but may be extended by amendment of the articles of incorporation	Maximum 3 years and can request for renewal for every 3 years	Based on investment period granted per enterprise license or concession license	No	No expiry date (Renewal permit on 5-year basis)
Generally allowed subject to restrictions found in the Foreign Investments Negative List (FINL); List A - areas of activities reserved to the Philippine nationals by mandate of the Constitution and other specific laws List B - areas of activities and enterprises where foreign ownership is limited pursuant to law. Among these are defense or law enforcement-related activities	No restrictions on foreign ownership, except for ownership of land	Generally allowed except for concession business, and business list reserved for Lao nationals	Generally allowed except for certain activities	Most activities are open to foreign investment with the exception of those reserved for the State under the State-owned Economic Enterprises Law, governed under Foreign Investment Law

Table 1: Setting up businesses in ASEAN countries (cont'd)

Foreign direct investment - Setting up business entities						
	Singapore	Malaysia	Thailand	Indonesia	Vietnam	
Other licenses	Special licenses for certain industries	Special licenses for certain industries	Special licenses for certain industries and foreign business license for foreign majority owned company	Import license and registration with custom office. Depending on the nature of business activities, there are other required technical licenses	Special licenses for certain industries	
Ease of starting a business (out of 189 economies from the World Bank's Doing Business report⁴)	3	16	91	175	109	
(a) Number of procedures	3	3	4	10	10	
(b) Number of days	2.5	6	27.5	48	34	
II. Type of entities						
Common business structures for foreign investors	(i) Company limited by shares (ii) Branch	(i) Company limited by shares (ii) Branch	(i) Company limited by shares (ii) Branch	A limited liability entity (Perseroan terbatas, PT) in the form of foreign capital investment	(i) Limited liability company (LLC) (ii) Joint-stock company (JSC)	
III. Comparison for company (most common entity)						
A. Corporate/statutory requirement						
1. Shareholder						
Minimum requirement	1 shareholder (individual or corporate)	2 shareholders (individual or corporate) at the time of incorporation	3 shareholders (individual or corporate), but when setup all 3 shareholders must be individuals	2 shareholders (individual or corporate)	(i) LLC - minimum 1 member (ii) JSC - minimum 3 shareholders (individual or corporate)	
Must be citizen or local resident	No restriction	No restriction	No restriction	Depending on the nature of business, the second shareholder must be Indonesian citizen	No restriction	
Corporate shareholder	Permitted	Permitted	Permitted after incorporation	Permitted	Permitted	

⁴ "Doing Business 2014," *The World Bank website*, www.doingbusiness.org/rankings, accessed 20 February 2014.

Philippines	Cambodia	Lao PDR	Brunei Darussalam	Myanmar
Special licenses for certain industries	(i) Special licenses for certain industries (ii) Final registration certificate for qualified investment project	Operational license to applicable business activity (governed by related ministries e.g., hospital business will be under the Ministry of Public Health)	Special licenses for certain industries	Permit from Myanmar Investment Commission (MIC) Export and Import license
170	184	85	137	189
15	11	6	15	11
35	104	92	101	72
(i) Domestic corporation or subsidiary (ii) Branch	(i) Branch (ii) Subsidiary	(i) Company (ii) Branch (for certain industries such as banks and insurance) (iii) Partnership	(i) Company (ii) Branch	(i) Limited Liability Company (ii) Branch
Minimum 5 individual shareholders	(i) 1 shareholder (individual or corporate) for single member private limited company (ii) 2 shareholders for private or public limited company	(i) Minimum 2 shareholders for Partnership and Company Limited (ii) 1 Shareholder for Sole Limited Company	2 shareholders (individual or corporate)	Minimum 2 shareholders (individual or corporate)
Majority must be local residents	No restriction	No restriction	No restriction	No restriction
Permitted but must be with at least 5 individual shareholders	Permitted	Permitted	Permitted	Permitted

Table 1: Setting up businesses in ASEAN countries (cont'd)

Foreign direct investment - Setting up business entities						
	Singapore	Malaysia	Thailand	Indonesia	Vietnam	
2. Officers of the company						
(a) Director						
Corporate director	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	
Minimum requirement	1	2	1	1	1	
Resident status	Minimum 1 ordinarily resident director	Minimum 2 local resident directors	Generally no restriction except for certain industries	At least one director is resident	Generally no restriction except for certain industries	
Legal representative	Not required	Not required	Not required	Not required	Required	
(b) Company secretary						
Corporate secretary	Must be an individual	Must be an individual	Not applicable	Not applicable	Not applicable	
Resident status	Ordinarily resident	Local resident	Not applicable	Not applicable	Not applicable	
Minimum requirement	1	1	Not applicable	Not applicable	Not applicable	
3. Capital requirement						
(a) Types of capital						
Authorized capital (maximum amount allowed to be issued, can be revised any time)	Concept of authorized capital abolished in 2005	Minimum amount RM400,000	Minimum amount THB 15	Minimum total investment is above Rp10 billion (or its USD equivalent)	Generally none unless specifically provided by special law	
(b) Paid-up capital						
Shares	Minimum 1 ordinary share	Minimum 2 ordinary shares of RM1 per share	Minimum 3 shares	Minimum 2 ordinary shares	Only applicable to JSC: minimum 1 ordinary share for each of the 3 founding shareholders	
Forms of contribution into capital	Cash and/or non-cash	Cash and/or non-cash	Cash and/or non-cash	Cash and/or non-cash	Cash and/or non-cash	
Capital must be in local currency	Not mandatory	Local currency	Local currency	Can be in USD or local currency	Local currency	

Philippines	Cambodia	Lao PDR	Brunei Darussalam	Myanmar
Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
5	Minimum 1, except for public limited company (minimum 3)	1	At least 2 directors, of which one shall be ordinarily resident in Brunei Darussalam. Where there are more than 2 directors, at least 2 of them shall be ordinarily resident of Brunei Darussalam	No restriction
Majority must be local residents	No restriction	Not mandatory	Yes (see minimum requirement)	No restriction
Not required	Required	Required	Not required	Not required
Must be an individual	Not applicable	Not applicable	Not applicable	Not applicable
Philippine citizen and resident	Not applicable	Not applicable	Not applicable	Not applicable
1	Not applicable	Not applicable	Not applicable	Not applicable
No minimum authorized capital stock	Minimum amount of 4 million Riel (approximately US\$1,000)	Generally no	Minimum B\$25,000	(i) US\$150,000 for manufacturing activity (ii) US\$50,000 for service activity
Minimum 25% of the authorized capital must be subscribed at time of registration	Minimum 1,000 shares	Minimum share value is 2,000 Lao kip per share	Minimum 2 shares	Minimum 2 shares
Cash and/or non-cash	Cash and/or non-cash	Cash and/or non-cash	Cash and/or non-cash	Cash
Local currency	Local currency	Local currency	Local currency	Capital must be made in USD

Table 1: Setting up businesses in ASEAN countries (cont'd)

Foreign direct investment - Setting up business entities						
	Singapore	Malaysia	Thailand	Indonesia	Vietnam	
Minimum paid-up capital or capital contribution	Determined by the promoters of company	RM2	Minimum THB5 per share	IDR2.5 billion (or its US\$ equivalent)	Generally no minimum unless specifically provided by laws for certain industries such as real estate and banking	
Prescribed contribution schedule	Not required	Not required	Shares must be paid up before registration	Shares must be paid up before legal incorporation	Required	
4. Constitutions/bylaws						
	Memorandum and Articles of Association	Memorandum and Articles of Association	Memorandum and Articles of Association	Articles of Association in the form of Akta Notaris	Charter	
5. Execution of documents						
	All documents must be translated into English and notarized. Certificate of incorporation must be certified by the Registry of Companies in the country of incorporation	All documents must be translated into English or local language and notarized. Certificate of incorporation must be certified by the Registry of Companies in the country of incorporation	All documents must be notarized in the country where document is executed and translated into local language	All documents must be notarized in the country where document is executed and translated into local language	All documents must be notarized, translated into local language and authenticated by the Vietnam Embassy or the Consulate in the country where document is executed	
6. Language requirement						
	English	English (most common language used for official documents) and local language	Local language	Local language	Local language	

Philippines	Cambodia	Lao PDR	Brunei Darussalam	Myanmar
Generally, corporations engaged in domestic market enterprises with more than 40% foreign equity – minimum paid-up is \$200,000. Those engaged in export enterprises (exports 60% or more of their output) is PHP5,000	Minimum KHR4,000 (approximately \$1) per share	(i) General business: LAK1 billion (equivalent to US\$140,000) (ii) Concession business: Depending on type of activities	Minimum B\$1 per share	(i) US\$150,000 for manufacturing activity (ii) US\$50,000 for service activity
Minimum 25% of total subscription must be paid up provided that it is not less than PHP5,000	Shares must be paid up before registration	(i) General business activity: Contribution schedule varies based on the type of activity, starting from 40% of paid-up capital within 90 days after enterprise license is granted and the rest of paid-up must be within 1 year (ii) Concession business: 20% of paid-up capital and within 90 days after concession license is granted and the 80% within 2 years	Not required	Not required
Articles of incorporation and bylaws	Memorandum and Articles of Association	Memorandum and Articles of Association	Memorandum and Articles of Association	Memorandum and Articles of Association
All documents executed outside of the Philippines must be notarized, translated into English, and authenticated by the Philippines Embassy or the Consulate in the country where document is executed	All documents must be notarized, translated into local language and authenticated by the Cambodian Embassy or the Consulate in the country where document is executed	All documents must be notarized, translated into local language and authenticated by the Lao PDR Embassy or the Consulate in the country where document is executed	All documents must be notarized in the country where document is executed and translated into English or local language	All documents must be notarized, translated into local language and authenticated by the Myanmar Embassy or the Consulate in the country where document is executed. Certain documents such as business activities in English must be translated into local language. Documents from foreign company or head office translated into English language are generally acceptable
English	Local language	Local language	English (most common language used for official documents) and local language	Local language and English

Practical approach from foreign investors' perspective

How easy is it to do business in ASEAN countries from the perspective of a foreign investor?

Lack of clarity and uncertainty in local laws, government policies and legal environment

One of the biggest challenges is the uncertain legal environment and lack of clarity concerning local laws and government policies. Many foreign investors are naturally anxious that governments may change their policies on important legislation with little warning, leaving investors with little or no time to react. Interpretation of laws and policies can sometimes be highly arbitrary. This means that an investor should be aware of the adage "caveat emptor" or "buyer beware" when investing in ASEAN.

The economies of some emerging markets are growing at a rapid pace. However, the current local laws, rules and regulations are outdated. Some of the governments are trying to catch up with the rest of the region to meet the demands of the fast-evolving business landscape. However, this has created confusion and uncertainty as changes to the rules and regulations may have been developed to address individual adhoc situations and may not necessarily be viable long-term solutions. In addition, many civil servants are not equipped with the right skill sets, lacking the expertise and being unfamiliar with roles and functions of various government bodies other than their own. This results in further uncertainty for investors.

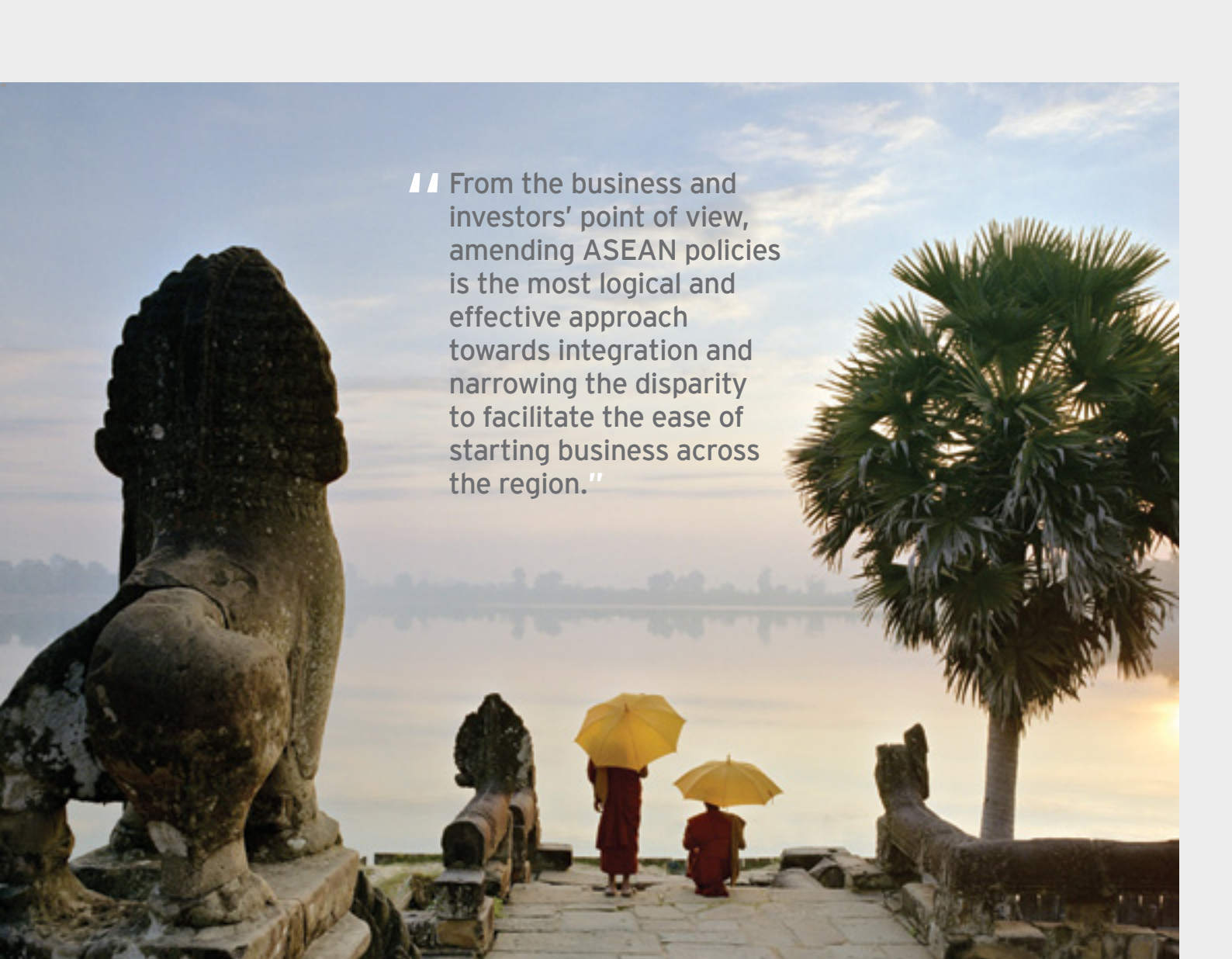
Complicated procedures and long delays

Based on the statistics published in the World Bank's recent *Doing Business report*⁵, the gap, or to some, the "Great Divide" of ASEAN, ranges from 1 to 189 in the category of ease of starting business in the region. The report also shows that the number of procedures required to start a business in ASEAN ranges from 3 to 15 and the processing time ranges from 3 days to 104 days (See Table 1).

The complicated regulatory procedures adopted in certain ASEAN countries tend to result in bottlenecks and long delays. In countries such as Singapore and Malaysia, where regulatory procedures are fairly advanced, the process of establishing a company can be completed within a few days at relatively low cost. In contrast, incorporating a local company in Cambodia may take approximately 104 days to complete.

Investment in IT improves efficiency and reduces bottlenecks. However, for some ASEAN countries, investment in IT still has some way to go.

⁵ "Doing Business 2014," *The World Bank website*, www.doingbusiness.org/rankings, accessed 20 February 2014.



“ From the business and investors’ point of view, amending ASEAN policies is the most logical and effective approach towards integration and narrowing the disparity to facilitate the ease of starting business across the region.”

Multi-layered approvals for licenses

In Singapore and Malaysia, a business can normally commence operations as soon as the Certificate of Incorporation is issued by the business registries of the respective countries. In some ASEAN countries, a business may require various licenses from various government ministries before it can commence operations.

There are important lessons to learn from Vietnam, a country that has made impressive progress in the past decade. By simplifying its application process using a one-stop registration system, an investor only needs to submit their

application dossier containing all required information and documentation to one governing authority. If the application fully satisfies the conditions, the ministry will liaise with other government organizations for relevant licenses and approvals internally before issuing the investment certificate. The whole process takes 1 to 1.5 months compared to 10 years ago when it could take up to 2 months and beyond.

In Indonesia, local regulations and practices, and licensing requirements vary from city to city. In Yogyakarta, business licensing is consolidated at a one-stop center to obtain business

trading license, company registration certificate and location permit.

In Pontianak, each license must be applied separately. One of the significant challenges of doing business in Indonesia is obtaining the necessary permits and licenses, which can be costly and time-consuming. Establishing strong governmental and industry relationships is key to starting and growing the business.

A few ASEAN countries have embarked on one-stop registration service, such as Indonesia, the Philippines and Cambodia. Indonesia has started a nationwide computerized system for company

3 to 15

The number of procedures required to start a business in ASEAN

registration. Legislation is currently in place to simplify licensing requirements across the country. Likewise, in the Philippines, the government has initiated the Philippines Business Registry to facilitate business registration-related transactions by integrating all the agencies involving business registration, such as the Department of Trade and Industry, the Bureau of Internal Revenue, the Social Security System, the Home Development Mutual fund, the Philippine Health Insurance Corporation, local government units and other permit or license-issuing agencies.

Although there are still areas for improvement, these initiatives are certainly moving in the right direction, expediting the process and reducing the red tape.

Legalization of documents

In addition to dealing with the challenges of starting a business, foreign companies are required by some ASEAN countries to submit documents issued by their country of establishment or home country. As part of the requirements, these documents must be legalized, which usually involves a three-step process of certification in the home country: notarization, certification by the Ministry of Foreign Affairs and finally certification by the consulate office of the respective ASEAN country.

Locating the nearest consulate office in the country of origin of the foreign investor can prove to be a challenging task. In certain jurisdictions, the consulate normally requires the physical presence of the company director or an authorized person. It may result in the entire board of directors flying 2,000 miles to visit the consulate office.

For many other countries outside ASEAN, certification by a notary public or by an official of equivalent standing in the home country is usually sufficient. Within ASEAN, countries such as the Philippines, Cambodia, Lao PDR and Myanmar still require the entire three-step process to be executed. The disparity confuses an investor and results in lengthy delays in the overall process.

Regulatory requirements

The requirement of local resident or local nationals as directors is mandatory in most countries. Foreign investors, more often than not, do not have contacts with local nationals who can assume the role. Therefore, in practice, they engage local nationals for a fee to act as a nominee director to fulfill the regulatory requirement. The nominee does not have any executive function and does not get involved in any operational matters save for regulatory compliance. The nominee will often have an indemnity agreement with the holding company for

the risk exposure in assuming such a role as the nominee is personally liable for all the acts by the company.

Such regulatory requirements may have been intended to protect the interests of nationals and ensure local participation. It may, however, become a double-edged sword. A case in point: a foreign-owned entity was caught employing foreigners to work without working visas. The nominee, who had no knowledge of such matter, was rigorously questioned by the immigration authorities. The illegal immigrants were deported and banned from entering the country but the punishment was more severe to the entity and the nominee. The entity was blacklisted and banned from employing foreigners and the nominee was blacklisted and set free after a stern warning. Conversely, a foreign investor may be caught in a bind or a deadlock situation if the nominee decides to make things difficult for him.

Foreign ownership restriction

Many ASEAN countries continue to have significant restrictions on specific sectors in terms of foreign ownership restrictions, with legislation enacted to uphold and safeguard the interests of its nationals. In addition, the myriad of local laws, national policies and governmental requirements may not always be aligned in many ASEAN countries and this adds further barriers to potential investors.

Prior to embarking on an investment in an ASEAN country, a foreign investor has to determine whether the proposed business activities fall within the restrictions as defined and prescribed in each ASEAN country. Although one can appreciate the rationale for such laws, they may deter foreign investment in ASEAN countries. Similarly, while it is appreciated that ASEAN countries are all in diverse stages of economic growth, and liberalization of the priority sectors for ASEAN has been one of the key initiatives of the AEC, progress in this area continues to be slower than hoped. This will clearly be an area where improvements will be needed beyond 2015.

Politics and bilateral relations

Politics has the power to change the nature of foreign investment. The greatest concern among the business community and foreign investors is uncertainty in any bilateral relationship, such as border conflicts, cross-border pollution and cultural clashes. This may require assistance from ASEAN as well as responsibility by individual countries.

To this end, perhaps ASEAN governments should learn from the business community's ability to make cross-border investments. Driven by the common goal to profit, or perhaps fear of negative repercussion in a foreign land, business partners often seek to find amicable solutions to deadlock situations.

ASEAN member states have to accept the reality that leaning on one another fosters survival and growth. An act by one will impact another.



Recommendations

Despite extensive discussions with the business community about how to simplify these processes, firms are still looking to governments as the solution provider. This is because there is only so much that firms themselves can do to alter the business environment of a country or a region. From the business and investors' point of view, amending ASEAN policies is the most logical and effective approach towards integration and narrowing the disparity to facilitate the ease of starting business across the region.

So what are the changes that businesses would like to see?

Three-pronged approach:

Regional level

The ASEAN Secretariat can play an important role to influence the ASEAN members to implement their ASEAN agreements. 2015 may prove to be a turning point as many nations are now facing the reality of not being able to achieve their promised goals. Hopefully, this will create a greater urgency and impetus for ASEAN members to push forward despite the increasingly difficult issues faced by them. It is important that this journey continues to gain momentum, so the work accomplished is not lost.

To enhance implementation effectiveness, we propose:

- ▶ Developing a definitive and detailed plan on phases of integration which should include:
 - ▶ **Regulatory process**
At the regional level, the ASEAN Secretariat should identify the differences in regulatory processes and requirements and local policies in each country and work towards developing a set of standards in procedures that is consistently applied across ASEAN. For example, simplifying the legalization procedures from the three-step approach to a simple certification by a notary public or an office of equivalent standing in an ASEAN country.
 - ▶ **Standardization of information requirement**
Information requirement and processes for the registration of a business entity varies within ASEAN, for example, the concept of capital contribution varies from one country to another. Similarly, the concept of legal representative is applicable in countries such as Vietnam and Cambodia, but not in Singapore and Malaysia. The ASEAN Secretariat should therefore identify and standardize the information requirement and processes in each country. From the identification process, the Secretariat can identify

the common terminology or its equivalent and use it to standardize the information required for business registration across ASEAN.

- ▶ **One-stop registry exchange**
The Secretariat should work with each government at the national level to help implement a one-stop registry or improve the existing registry. The Secretariat should be used as a platform to exchange information and assist in developing a business friendly, one-stop registry in each country. Ultimately, such one-stop registry platforms should become similar across ASEAN.
- ▶ **ASEAN information exchange**
Governments should develop a platform for exchange of information in relation to legal framework and requirements, and perhaps a cross-border securities exchange.
- ▶ **ASEAN portal**
Member states should develop an ASEAN portal that provides a step-by-step guide on starting a business in each country, including information on local requirements, documentation requirements and templates, application procedures and relevant information with web links to the one-stop registry in each country.
- ▶ **Dialogue session**
Dialogue sessions across ASEAN member states should be conducted by national governments through to



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each level of local government to keep them apprised of the changes, and create a way for regular feedback on areas for improvement to be captured.

National level

The ASEAN Secretariat and national governments should be more proactive in their approach in implementing ASEAN objectives. A steering committee comprising representatives from business communities and professionals, government ministries and the secretariat could be formed to develop a strategic plan and timeline for the implementation of the objectives. This also serves as a bridge to the business community within each country and across ASEAN so that the voices of business investors can be heard.

► **Public consultation**

Proposed changes will affect the business community and local governments. Therefore, it is important to conduct public consultation to obtain feedback on the proposed changes from various professionals, business community, associations, civil servants and non-profit organizations before rolling out the changes.

► **Targeted timeline for implementation**

A targeted timeline for implementation of the proposed changes should be rolled out to all communities to ensure that they are well-informed and have sufficient time to prepare themselves for the changes.

Local government level

Local government should consider setting up a working committee comprising government representatives, ministry officials and business advisors or international professional firms' representatives that have been assisting foreign investors to set up business entities in the country. They would be able to provide practical insights as well as feedback on issues faced by the business community and what can be done to address these issues over time.

► **Language problem**

The immediate need is to resolve the language and communication obstacles. Advice should be sought from professional advisors who have been assisting foreign investors to set up business entities in ASEAN countries. They are likely to be proficient in English and will have developed their own sets of materials drawn from their experiences in dealing with the local governments and local laws. With their help, the committee should help develop a series of standard bilingual materials.

► **Simplification and standardization of documentation forms and other materials**

The committee should look at all the requirements of each province, identify the needs and issues, and develop simplified and standardized materials and legal requirements across all provinces.

► **Continual dialogue**

The only constant is change. The business environment is continually evolving from domestic and external influences. It is, therefore, important that the local government maintains dialogue with the business community to ensure that the processes and regulations remain relevant.

In the commercial world, one understands the meaning of "membership has its privileges" and this applies equally to the membership of ASEAN. The ability to uphold integration and promote cross-border transactions across the region, while still appreciating the diversity, is the unique feature of ASEAN.

Conclusion

To be truly successful, the AEC needs to become a business friendly and integrated economic region. As we have briefly illustrated above, involving the business community will be crucial as there are practical implementation-level measures that governments can take to significantly enhance their own attractiveness, and in the process contribute to ASEAN's attractiveness as a whole.



6 member states

Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand have eliminated tariffs on almost all goods that are produced in ASEAN.

3

Cross-border trade

Navigating through the maze

By Shubhendu Misra and Tan Juan Fook

In this chapter, we examine, at the implementation level, two of the important issues affecting intra-regional trade: navigating the various entry barriers and the search for certainty to obtain and retain preferential tariff concessions under the ASEAN Trade in Goods Agreement (ATIGA). Even though addressing these challenges will be time-consuming and there is often no easy solution to bridge the gaps that exist among various jurisdictions, major efforts from all ASEAN governments are, nonetheless, required.

Navigating cross-border trade issues in ASEAN

Barriers to international or cross-border trade are generally classified as “tariff” or “non-tariff.” Such barriers have the effect of delaying and sometimes denying the entry of foreign-origin products into a domestic market. At their extreme, barriers may be seen as policies designed by governments to protect their domestic industry from competition. Tariff barriers have the added effect of helping governments collect revenue from local importers when they bring in goods from overseas.

Types of barriers

Examples of tariff barriers

- ▶ Import duties
- ▶ Excise duties
- ▶ Luxury tax
- ▶ Sales tax
- ▶ Non-creditable value-added tax or goods and services tax

Examples of non-tariff barriers

- ▶ Import licensing
- ▶ Prohibition
- ▶ Labeling, packaging, testing and quarantine requirements
- ▶ Pre-shipment inspection
- ▶ Pesticide residue thresholds
- ▶ Tariff rate quota
- ▶ Public health and national security-related requirements
- ▶ Other administrative and documentation requirements

According to the World Bank's recent *Doing Business report*⁶, the time taken to clear general sea or land shipment cargo from customs checkpoints can range from 4 to 26 days among ASEAN countries. The survey only includes activities carried out in the importing country, such as the time needed by the importer to obtain all the necessary documents to be shown to the importing customs authority; inland transportation and handling; customs clearance and inspection; and port and terminal handling. This idle time while the goods await customs clearance at the ports results in unnecessary inventory and other logistics costs and makes the entire supply chain inefficient and unpredictable.

The contrast in the number of days to clear goods at the respective customs authorities in ASEAN is a stark reminder of the uneven levels of economic development across ASEAN. Malaysia and Singapore are ranked highly in the "trading across borders" component of the World Bank report⁶ as they are open about facilitating the clearance of cargos in legitimate trade, while keeping a vigilant eye on countering illicit trade.

Non-tariff measures

The ATIGA is a free trade agreement to help promote intra-ASEAN trade for goods manufactured in the region, provided that the goods meet the prevailing rules of origin requirements. Since 2010, and in line with the ATIGA schedule, the original ASEAN-6 member states (Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand) have eliminated tariffs on almost all goods that are produced in ASEAN, whereas newer member states, such as Cambodia, Laos, Myanmar and Vietnam, are committed to eliminate tariffs on such goods by 2015, and with some flexibility by 2018 at the latest.

With the ATIGA tariff liberalization on track, ASEAN's priority has been on trade facilitation efforts to remove impediments to cross-border trade with a view to realizing the AEC's vision of an integrated economic region. It is recognized that tariff elimination alone would not fulfil this vision and the AEC's pillar of a single market and production base cannot be established unless free flow of goods becomes a reality.

ASEAN member states have voluntarily submitted their list of existing non-tariff barriers and have been stocktaking and updating the ASEAN Non-Tariff Measures (NTMs) database for the purpose of transparency. The database is available on the ASEAN Secretariat website⁷ and traders can make use of this database to find out whether their products are subject to additional import requirements and by which competent agency of the ASEAN country before they engage in cross-border trade.

⁶ "Doing Business 2014," *The World Bank website*, www.doingbusiness.org/rankings, accessed 20 February 2014.

⁷ "Non-tariff measures database," *ASEAN website*, www.asean.org/news/item/non-tariff-measures-database, accessed 14 January 2014.

The ASEAN website also provides a matrix of actual cases on NTMs or trade barriers that have been deliberated by ASEAN officials for easy tracking by traders.⁸

For instance, Malaysia had raised an issue that air conditioners and refrigerators produced in Malaysia and exported to Singapore must meet Singapore's prescribed minimum energy performance standards. This resulted in Malaysian exporters incurring additional cost to send their products for testing at approved laboratories. Singapore's explanation was that the minimum energy performance standards "were implemented for household air conditioners and refrigerators, which together account for almost half of a typical home's energy consumption. The standards were set at a level based on two key principles: (a) minimizing life cycle cost (i.e., accounting for both upfront costs and electricity cost over its useful life-span) and (b) ensuring reasonable availability and variety for each appliance type and model (e.g., a sufficient range of air conditioner brands and models)." The standards adopted were based on internationally recognized benchmarks and details were available on the competent authority's website. The issue was resolved as Malaysia accepted Singapore's explanation.

The key lesson here is that exporters should not shy away from exporting goods to other ASEAN countries once a "brick wall" appears in their path. In fact, if exporters feel that certain regulations practiced by the importing ASEAN countries are biased, they could consider taking up the issues through their respective authority at domestic level and such issues could be taken up bilaterally or at ASEAN working group level for resolution.

The matrix of actual cases on NTMs or trade barriers is certainly not an exhaustive list. We have listed some examples from two of the largest ASEAN economies where customs authorities have known to be adamant about doing things their own way:

Thailand

As in many other jurisdictions, Thailand's customs officials are driven by their key performance indicator of increasing government revenue. They require full documentation to be provided by the importer, especially in valuing products in related party sales where the importer is required to prove that the transaction is at "arm's length."

To add to the complexity, Thailand Customs' incentive program enables customs officers to share the penalties

levied during post-clearance audits on importers, regardless of whether the errors are unintentional or not. This has arguably impacted their approach to investigations as they tend not to give the benefit of doubt to importers.

It is also daunting for the importer to take a case to the court in Thailand as the penalties may dramatically increase more than 10 times compared to settlement if the company loses the case.

In a specific instance, Thailand Customs took the view that the product HS classification declared by the client was incorrect. This meant that the client had to pay customs duty of 10% instead of 1% under the declared HS classification. Due to the urgency of the shipment, the importer had to "pay under protest" based on the new classification and pay the import duty of 10%, before pursuing the matter with Thailand Customs. The case was subsequently resolved only when the importer indicated that they would import their products at other ports where the customs authorities were accepting the HS classification at 1% duty rate. The port official finally relented in order to still be able to collect the 1% import duty rather than lose the revenue to another port.

⁸ "Other documents," ASEAN website, www.asean.org/communities/asean-economic-community/category/other-documents-24, accessed 14 January 2014.



In our experience, having informal discussions with customs officers at the ports is important and a good way to understand the documentation requirements. However, the lack of transparency and uniformity leads to inefficiencies and thus impacts trade.

Indonesia

Much like Thailand, Indonesian importers also face their share of difficulties with customs officials on issues such as valuation, related party sale, classification and non-acceptance of preferential certificate of origin (CO).

For example, Indonesian Customs rely on their customs value database, which captures historical prices of goods. If such a database has a record of import of similar products at higher prices, the price declared by the importer would be rejected and customs would seek to collect duties at such higher price extracted from the database. If the importer disagrees with the customs assessment they may challenge it through an arduous process of objections and appeals to the Tax Court and would generally need to deposit the disputed tax amount in cash or via a bank guarantee. To that extent, the funds would get trapped for the time taken in the dispute resolution process.

There are also frequent objections made on minor clerical errors, such as the authorized signature and stamp found in Form D or other certificates of origin. Customs will relent if they receive confirmation letter from the issuing authority to authenticate the said CO. Very often, the importers will forgo the claim and pay the prevailing import duty as they are unable to obtain a confirmation letter.

Generally, Indonesian Customs are aggressive in their objections but anecdotal evidence suggests there has been a slight improvement in the overall import processing.

To their credit, ASEAN countries have always explored ways to address the choke points and expedite cargo clearance at the ports. We briefly discuss below two other significant initiatives for trade facilitation.

Common classification coding system

ASEAN established a common eight-digit tariff classification system known as the ASEAN Harmonized Tariff Nomenclature (AHTN). The AHTN is a trade facilitation initiative that aims to provide a transparent, predictable and uniform goods classification system to facilitate trade in ASEAN. On the basis of the Harmonized Commodity

From 4 to 26 days

The time taken to clear general sea or land shipment cargo from customs checkpoints among the ASEAN countries.

Description and Coding System developed by the World Customs Organization, it is our understanding that the AHTN would have eliminated most of the issues relating to tariff classification. However, in practice, it is still very common for importing customs authorities to adopt differing product classifications and deny ATIGA preferential duties.

ASEAN single window

Another example is the concept of ASEAN Single Window (ASW). Instead of the conventional way of importers declaring shipment information to the importing authorities, such information can be transmitted by the exporting country in ASEAN prior to the departure of the consignment. This results in simpler, faster processing and a more transparent way of doing business. Issues highlighted earlier, such as valuation and classification disputes, may not exist as the information is transmitted from a government agency in the exporting ASEAN country, which is a more trusted source.

We understand that seven member states have successfully tested the connectivity infrastructure in order to be able to transmit and receive pertinent trade and shipment information. One of the main challenges in the successful implementation of this cross-border exchange of information is that the

data elements and IT infrastructure of the national single window of each member state must be harmonized and standardized. The ASW endeavors to be the answer to choke points at the ports by reducing the number of days required to clear goods from the customs checkpoints. With the ASW set to be implemented in 2015, significant efforts will be required to make it a reality.

More can be done

While the intent is to achieve free flow of goods among ASEAN countries, much more needs to be done to make this vision a reality. The major impediments continue to be lack of uniformity and harmonization in trading rules, varying administrative practices and, above all, protectionism. All of these combined with the inherent lack of trust in the trading community by some of the ASEAN member states' customs administration is preventing the economies from realizing the full benefits from free trade.

Businesses operating in ASEAN countries, whether they originate from within the region or are part of wider transnational corporations, would welcome any efforts to reduce the red tape in cross-border trade. The AEC 2015 provides an excellent platform to push through a variety of reforms designed toward this goal.

Another recent and related development is the WTO Agreement on Trade Facilitation, which is part of the Bali Ministerial Declaration adopted in December 2013. While this agreement is part of the WTO multilateral process, it provides an excellent reference for ASEAN to embrace and implement on an accelerated time frame as part of the run-up to the AEC 2015. Many of the trade facilitation measures forming part of this agreement are in areas where ASEAN currently lacks. Early adoption by ASEAN on a unilateral basis would send a strong signal to the world that ASEAN is open for business.

Certificate of Origin under the ASEAN Trade in Goods Agreement

Under ATIGA the claim for preferential tariff treatment is based on a CO – referred to as “Form D” – issued by a specified authority to the exporter in the country of export at the time of export of goods. The exporter needs to provide the approved Form D to the overseas ASEAN importer, who then presents the document to the customs authority at the point of importation. On the basis of this Form D, the customs authority should grant preferential tariff concession, provided all the supporting documents are in order.

The above process looks simple enough but appearances can be deceptive. Over the years, there have been many complaints, ranging from difficulties of exporters in obtaining Form D from the issuing authority; non-acceptance of Form D by the importing authority at the port of importation; and repetitive requests by certain importing authority for verification and authentication for Form D.

The frequent rejection of Form D at the ports of import suggests that the importing authorities doubt the veracity of the Form D issued by the exporting member state. In the spirit of ATIGA, Form D should always be accepted by the importing authority in good faith and any concerns on its authenticity should be addressed on a post-importation basis. This is rarely the case.

Exporting country



Exporter submits Form D application to the issuing authority for approval.

Issuing authority approves Form D.

Exporter sends original copy of Form D to overseas importer.

Importing country



Importer submits the necessary import documentation upon arrival of goods and presents Form D to the customs authority.

Customs authority grants the preferential tariff concession to the importer.

On the basis of the collective feedback, ASEAN member states have agreed to the following list of minor discrepancies that are acceptable and should not invalidate Form D. Under such circumstances, the importing authority is obliged to grant preferential tariff treatment to the imported goods. This initiative has certainly encouraged customs authorities to be more tolerant of minor discrepancies.

Form D - list of minor discrepancies

Minor discrepancy issue

- 1 Spelling and/or typing errors in the certificate of origin
- 2 Size of tick marks and execution (either manual or typewritten), including crossed instead of ticked
- 3 Slight discrepancy in the authorized signature in the certificate of origin and the authorized list of signatories
- 4 Different units of measurements stated in the certificate of origin and supporting documents such as invoices or packing list and supporting documents
- 5 Minor differences in A4 paper size of the certificate of origin
- 6 Minor discrepancy in ink color (black or blue) of the text on the certificate of origin
- 7 Slight differences in description in the certificate of origin or self-certification and the supporting documents



Although providing these examples of minor discrepancies is a step forward, it must be noted that it is a short list and does not provide much comfort to traders. Traders' concerns are that customs authority can deny preferential tariff claim due to many other reasons arising from Form D. In the section below, we identify some of the mistakes made by traders during the Form D process:

▶ **Wrong origin criterion**

An exporter, not being familiar with the rules of origin, declared incorrect origin criterion in Form D. While the manufactured goods qualified under the regional value content rule, the exporter erroneously declared that the goods were wholly obtained or produced.

The importing customs authority rejected Form D as it had doubts on the exporter's ability to qualify the products under the wholly obtained rule as no such natural resources existed in the exporting country.

▶ **Wrong type of CO applied**

In addition to ATIGA, ASEAN has five other FTAs with six other trading partners in Asia. Some of the ASEAN businesses with a pan-Asia export footprint struggle to ensure that the COs are applied correctly as these vary on the basis of the destination country or the applicable FTA. There

have been instances where a wrong application resulted in the importer not optimizing the FTA benefits as the tariff concessions in FTAs differed.

An exporter in Malaysia had provided Form D to its customer in Vietnam. Preferential tariff concession was granted but on the basis of the ATIGA rate of 3%, instead of the ASEAN-China FTA, which was pegged at 0%. In this instance, it would have been more beneficial to use the ASEAN-China FTA as the products qualified under that as well.

▶ **Invoice details vs. Form D details**

An exporter did not ensure that the details in the commercial invoice and Form D match and this caused the shipment to be questioned by the importing customs authority. In several cases, exporters use trade names or part numbers to describe their products in the commercial invoice whereas the description in Form D is more generic, leading to greater scrutiny by the importing customs authorities.

▶ **Box 13 - tick boxes**

Box 13 of Form D can be an importer's nightmare. The omission of a tick in the relevant boxes have resulted in goods not being granted preferential tariff concession either at the point

of importation or during post-importation audits. Some examples of these tick boxes are Third-country invoicing, Accumulation, Movement certificate or Back-to-back CO, and Issued retroactively. It is important to ensure that the right boxes are ticked, depending on the specific transactions.

Self-certification

In a move to enhance the FTA utilization and boost its image as a manufacturing base to potential investors, ASEAN is considering replacing the conventional Form D with self-certification by exporters. Under the proposed system, certified exporters need not apply for Form D from their issuing authority. Such accredited exporters would make a self-declaration that their goods met the prevailing origin criteria, using a simplified declaration text on the commercial invoice. The overseas importer would submit this invoice declaration to the importing customs authority to claim for preferential tariff treatment at the time of clearance of goods. We understand that there are two separate pilot project groups⁹ currently being set up to test the robustness of the self-certification system. These pilots are taking place due to inherent differences that some ASEAN member states could not agree upon.

⁹ Brunei, Malaysia and Singapore formed a self-certification pilot group in October 2010. Thailand subsequently joined this group about a year later in October 2012. The MOU for the second pilot group consisting of Indonesia, Laos and the Philippines was signed in August 2012. Cambodia, Myanmar and Vietnam will need to decide which group they intend to join, if they have not already decided. Separately, Thailand is considering joining the second pilot group. Both pilot projects will run concurrently until the ASEAN makes a decision to implement a common self-certification system across ASEAN by 2015.

Singapore Customs, the issuing authority, once remarked that with a full-fledged self-certification system in place, collective annual savings of more than S\$1million could be achieved by Singapore traders in terms of cost avoidance by not having to apply for an official Form D. In addition, there would be productivity gains both at the exporters' end as well as at the government level.

If ASEAN member states are able to settle their inherent differences in self-certification, we can envisage the ASEAN-wide implementation of self-certification in 2015. We look forward to the day when operational issues relating to application and presentation of Form D become problems of the past.

Many have commended ASEAN for its achievement in substantially removing tariff elimination on intra-ASEAN goods under the AEC 2015 Blueprint. Critically, ASEAN member states need to ensure that the process of making preferential tariff claims is transparent and easy for traders. Potential investors are keen to invest more if ASEAN member states can demonstrate that they can keep their house in order, especially in the area of facilitating FTA utilization.

Regional Comprehensive Economic Partnership (RCEP)

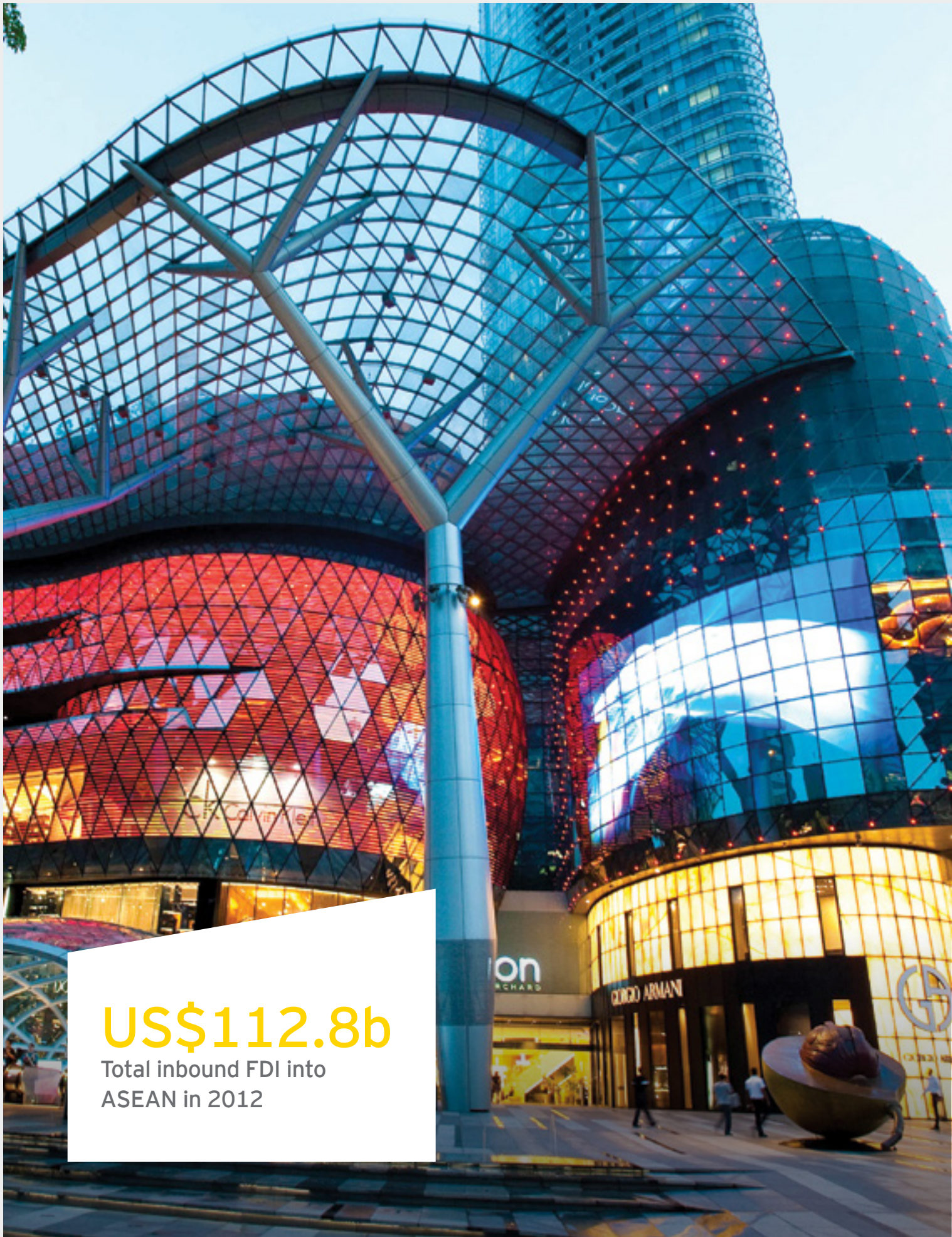
ASEAN is currently undertaking RCEP negotiations with countries that have FTAs with them, namely Australia, China, India, Japan, South Korea and New Zealand. It is targeted to be concluded in 2015. Some of the existing ASEAN countries with FTAs offer better tariff concessions to their FTA partners than those offered within ASEAN under the ATIGA. If this trend continues, coupled with the implementation issues related to Form D, it could undermine what the AEC Blueprint has been trying to achieve.



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US\$112.8b

Total inbound FDI into
ASEAN in 2012

4 Investment bodies

Lighthouse for foreign direct investment

By Tan Bin Eng

“A free and open investment regime is key to enhancing ASEAN’s competitiveness in attracting foreign direct investment (FDI) as well as intra-ASEAN investment. Sustained inflows of new investments and reinvestments will promote and ensure dynamic development of ASEAN economies” – ASEAN Economic Community Blueprint, 2006.

Attracting inbound FDI has been a cornerstone of the growth strategies of the majority of ASEAN countries, and many of the ASEAN countries have traditionally applied fiscal tools, such as tax incentives, to enhance their competitiveness as a location for inbound FDI. Notwithstanding Asia’s position as the strong engine powering global economic growth in the last two decades, and the greatest beneficiary of inbound FDI, ASEAN has not been successful in garnering its share of the FDI pie.

Diagram 1: Inbound FDI (in US\$ millions) in ASEAN countries

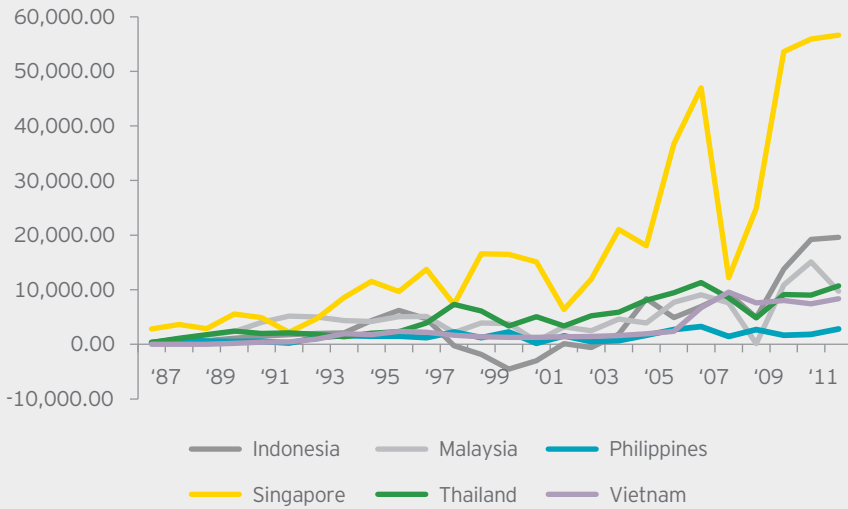


Diagram 2: Inbound FDI (in US\$ millions) in ASEAN region versus China

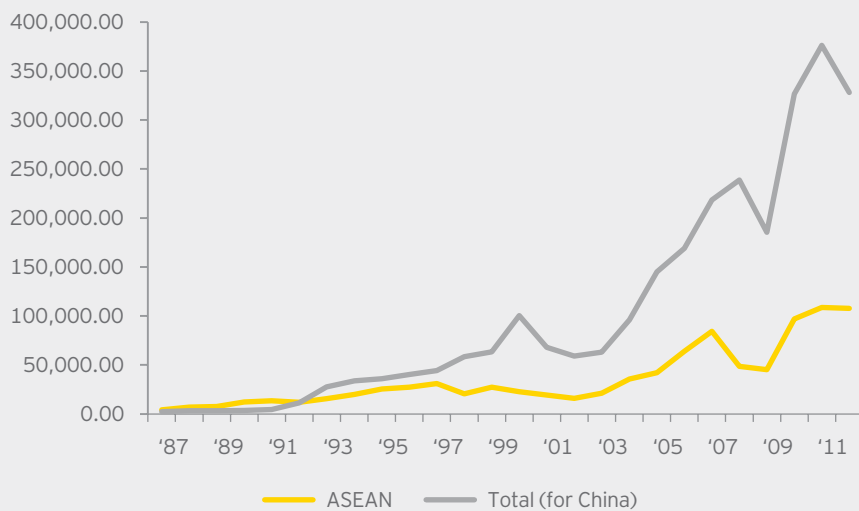


Diagram 1 above illustrates the inbound FDI (in US\$ millions) for each of the ASEAN countries in the last 25 years. The most successful ASEAN country to attract FDI is Singapore, with the highest levels of inbound FDI from as early as 2000 onwards. While the total of FDI for ASEAN as a whole has certainly increased over the years, Diagram 2 shows the growth in inbound FDI in China outstrips ASEAN countries. The Asian Development Bank¹⁰ also revealed that ASEAN's share of the stock of global FDI over the past three decades had fallen. In addition, ASEAN's stock of world FDI has not reached its 1996 level when it peaked prior to the financial crisis.

AEC initiatives

Reversing the declining trend in the growth of FDI inflow into ASEAN is one of the intended objectives of the AEC Blueprint, but it is clear that there is still much to do. Many of the initiatives proposed by the AEC are either still being considered at the policy stage or, if introduced, their implementation has not occurred as fast as one may have hoped.

Roles of investment bodies

While it is generally acknowledged that the journey toward an integrated ASEAN economic region is far from over, and many of the initiatives targeted at free flow of investment have not yet been implemented, it is worth considering how certain ASEAN countries such as Singapore, Malaysia and Thailand appear to have greater success attracting inbound FDI. What are the key success factors that differentiate one ASEAN country from the next?

One of the key success factors is the presence of strong investment promotion bodies, also recognized by the ADB. In this section, we look at several investment bodies across the region, and suggest what else can be done by the various government agencies to help attract FDI.

¹⁰ "The Asean Economic Community: A Work in Progress," a joint study by Asian Development Bank and Institute of Southeast Asian Studies, Singapore, 2013.



What are investment bodies? What roles do they perform? Globally, they perform an important role in terms of facilitating an investors' experience when investing into a source country. They serve as one-stop shops that are business friendly, and help the investor navigate their way through government red tape. They act as a champion for the cause of the investor within the myriad of complex government rules and regulations and support the investors' intended investments into the country. This means that for an investment agency to be effective in its role, it is critical that it has significant ability to either approve or influence the workings of the government, ensuring a smooth experience that boosts the confidence of the investor.

However, their importance should not be underestimated. The majority of investments in any country tend to come from global multinational corporations. A smooth and efficient experience with the country's investment body the first time improves the likelihood of future repeat investments.

While all the ASEAN countries have taken steps to set up an investment agency (see Table 2), not all have the authority to be able to respond quickly to investors' demands. While all are set up with the same objective and administer a number of incentives targeted at encouraging inbound FDI, several differences are clear:

- ▶ Not all ASEAN member countries have the authority to approve incentives, even if such incentives are legislated and the criteria are clearly specified. These tax incentives usually comprise a mix of concessionary corporate tax rates, indirect tax concessions such as exemption from import duties, and sometimes even individual tax concessions for expatriates as well. They are an important consideration for investors when weighing the attractiveness of various locations. In addition, outside Singapore and Malaysia, tax incentives are all statutory, and the investment bodies have limited authority to customize or vary these incentives. This frequently creates inflexibility and impacts the attractiveness of a location. For example, a new legal entity may need to be set up in order to obtain the tax incentive, something many multinationals are often unwilling to do, especially in the current climate of streamlining and legal entity rationalizations.
- ▶ In the area of regulatory and licensing approvals, all investment bodies play a role of influencer or facilitator, but frequently lack the power to pass judgment. This can be an important factor, particularly in ASEAN countries where many sectors or industries could still be restricted and not fully open to foreign investors. An investment body that cannot strongly influence decision making on licensing or regulatory matters means that its ability to

smooth the path for investors can be seriously hampered. These issues are particularly critical for countries such as Indonesia, Vietnam, the Philippines and Myanmar.

- ▶ Many investment bodies in ASEAN countries, except Singapore, Malaysia and Thailand, do not have overseas offices that oversee marketing activities and talk to potential investors. This is an important function. In a competitive global economy, ASEAN's traditional strengths in lower operating costs are no longer as attractive. It is important to get in front of investors and demonstrate how attractive ASEAN is as an FDI destination. Investment bodies need to be active advocates for the foreign investor in this process.
- ▶ Documentation requirements to apply for tax incentives vary across ASEAN, and authorities have the power to ask for more documentation, and they frequently do so, beyond what is originally outlined. With the exceptions of Singapore and Malaysia, both of which allow investors to file in English, the rest of the countries require the documentation is translated and filed in the local language. These extra steps create additional costs and cause delays in the overall process.

Table 2: Comparison table for select ASEAN member countries

Foreign direct investment - Setting up business entities			
	Singapore	Malaysia	Indonesia
Primary administering body for inbound FDI	Singapore Economic Development Board www.sedb.com	Malaysian Investment Development Authority (MIDA) www.mida.gov.my	Indonesia Investment Coordinating Board (BKPM)
Presence of regional administering bodies	Not applicable	a) Iskandar Region Development Authority (IRDA) b) InvestKL c) Invest Penang d) East Coast Economic Region e) Northern Corridor Economic Region f) Sarawak Corridor of Renewable Energy (SCORE) g) Sabah Development Corridor (SDC) h) Halal Industry Development Corporation (HDC)	Yes
High-level objective of administering body	To act as one-stop agency that facilitates and supports foreign investors; to focus on creating sustainable economic growth with vibrant business and good job opportunities	To ensure Malaysia achieves its goal in economic transformation and its aspiration of a developed nation	As the Government's agency, BKPM has a one-stop services (OSS/PTSP) that organizes complete licensing and non-licensing procedures of investment in single office that has the authority from related technical institutions or ministries to issue the licensing and non-licensing documents on particular sectors
Hierarchy - under purview of which ministry	Ministry of Trade and Industry	Ministry of International Trade and Industry	At the Ministerial level direct under the President
Size of the organization	400-500	700-800	621
Presence of overseas offices	19 overseas offices in Europe, the US, China, India, Brazil etc.	24 overseas offices in the US, Europe, Africa and Asia-Pacific	8 overseas offices in Abu Dhabi, London, New York, Singapore, Seoul, Sydney, Taipei and Tokyo
Functions			
Leads discussions with inbound investors	Yes	Yes	Yes
Administrator of incentives	Yes	Yes	Yes

	Thailand	Philippines	Vietnam	Myanmar
	Thailand Board of Investment (BOI) www.boi.go.th	Board of Investments (www.boi.gov.ph/) Philippine Economic Zone Authority (www.peza.gov.ph/)	Vietnam Ministry of Planning and Investment and provincial Departments of Planning and Investment	Myanmar Investment Commission https://www.mnped.gov.mm/
	Not applicable	BOI: Yes. There are BOI offices in two provinces PEZA: Yes. It has offices in some economic zones	Not applicable	Not applicable
	To act as the main agency providing tax and non-tax incentives and business support services to foreign investors investing in Thailand	To act as a one-stop agency that facilitates and supports foreign investors, and to promote investments, extend assistance, register, grant incentives to and facilitate the business operations of investors	http://www.mpi.gov.vn/portal/page/portal/bkhdt	To act as the initial approving authority for investment proposals that facilitates and supports foreign investors to be in compliance with the foreign investment law
	Ministry of Industry	Department of Trade and Industry (DTI) – executive department of the Government tasked to expand Philippine trade, industries and investments		Ministry of National Planning and Economic Development
	400-500	BOI: 300 PEZA: 400-500	Not available	50-100
	13 overseas offices in Europe, the US, Japan, China, South Korea and Australia	None	Regulate and promote the foreign investment in Vietnam	Not present
			Directly under the management of the Prime Minister	
	Yes	Yes	Yes	Yes
	Yes	Yes	None	Yes

Table 2: Comparison table for select ASEAN member countries (cont'd)

Foreign direct investment - Setting up business entities			
	Singapore	Malaysia	Indonesia
Ability to approve or influence incentives (whether tax or cash)	Yes, able to approve majority of incentives	MIDA considers the applications and makes recommendations to the Ministry of Finance (MOF). Final approval is from the MOF	No, but able to facilitate on incentives
Ability to approve or influence licensing or regulatory requirements	Influence	Facilitator Licensing or regulatory requirements are under the purview of the relevant ministers or agencies	Yes
Ability to approve or influence land availability	Influence	Facilitator Land-related matters are under the purview of the relevant state government	Yes
Speed of approval for regulatory approvals	Not applicable	Not applicable	Typically it takes 2 to 3 weeks to obtain each license and permit
Speed of approval for incentive approvals	Typically 3-6 months for incentive negotiations or applications	Typically 3-6 months for incentive negotiations or applications	It takes approximately 1-2 weeks to obtain a recommendation for incentives. It is the Ministry of Finance that provides the approval
Extent of documentation required in discussions	Application forms, financial statements, business plans (however, documentation beyond this are typically requested for during the negotiations process)	Application forms, financial statements, business plans and other documentation upon request by the authority (may be different subject to type of incentives and typically requested for during the negotiations process)	A prescribed application form and investment plans which should be supported by relevant details of shareholders
Ability to exercise flexibility or customize requests from companies	Yes (typically acts as a champion or influences decision-making government agencies)	MOF has the power to exercise flexibility or customization of request from companies; MIDA is usually the primary body that considers all incentive applications	The BKPM is strictly in compliance on the regulations in place

	Thailand	Philippines	Vietnam	Myanmar
	Yes, able to approve majority of incentives	Yes	Yes	Major influence
	Influence	Influence	Yes	Major influence
	Influence	BOI: No influence PEZA: Influence	Yes	No influence
	Not applicable	Depends on a case-to-case basis		Accept or refuse proposal within 15 days, and investor has 90 days to accept or refuse investment
	Typically 3-6 months depending on feasibility and project value	Depends on a case-to-case basis; on average, 1 month from submission of completed documents	Practically from 3 to 6 months dependent on the industry No official approval for tax incentives; it is generally on self-assessment basis. However, for certain types of projects that involve significance in investment scale or impact to the country, negotiation with the Ministry of Finance will be expected. There is no regulated timeline for the negotiation and approval, but can be expected to be from 6 months to 1 year. Application forms, certificate of incorporation and financial statements of the investor(s), business plans (however, documentation beyond this are typically requested for during the negotiation process)	Accept or refuse proposal within 15 days, and investor has 90 days to accept or refuse investment
	Application forms, financial forecast, source of fund, project plans (other required documents depend on type of businesses)	Application form, project brief, anti-graft certificate and other documentary requirements	Yes	Application forms, financial statement, bank recommendation, board of director resolution, intended activities to be performed (other documents depend on request)
	Yes (based on available rules and regulations)	No, all incentives are statutory	Yes	Yes (if it is of interest for national and economic development)

Recommendations

While many policy initiatives to enable a free and open ASEAN investment climate will remain a work in progress for at least another decade, there is also much that can be done now to enhance cooperation and collaboration:

- ▶ While ASEAN also traditionally competes internally for FDI, there is more to gain from being allies than competitors. ASEAN investment bodies can cooperate to identify areas ripe for collaboration across the region. These can include specific industries and sectors, or specific geographic locations. Bilaterally or multilaterally, these areas can then be developed further into value propositions with which investment bodies in ASEAN can approach foreign investors as a semi-collective body. These value propositions will provide investors with a more complete view of ASEAN and what it has to offer.
- ▶ Bearing in mind that ASEAN is collectively a highly diverse economic region, with significant differences in its ability to harness and utilize government infrastructure, more can be done to share best practices across ASEAN's investment bodies. Given that the investment bodies in Singapore and Malaysia are highly successful and viewed by investors to be business friendly, they are well-placed to share their experiences and practices. Beyond sharing, this needs to be followed through with the implementation of best practices within the ASEAN member states.
- ▶ Gaining a full understanding of the processes and procedures is something that investors assess at the early stages of shortlisting a location for investments. ASEAN investment bodies should consider how each country can streamline its processes, and collectively provide better information flow and guidance to investors.

ASEAN has sought for many years to achieve an integrated economic region that can significantly bolster its attractiveness as a location for foreign investors. This journey has not been without challenges that are likely to continue in the future. However, the clock is ticking. In the globalized economy, new competitors are fast emerging. The time has come for the region's policy-makers and business leaders to come together anew and help chart a prosperous future, one underpinned by the free flow of its goods, services and people.





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