THE POLICY/LEGAL AND INSTITUTIONAL FRAMEWORK FOR FDI

Training Course on Promotion, Attraction and Facilitation of Foreign Direct Investment for Inclusive and Sustainable Development for Myanmar,
Hpa An, 14-16 June 2017
Monywa, 19-21 June 2017
OUTLINE OF PRESENTATION

- Policy and institutional framework for FDI
- Sector focus: FDI in agriculture
- FDI promotion: the need for sustainability
- Legal framework for FDI
POLICY AND INSTITUTIONAL FRAMEWORK FOR FDI
SOME BASIC QUESTIONS

- What is investment policy? Complement or substitute for industrial policy?
- What types of investment? For what level of development?
- Who does investment policy, regulation, promotion (required institutional framework)?
- How does national investment policy interact with regional/global policy?
- What is the link between investment policy and investment law(s)? Is there a need for a national investment law?
- How can we rebalance and redirect FDI for sustainable development (i.e. contribution to SDGs)?
- How can we effectively address the global nature of FDI through national/regional level action? OR:
- Is the time ripe for a global agreement on investment?
DEVELOPMENTS IN INVESTMENT POLICY

- 1980s: “getting the prices right”: eliminate micro-policies (e.g. subsidies)
- 1990s: “getting the policies right”: embrace macro-economic policies (e.g. deregulation and liberalization) to promote global integration; active investment policy to attract FDI
- 2000s: “enabling environment”: fostering legal, regulatory and political institutions which provide stability, protection and transparency to (foreign) investors and social infrastructure (e.g. education and health care); active investment promotion and facilitation, including aftercare. Growth of IPAs
- 2010s: (a) “inclusive growth and sustainable development”: foreign investments strongly embedded in the host business climate contributing to economic developments in a sustainable way; (b) national security concerns
DEVELOPMENTS IN INVESTMENT PROMOTION

- 1980s: economic and financial liberalization: focus on macroeconomics
- 1990s: Increased attention to active investment promotion through Investment Promotion Agencies
- 2000s: Increased competition among developing countries for FDI through incentives; rise of IIAs; more sophisticated investment promotion techniques using websites and investor targeting
- 2010s: Shift from investment promotion to investment facilitation (aftercare)
INVESTMENT POLICY: WHO?

- Central ministry: Ministry of Trade and Industry
- Line ministries (by sector): energy, mining, industry, ICT, telecommunications, transport, etc.
- Involvement of other ministries: social development, environment to ensure sustainability
- Coordination is key! But often lacking
- Strong link between trade and investment policy but also investment and science, technology and innovation (STI)
- Investment promotion agency?
- Labour unions, chambers of commerce, civil society consultations are important
INVESTMENT PROMOTION: WHO?

- Ministry of Planning/Industry and Trade
- Other line ministries
- Chambers of commerce
- Export Processing Zone authorities
- Central body: Investment Promotion Agency
- Combining Trade and Investment Promotion Agency?
- One-stop shop?
INVESTMENT REGULATION: WHO?

- Elected members of parliament formulate the laws
- Relevant ministries/government provide inputs to laws, play a role in overall regulation (often by sector)
- Special bodies
- Central banks
- Consultation with private sector and civil society
- Importance of inclusive and transparent process
- Essential: implementation and enforcement, rule of law
- What is the role of the IPA?
KEEP KEY FUNCTIONS SEPARATE

- Investment policy and promotion
- Investment regulation and promotion

Investment policy and regulation is a function of various ministries and lawmakers, while investment promotion is about marketing and providing information and helping the investor setting up and realizing his investment. These functions require different skills at different level and cannot/should not be combined in one agency.
INVESTMENT POLICY IS CLOSELY LINKED TO:

- Economic and development policy
- Trade policy
- Competition policy
- Privatization policy
- Labour policy (increasing employment)
- Enterprise development and value chain integration (forging linkages)
- STI policy
- Transport policy
- Environment and energy policy
“SMART” FDI POLICY GOALS

- **SPECIFIC**: Break down objectives and expected impact for priority sectors and activities
- **MEASURABLE**: Focused set of quantifiable indicators
- **ATTAINABLE**: Realistic target setting (based on peer review)
- **RELEVANT**: Goals attained and indicators measured should be linked and attributable to FDI
- **TIME-BOUND**: Goals should be achieved within a stipulated time frame for sustainable development: short-term, medium-term, long-term (strategic)

FDI policy should identify priorities and measures to attain goals based on cost effectiveness
WHY YOU WANT TO ATTRACT FDI?
SOME POSSIBLE OBJECTIVES

- access foreign technologies and skills;
- close the domestic savings-investment gap;
- provide domestic employment;
- undertake privatization in an environment of weak domestic private sector;
- stimulate domestic competition;
- improve sustainable business practices;
- develop domestic infrastructure under public-private partnerships;
- close balance-of-payment deficits;
- close government budget deficits;
- gain or expand access to foreign markets;
- strengthen national competitiveness across the board;
- allow domestic SMEs and other domestic enterprises to effectively integrate into regional or global value chains;
- or any combination of the above.
INVESTMENT POLICY AND PROMOTION CONSIDERATIONS

- Understand FDI determinants!
- Which type (e.g. market? resource? supply-chain? labour-intensive? R&D?)
- Which form (e.g. greenfield, M&A, JV, 100% ownership, HQ?)
- Which location (SEZ, province, port, capital city?)
- Which sectors (agriculture, manufacturing, services?)
- Which source countries?
- Coordination among relevant institutions and ministries
- Sustainability
LIBERALIZATION VS. REGULATION

- Liberalization of what?
  - FDI regime (sectors, ownership, performance requirements, etc.)
  - General business operations/registrations/ start up
  - Economy as a whole
  - Land ownership
  - World Bank Ease of doing Business refers

- Pace of liberalization: controlled and sustainable

- Balance with prudential supervision and regulation

- Liberalization for efficiency but regulation for stability. Both are needed!

- Regulation usually needed to ensure fair competition, environmental and social issues, finance and taxes, etc.

- Investment liberalization alone is not sufficient to attract FDI
INVESTMENT LIBERALIZATION NORMALLY MEANS REDUCING:

- Restrictions on sectors in which FDI can be made;
- Restrictions on the value of FDI;
- Restrictions on the level of foreign ownership;
- Compulsory joint ventures with local firms;
- Controls on repatriation of profits;
- Performance requirements, e.g. export requirements, local content requirements, technology transfer requirements, skills development requirements; trade balancing requirements;
- Import restrictions.
“A good investment climate provides opportunities and incentives for firms - from microenterprises to multinationals—to invest productively, create jobs, and expand.”

“A good investment climate is not just about generating profits for firms - if that were the goal, the focus could be limited to minimizing costs and risks. A good investment climate improves outcomes for society as a whole. That means that some costs and risks are properly borne by firms.”

Quotes by World Bank
MUCH CITED OBSTACLES TO FDI IN MYANMAR

- Political risk: entrenched interests and the future of the reform process
- Ongoing conflict with ethnic minorities
- Regulatory uncertainty
- Poor enforcement of rules/lack of competence and impartiality of the court system
- High land and real estate prices
- Insufficient level of labour skills
- Lacking infrastructure
- High costs of doing business/excessive red tape
- Difficulties with expatriation of profits
- Primitive financial system/lack of international accountancy standards
- Ongoing sanctions
- Export tax and exchange rate fluctuations
- Complex import and export procedures
### MYANMAR INVESTMENT CLIMATE: SOME WAY TO GO

<table>
<thead>
<tr>
<th>Indicator</th>
<th>2016</th>
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<tr>
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<td>Political Risk Index Score (out of 100)</td>
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THE ISSUE OF COMPETITIVENESS

Porter’s “Diamond”
MYANMAR’S COMPETITIVE ADVANTAGES

- Geographic position as bridge between South and South-East Asia
- Part of ASEAN and AEC
- Language abilities (English)
- Availability of many natural resources and arable land
- Availability of energy, both fossil based and renewable
- Cultural heritage
- Long coast line
- Potentially large market
- Very low labour costs and high level of literacy
- WTO member
Improving Investment Climate (World Bank)

- Investment climate: the location-specific factors that shape the opportunities and incentives for firms to invest productively, create jobs, and expand
- A good investment climate improves outcomes for society as a whole
- A good investment climate provides opportunities and incentives for firms—from microenterprises to multinationals—to invest productively, create jobs, and expand
- A good investment climate encourages firms to invest by removing unjustified costs, risks, and barriers to competition
- Improving policy predictability can increase the likelihood of new investment by more than 30 per cent
SECTORS IN WHICH MYANMAR HAS COMPETITIVE ADVANTAGES

- Agriculture (e.g. rice) and agro-industry
- Natural resources: oil, gas, timber, hydro, renewable energy, gems and jewels, marine resources and livestock
- Infrastructure
- Telecommunications
- Power
- Light industry: textiles, garments, food and beverages, ceramics, rubber, pharmaceutical, paper, chemical, electronics and IT
- Tourism/hotels
- Real estate and industrial estates
IMPROVING INVESTMENT CLIMATE BY:

- Reducing risk of policy uncertainty and arbitrary regulation
- Reducing high costs of doing business (taxes, corruption, customs clearance and duties, cost of borrowing, cost of utilities, labour etc.)
- Reducing barriers in both pre-establishment and post-establishment phase of investment
- Improving labour skills
- Improving access to high quality infrastructure
- World Bank Ease of Doing Business refers
IMPROVING INVESTMENT CLIMATE: 
THE ROLE OF TRADE FACILITATION

- Simplify and harmonize trade procedures in accordance with international recommendations such as UN/CEFACT (http://www.unece.org/cefact/recommendations/rec_index.html)
- As part of this exercise, adopt paperless trading systems and single window systems. Such single windows can be regionalized within the context of a certain regional integration agreement, such as the ASEAN Single Window
- Implement the WTO agreements and provisions related to trade facilitation, in particular the WTO Trade Facilitation Agreement.
- Sign ESCAP Regional Agreement on the Facilitation of Cross-Border Paperless Trade
- Countries may also wish to explore membership of the World Customs Organization (WCO) and become party to its various international agreements and conventions and implement its recommendations
Bilateral comprehensive trade costs in the Asia-Pacific, excluding tariff costs of selected economies with China and United States (2009-2014)

Bilateral comprehensive trade costs in the Asia-Pacific, excluding tariff costs of selected economies with Myanmar (2009-2014)

Overall trade costs of Myanmar with Thailand, Malaysia and India remain lowest.

Technology and innovation capacity attract FDI
FDI contributes to technology transfer and innovation
The quality of national and subnational innovation systems matter
Governments can promote cooperation among companies through clusters, science and technology parks, incubators and networking among all stakeholders in an NIS, e.g. academia, research institutes, private sector, foreign investors, and government agencies
A strong legal and regulatory framework that promotes competition and protects IPR is also required.
A national innovation system refers to the complex and interactive web of knowledge flows and relationships among industry, government and academia and making them work systematically to sustain innovation and science and technology development efforts.
A SAMPLE NIS
(OECD)
GOVERNMENT POLICIES FOR STI/NIS

- Education and investment in human capital
- Networking (e.g. Silicon Valley)
- Creation and diffusion of technology and promotion of indigenous R&D
- Establishment of world-class metrology, standards, testing, and quality control (MSTQ) infrastructure to ensure that the quality of domestic industrial products meets international standards
- Nurture innovation and entrepreneurship culture
- Promoting and mainstreaming open innovation
- Free flow of national and international knowledge and flexible labour mobility:
  - Provide appropriate legal and regulatory framework
  - Provide an enabling infrastructure: incubation parks, science and technology or high-tech parks etc. (e.g. MSC)
- Promote technology and innovation financing mechanisms and modalities
- Maintain open trade and investment regimes: Mainstreaming gender in STI
Both vertical (backward and forward linkages) and horizontal linkages: focus is integration into global value chains

Linkages will only be sustained if they are technically viable and commercially profitable for the firms involved

Successful linkages depend on:

- The existence of SMEs which have the potential to meet high TNC standards;
- The TNC corporate strategy (i.e. efficiency-seeking FDI has the highest chance of establishing vertical backward linkages while market-seeking FDI has the highest chance to establish horizontal linkages through joint ventures;
- The existence and efficiency of a set of supporting public policies.
SUCCESS FACTORS FOR JOINT VENTURES

- There is mutual understanding that the IJV is a distinct entity, not a subsidiary or branch of any of the partners.
- There is mutual understanding and alignment of the objective of the IJV and responsibilities of the partners.
- There is a high level of trust, respect and courtesy between the partners.
- The local partner is free from government or political interference (linked to mutual trust).
- The local partner has realistic expectations from gaining access to the foreign partners often superior assets, technology and knowledge and intellectual property. Such access needs to be specified in the IJV legal agreement.
- The IJV is not a product of a “forced marriage” (because of local legislation for instance).
- Both partners are committed to accord the necessary time and resources to make the IJV a success.
- Both partners have undertaken proper research and planning before concluding the IJV.
- There is more or less equal bargaining power and capacity between the partners.
- There is a clear objective and benefit to be derived from the partnership joining partners with different but complementary ownership advantages.
- The foreign partner maintains a certain strategic direction of which the IJV is an important part.
- Disputes between the parties are to be decided in a third country.
POLICY FRAMEWORK FOR LINKAGES

- Information and matchmaking (role of IPA), e.g. Thailand’s BOI BUILD facility

- Enhancing the capacity of SMEs and local suppliers (comprehensive package, focus, targeted including technology, marketing, finance, training)

- Encouraging TNCs to engage in linkages
  Linkage programmes should be based on voluntary cluster approaches, not performance requirements
BOI Unit for Industrial Linkage Development (BUILD) programme aims to promote linkages between investors with parts and components suppliers in Thailand (matchmaking)

Various services provided under BUILD, including:
- Vendors Meet Customers (VMC) programme: arranges factory visits to Thai subcontractors
- Comprehensive computerized information on subcontracting opportunities in Thailand
- Support for foreign buyer firms seeking sourcing networks in Thailand
- In-depth technical and management assistance to local suppliers interested in developing subcontracting relationships

ASEAN Supporting Industry Database (ASID): database of supporting industry contractors within ASEAN (http://www.asidnet.org/web)
- contains information about more than 17,000 supporting industry companies
- ASID serves as a regional "Yellow Pages"
- compare designs and specifications and view catalogues online
MYANMARSMELINK is a business-to-business opportunity platform that connects Myanmar’s SMEs and entrepreneurs with global business, capital and services.

It is a unique resource point for SMEs to reduce information asymmetries and share business connections, resources, capabilities and the knowledge necessary to further develop their businesses.

The platform offers an attractive array of services, including business matching, investment opportunities, alliances/JV partnerships, business services and up-to-date business news and information on Myanmar.
MYANMAR SME LINK

United Nations Economic and Social Commission for Asia and the Pacific
PERFORMANCE REQUIREMENTS
PROHIBITED BY INTERNATIONAL LAW

- Performance requirements are largely counterproductive but may be linked to incentives
- WTO-TRIMS explicitly prohibits:
  - Local content requirements
  - Trade balancing requirements
  - Foreign exchange restrictions
  - Export restrictions
  - Quantitative restrictions
  - Requirements that violate national treatment

- Prohibited or conditioned: provisions in free (preferential) trade agreements/economic partnership agreements/international investment agreements (BITs)
PERFORMANCE REQUIREMENTS WHICH COULD BE MANDATORY

- Conform to internationally recognized principles and standards related to responsible business conduct and CSR, including:
  - OECD guidelines for MNEs
  - Guiding principles on business and human rights
  - Global Compact
  - ILO conventions on decent work, including Tripartite Declaration of principles concerning multinational enterprises and social policy (MNE Declaration)
- Environmental assessments and pollution control
- Benefit sharing in natural resources
- Abstain from political meddling and peddling to vested local interests
UNDERSTANDING THE ROLE OF INCENTIVES IN THE CORPORATE INVESTMENT PROCESS

<table>
<thead>
<tr>
<th>Strategic Assessment</th>
<th>Location Screening, modeling &amp; benchmarking</th>
<th>Cost comparison</th>
<th>Community Evaluations</th>
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<td>Phase 1</td>
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<td>Define project and goals</td>
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<td>Business requirements</td>
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<td>Project definition &amp; understanding of strategy</td>
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<td>Resources for site visits</td>
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<td>Phase 5</td>
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<tr>
<td>Define real estate objectives and accommodation needs</td>
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**Comparison of costs**
- Site visits
- Real estate support

**Analysis and comparison of locations**
- Data gathering
- Build model for location analysis
- Present rankings of locations
- Sensitivity analysis
- Exploration of incentives

**Set up cost model**
- Cost differentials between locations

**Prepare site visits**
- Prepare discussions with relevant governments and service providers
- Incentive negotiations

**Real estate transaction and acquisition support**
THE ROLE OF SMART INCENTIVES

- Incentives are generally not a major FDI determinant: at best they are “icing on the cake”
- Incentives can’t turn a bad location into a good one but can tip the location decision to your favour
- Link incentives to concrete sustainable development targets and conditions, especially regarding social and environmental targets and conditions
- Undertake careful M&E of the use and effects of incentives
COMMON OBSTACLES TO SUCCESSFUL SEZ

- Poor strategic planning
- Lack of comparative advantage
- Poor site locations, entailing heavy capital expenditures
- Uncompetitive policies—reliance on tax holidays, rigid performance requirements, poor labour policies and practices
- Uncompetitive fiscal incentives
- Poor zone development practices—inappropriately designed or over-designed facilities, inadequate maintenance and promotion practices
- Subsidized rent and other services
- Cumbersome regulations and procedures and restrictive controls on zone activity;
- Inadequate administrative structures or too many bodies involved in zone administration; weak administrative bodies
- Lack of coordination between private developers and governments in infrastructure provision
- Exclusion of merchandise processed in zones from entry under bilateral and regional trade agreements
- No linkage with domestic economy
- Corruption
PURPOSE OF SEZ

- An SEZ is a trade and investment development instrument, with the goal to promote rapid economic growth by using tax and business incentives to attract foreign investment and technology.
- The goal is to artificially create a level playing field to ensure a globally competitive investment climate.
- Special regulations must be in place to avoid distorting effects to the existing domestic manufacturers and service providers.
- Especially in countries with an abundant and cost competitive labour force, SEZs have become a successful instrument to attract significant levels of FDI.
RECOMMENDATIONS FOR SEZs

- SEZs need to be competitive and prevent “enclave” syndrome
- In particular, the focus of SEZs needs to shift from attracting labour-intensive to innovation-driven investment and conform to obligations under WTO and RTAs (i.e. AEC)
- There should be no discrimination between foreign and local companies in treatment
- Zones should preferably have a multi-market orientation, not just for export and contain proper logistics and social facilities
- New SEZs should focus on wielding stronger physical, strategic and financial links with the local economy.
- The provision of excellent infrastructure, reliable power and skilled labour is much more important than incentives.
- SEZs should have a fully operational single window for all investment approvals and facilitation.
- Attractive on-site residential facilities (schools, shopping, R&R) should be available.
- In short, SEZs need to create a more attractive investment environment than in the rest of the country
- SEZs should be located in strategic locations, i.e. close to population and urban centres with sophisticated infrastructure (ports, railroads, roads, etc.)
- SEZs should be demand-driven and be developed/managed by private sector
- SEZs need independent regulatory bodies backed up by law. The regulatory authority may be different from the development agency

United Nations Economic and Social Commission for Asia and the Pacific
IMPORTANCE OF REGIONAL COOPERATION

Binding vs. non-binding
- Investment cooperation and facilitation
- Investment promotion
- Investment liberalization
- Investment protection
- Investment agreements

Individual vs. collective actions
Best practice: ASEAN Investment Area and subsequent ASEAN Comprehensive Investment Agreement (ACIA)
REGIONAL COOPERATION ACROSS THE BOARD CAN SUPPORT FDI ATTRACTION

- Regional FDI incentive schemes
- Joint R&D and technology development
- Regional patent filing system
- Regional technical standards
- Joint databases on supporting industries and technology suppliers
- Harmonized competition policies
- Regional credit/insurance guarantee schemes
- Regional linkage systems
- Joint regional investment promotion agency
- Macro-economic and financial policy coordination
- Regional currency alignment schemes
- Regional chambers of commerce (e.g. GMS-Business Forum)
- Regional connectivity in roads, railroads, electricity, broadband etc.
SECTOR FOCUS:
FDI IN AGRICULTURE
Attracting agricultural FDI as means to achieve sustainable economic development has provoked a controversial debate.

**Proponents**
- Introduction of innovative production techniques
- Provide required capital investments
- Job creation
- Address limited local production capabilities through new technologies
- Enhance low productivity levels
- Reducing food waste, improve food storage and improve efficiency of supply chains

**Opponents**
- Foreign investors profit too much from country’s assets and (scarce) resources at the expense of the host country and domestic firms
- Pose a threat to food security, poverty reduction and rural development
- Providing limited increases in rural employment
- Country loses sovereignty over land as a result of restricted IPR laws
- Foreign investors may introduce methodologies and technologies not suited to local environments
A few drivers of the post-Millennium increase in agricultural FDI include:

- Steep rise in commodity and food prices
  
  *Countries dependent on food imports invested in countries with abundant natural resources to secure food supply*

- High energy prices
  
  *Triggered international investment in the production of feedstock crops for biofuels*

- Long-term expectations
  
  *Continuation of rising prices, population growth, growing consumption rates and market demand for food and natural resources*
Successful projects combine the strengths of the investor with those of local farmers:

- **Investors**
  - Capital
  - Management
  - Expertise
  - Technology

- **Local Farmers**
  - Labour
  - Land
  - Traditional know-how and knowledge of local conditions

This combination can be the basis for win-win outcomes.
Inclusive business models:
- Leave farmers in control of their lands which gives them incentive to invest in the improvement of the land
- Empower farmers by giving them a say in the implementation of the project or even its management

These characteristics make inclusive business models more conducive to sustainable investment than land acquisition

Support is needed to strengthen the capacity of local farmer organizations as well as the initially high transaction costs
FDI to bring new technology in agriculture, says Prime Minister

Ludhiana: A day after the UPA government won Parliament's approval on its proposal to allow foreign direct investment or FDI in multi-brand retail, Prime Minister Manmohan Singh has said FDI will create a revenue model for farmers.

"FDI has been passed by Parliament and it was strongly supported by organisation in Punjab. Agriculture and food retail business will be benefited by it, farmers and consumers will be benefited by FDI," the Prime Minister said in Ludhiana today at the convocation of the Punjab Agricultural University.

"The policy will introduce new technology and investment in marketing agricultural produce," he added.

The government's decision to allow foreign supermarkets such as Wal-Mart Stores Inc to set up shop in India has been a contentious one. The Opposition, led by the BJP, had opposed it vehemently and even
A potentially important area of FDI in agriculture is transfer of farming technologies and best practice expertise, together constituting local technological capacity building.

Many sustainable agricultural practices and technologies already exist and are currently commercially available to be acquired, adapted and utilized.

FDI can play an important role in TT. However, the positive impact of FDI on TT is not automatic and depends largely on the motives for FDI, level of the technology, local adoption and adaptation capacity, and appropriate policies to enhance positive impacts.
HORIZONTAL AND VERTICAL LINKAGES ALLOW FOR TT THROUGH FDI IN AGRICULTURE

- **Vertical linkages**
  - Backward: relations with suppliers (farms, seeds)
  - Forward: relations with buyers (wholesalers, supermarkets)

- **Horizontal linkages**
  - Transfer of technology through demonstration (skills transfer) or competition forces

The effect of such linkages on local farmers depends on the quantity and quality of inputs supplied and the willingness of foreign investors to transfer knowledge and build a long-term relationship with them.

Foreign investors can also help raise productivity through providing technical assistance and information to improve quality or facilitating innovations or assisting in purchasing inputs and intermediary goods, setting up production facilities and diversifying along their supply chain.
IMPORTANCE OF IPR

- IPR is important but should not lead to dominance of TNCs of agriculture
- Biodiversity and traditional knowledge should be protected but TK is not part of modern IPR systems (such as TRIPS) – prevention of bio-piracy
- TRIPS sets minimum standards for IPR
- Seeds (re-use of seeds) should not be subject to patents; access to genetic resources
- TRIPS allows for sui generis systems for protection of plant varieties
- Most commonly used system: International Union for Protection of New Plant Varieties (UPOV)
- Balance between rights of the IPR owner, commercial plant breeders and small farms/development
- TRIPS allows for compulsory licensing but under strict conditions
- Those seeking IPR protection should show evidence of free and informed consent of the traditional owners for the sharing of ownership, control, use and benefits. National laws should provide for labelling and correct attribution of TK.
- Prevention of monopoly rights
- Issue of geographical indications
- Other important international agreements: Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR)
FDI IN THE AGRICULTURAL SECTOR: MAIN CONSIDERATIONS

- What do you try to achieve?
  - Important to improve agricultural efficiency, access to technologies and rural employment
  - Food security is key determinant for FDI but domestic food security comes first!
  - Land access (rights) and sustainable land use are important issues
  - Watch the environmental implications carefully, including water use
  - Promote value added food industries and FDI, e.g. build supply chains, involving local farms and agricultural enterprises
  - Rural infrastructure and logistics matter. FDI can help reduce waste and improve efficiency
  - Focus on the needs of small landholders
  - Promote off-farm employment
  - Strengthen the domestic legal framework
  - Negotiate/conclude sustainable investment contracts
Agricultural mechanization is a cross cutting issue particularly valuable to the attainment of the SDGs in the Asia Pacific region. 

The adoption of technologies that blend traditional knowledge and modern science will have a tremendous impact on the region's capacity to answer to food demand, social dynamics and environmental concerns.

CSAM main functions:

- Serving as a regional forum for regular policy dialogues among member countries and other interested parties in the region and the beyond to bring different perspectives, facilitate knowledge generation and sharing, and promote cooperation on sustainable agricultural mechanization.
- Becoming a data and information hub in the agricultural mechanization community through collecting and analyzing relevant data and information so as to inform members and interested parties for evidence-based decision-making.
- Serving as a recognized reference point for standards and protocols of agricultural machinery and equipment testing through collecting and sharing domestic and international standards and protocols with the purpose of improving the regional capacity on agricultural machinery and equipment testing, and promoting standardization of regional codes and testing procedures.
- Strengthening its role as the center for capacity building for concrete and targeted capacity development assistance on agricultural mechanization through policy recommendations technical assistance, technology transfer and human resource development.
- Facilitating regional agro-business development and trade in collaboration with the private sector, governments and other stakeholders and promoting green agro-technology transfer.
FDI PROMOTION: THE NEED FOR SUSTAINABILITY
NEW GENERATION OF INVESTMENT POLICIES  
(UNCTAD WIR 2012)

- Investment policies have consequently evolved to a new generation of investment policies that strive to:
  - Create inclusive growth and sustainable development through the benefits of FDI
  - Create synergies with wider economic development goals or industrial policies and achieve seamless integration in development strategies
  - Foster responsible investor behaviour and incorporate principles of corporate social responsibility (CSR)
  - Ensure policy effectiveness in their design and implementation and in the institutional environment within which they operate
UNCTAD’S IPFSD: CORE PRINCIPLES

- Policy coherence
- Public governance and institutions
- Dynamic policymaking
- Balanced rights and obligations
- Right to regulate
- Openness to investment
- Investment protection and treatment
- Investment promotion and facilitation
- Corporate governance and responsibility
- International cooperation
NATIONAL FDI POLICY CHALLENGES
(UNCTAD IPFSD, 2012)

- Integrating investment policy in development strategy
  - Channeling investment to areas key for the build-up of productive capacity and international competitiveness
  - Ensuring coherence with the host of policy areas geared towards overall development objectives

- Incorporating sustainable development objectives in investment policy
  - Maximizing positive and minimizing negative impacts of investment
  - Fostering responsible investor behaviour

- Ensuring investment policy relevance and effectiveness
  - Building stronger institutions to implement investment policy
  - Measuring the sustainable development impact of investment
INTERNATIONAL FDI POLICY CHALLENGES
(UNCTAD IPFSD, 2012)

- Strengthening the development dimension of IIAs
  - Safeguarding policy space for sustainable development needs
  - Making investment promotion provisions more concrete and consistent with sustainable development objectives

- Balancing rights and obligations of states and investors
  - Reflecting investor responsibilities in IIAs
  - Learning from and building on CSR principles

- Managing the systemic complexity of the IIA regime
  - Dealing with gaps, overlaps and inconsistencies in IIA coverage and content and resolving institutional and dispute settlement issues
  - Ensuring effective interaction and coherence with other public policies (e.g. climate change, labour) and systems (e.g. trading, financial)
PROMOTING SOCIALLY RESPONSIBLE INVESTMENT

- **OECD guidelines for Multinational Enterprises:**

- **United Nations Global Compact principles:**
  [https://www.unglobalcompact.org](https://www.unglobalcompact.org)

- **ISO 26000 series on social responsibility:**
  [http://www.iso.org/iso/home/standards/iso26000.htm](http://www.iso.org/iso/home/standards/iso26000.htm)

- **United Nations Guiding Principles on Business and Human Rights:**

- **ILO conventions:**

United Nations Economic and Social Commission for Asia and the Pacific
LEGAL FRAMEWORK FOR FDI
CHARACTERISTICS OF COUNTRIES WITH HIGH SCORES ON LEGAL FRAMEWORK FOR FDI

- Allowing FDI across (and in virtually all) sectors
- Equal treatment of foreign and domestic investors
- Simple and transparent establishment process
- Easy and secure access to and use of land and efficient land acquisition procedures
- Strong arbitration laws
- Conformity to international principles and laws
- Supportive court system and fair trials
- Quality of legal services

In addition (depending on type of FDI):
- Non-restrictive labour laws
- IPR protection
- Easy repatriation of profits
FOREIGN INVESTMENT LAW

- FI Law is a law regulating investments made by foreigners or non-nationals in a specific country
- Why? To address issues related to national security, sovereignty, culture and development
- Definition of investment: assets, technology, knowledge, and any other form of capital that is brought into a country for business purposes
- FI Law specifies when, how, and to what extent foreigners may invest in a country
- FI Law normally regulates ownership and protection, repatriation of profits, rights and obligations of investors vs. right of the state, land and labour use, restrictions, performance requirements and incentives, dissolution and liquidation, FI approval and promotion, registration, arbitration
ISSUES IN FOREIGN INVESTMENT LAW

- Do you need it?

- Do you need to discriminate between foreign and domestic investment?

- Consistency with other laws is very important

- Insufficient by itself to establish proper legal regime for FDI
MYANMAR INVESTMENT LAW: IMPROVEMENTS

- Replaces 2012 Foreign Investment Law and 2013 Myanmar Citizens Investment Law
- Sends the right signal to investors that Myanmar is open to business
- Law was formulated on the basis of due consultation and engagement of civil society and the private sector
- More sectors open to FDI
- Ends discrimination between citizens and foreigners
- Streamlined investment approval process (from 6 to 3 months)
- Improved tax incentives for investment in underdeveloped regions and priority sectors
- More generous land leasing rights to foreigners (longer than 50 years)
- Increased investor protections (e.g. related to unfair treatment and expropriations)
- More flexible staffing and employment provisions (re. domestic vs. foreign staff)
- Pre- and post establishment MFN and NT, FET
MYANMAR INVESTMENT LAW: CHALLENGES

- Implementation rules and regulations yet to be issued
- Lack of clarity: what is the difference between “investment proposal” and “investment endorsement”? What is zone 1, 2, 3 etc.?
- Which businesses are “not restricted”? What is a “strategic” business?
- Government approvals need to be in place before MIC can issue endorsement (previously, MIC obtained the approvals)
- Role of state and regional government in investment approval
- Investor protections leave room for interpretation and exceptions leading to uncertainty
- The general prohibition against foreigners or foreign companies leasing immoveable property such as land, apartments, offices or factories for more than one year still applies
- No recourse to international arbitration; no clear level playing field with domestic investors
- Provisions on interaction with other laws and international treaties not consistent
April 2017: International Finance Corporation (IFC), a member of the World Bank Group, and the Securities and Exchange Commission of Myanmar (SECM) signed a memorandum of understanding (MoU) in March to strengthen corporate governance regulatory standards and practices in Myanmar.
### Major Changes in Investment, Corporate Law

**New Investment Law Introduced in October 2016**

<table>
<thead>
<tr>
<th>Before</th>
<th>After</th>
</tr>
</thead>
<tbody>
<tr>
<td>Long-term lease of real estate (more than 1 year)</td>
<td>MIC approval required</td>
</tr>
<tr>
<td>Special corporate tax exemption</td>
<td>MIC approval required</td>
</tr>
<tr>
<td>Employment of local workers (in positions requiring high technical skills)</td>
<td>Required ratio to workforce</td>
</tr>
<tr>
<td>Overseas remittance</td>
<td>MIC approval required</td>
</tr>
</tbody>
</table>

**Revisions to Companies Act Expected in Spring 2017**

<table>
<thead>
<tr>
<th>Current</th>
<th>Anticipated Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acquisition of Myanmar stocks by foreign investors</td>
<td>Not permitted</td>
</tr>
<tr>
<td>Definition of foreign invested companies</td>
<td>Companies that receive any stock investment from foreign companies</td>
</tr>
<tr>
<td>Foreign participation in restricted industries</td>
<td>Not permitted in trading, other sectors, in principle</td>
</tr>
</tbody>
</table>
ADDITIONAL REQUIREMENTS FOR PROPER LEGAL FDI FRAMEWORK

- (Intellectual) property law and regulations
- Enterprise (company) or corporate law and regulations – for Myanmar pending, important for M&A
- Contract law and regulations
- Land law and regulations: access/ownership of land (own or lease); land use rights
- Labour law and regulations
- Foreign exchange law and regulations
- Financial laws and regulations
- Insolvency and bankruptcy laws
- Tax laws: consumption, VAT, business, profit, income, etc.
- Trade law and import/export regulations
- Competition law and regulations
- Environmental laws and regulations
- Sectoral laws and regulations (agriculture, defense and security, mining and minerals, real estate and construction; services like telecommunications, transportation, utilities, media, finance, entertainment and tourism, health care, professional and retail; manufacturing sectors)
- Specific issue laws: franchising, SMEs, special economic zones (SEZs), licensing, technology transfer, privatization, M&As, insurance etc.
- Dispute settlement and law enforcement
- National vs. local laws and regulations
IPR PROTECTION: IS IT NECESSARY FOR FDI?

- Depends on host country and industry
- FDI to LDCs generally-speaking not motivated by IPR issues
- Stringent IPR protection is often a burden to LDCs which may result in net development costs
- However, IPR are necessary to develop national R&D and technology development capabilities, essential in strengthening national competitive advantage, which, in turn, attracts higher levels of FDI
- IPR is more important in countries with relatively high imitation capabilities (though licensing may substitute for FDI)
- IPR makes a difference in being able to attract “quality” FDI (i.e. knowledge-intensive, R&D oriented)
- BITs and multilateral obligations diminish IPR as a competitive advantage for attracting FDI
- Openness to trade and overall open economy more important for export-oriented FDI
NEED FOR INTERNATIONAL COMPLIANCE

- Multilateral agreements under WTO: GATS, TRIMS, TRIPS

- Regional and bilateral agreements: IIAs (BITs), RTAs (RCEP), in particular under ASEAN (e.g. ACIA!)
DO IIA\textsuperscript{s} HELP IN ATTRACTING FDI?

\begin{itemize}
\item IIA\textsuperscript{s} can influence a company's decision to invest, but:
  \begin{itemize}
  \item Role is limited (IIA\textsuperscript{s} alone cannot do the job); economic determinants are more important
  \item Impact is generally stronger in the case of FTAs with investment chapters than with regard to BITs
  \item Also depends on the kind of FDI
  \item The conclusion of IIA\textsuperscript{s} need to be embedded in broader policies covering all host country determinants of FDI
  \end{itemize}
\end{itemize}
REBALANCING REQUIRED?

Some criticisms against current agreements

- Too narrowly focused, addressing only the rights of the foreign investors (and not their obligations)
- Investment protection provisions strong, investment promotion provisions weak
- Dispute settlement mechanism has shortcomings (not transparent enough, prone to conflicts of interest)
  - In response, IISD developed in 2005 a “Model International Agreement on Investment for Sustainable Development”
  - UNCITRAL Rules and Convention on Transparency

At the same time

- Agreements are about protection of investors and initiated to attract investments by decreasing the risk for investors.
- The obligations of investors are to follow host country law.
- How strong can you make promotion provisions, and why?
- Countries are still more or less following the usual form of agreements, with some modifications (e.g. provisions related to environment & dispute settlement).
HOW CAN IIA\textsuperscript{s} BE ADAPTED TO CONTRIBUTE TO SUSTAINABLE DEVELOPMENT (UNCTAD IPFSD)?

- Better definitions of “investment”
- Clarifications on MFN/NT ("like circumstances")
- Strengthening general exceptions/general obligations/investor obligations
- Include reference to international standards of responsible investment and responsible business practices
- Careful definitions of the scope of pre-establishment commitments
- Better define FET
- Insert appropriate social (labour) and environmental clauses that would allow governments to take appropriate measures for inclusive development without fearing a lawsuit
- Include provisions that shield host countries from unjustified liabilities and high procedural costs of ISDS
- Limit the Full Protection and Security provision to “physical” security and protection only and specifying that protection shall be commensurate with the country’s level of development
- Introduce language that draws a line between a compensable indirect expropriation and the adverse effects endured by a foreign investor as a result of bona fide regulation in the public interest
  - e.g. Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (2007)
SUMMARY OF POLICY PRINCIPLES FOR FDI

- Define objective: why do you want FDI? For what purpose?
- Adhere to SMART
- Investment policy needs to address the following questions: who can invest in the country/location, where, and under what conditions
- Investment policy before investment law
- Consult stakeholders!
- Proper monitoring and evaluation framework
- Proper coordination framework (single agency under head of state)
- Political and economic stability matter!
- Infrastructure and human resources matter!
- Improve ease of doing business and cut red tape
- Avoid incentives and reform tax regimes in accordance with the principles of simplicity, predictability and conformity to SDGs
- SEZs can be useful but need to be carefully planned
- Strengthen legal framework for land rights and access
- Improve institutional effectiveness (IPA)
- Keep institutions for investment policy, regulation and promotion separate
- Don’t neglect domestic investment
- Formalize the informal sector
Ownership restrictions vs. establishing nationality
Anticompetitive practices by foreign affiliates
Volatile flows of investment and related payments deleterious for the balance of payments
Tax avoidance and abusive transfer pricing by foreign affiliates (BEPS: Base Erosion and Profit Shifting)
Transfers of polluting activities or technologies
Crowding out local firms and suppressing domestic entrepreneurial development
Crowding out local products, technologies, networks and business practices with harmful socio-cultural effects
Concessions to TNCs, especially in export processing zones, allowing them to skirt labour and environmental regulations
Excessive influence of TNCs on economic affairs and decision-making, with possible negative effects on industrial development and national security

In short: a balancing act between the interests of investors and the host country
QUESTIONS FOR DISCUSSION: POLICIES

- Why does your country attract FDI? In other words, what are the immediate and long-term objectives of attracting FDI?
- Has your country undertaken any economic, financial, trade, investment liberalization initiatives? How have these initiatives helped economic growth and attraction of FDI?
- Does or did your country have a privatization programme? What was the role of FDI in the implementation of this programme? Was it successful?
- How well is FDI integrated in your national development policies, plans and strategies?
- Does your country have a national innovation system? How would you rate the quality of that system? What role does it play in attracting quality FDI? What could you do to improve it and what role could FDI play in this regard?
- Does your country have a business linkage programme to help SMEs integrate into global and regional value chains? What role does the attraction of FDI play in this regard? How successful is this linkage programme and how could you improve it?
- How do you see the role of regional cooperation and integration (ASEAN/AEC) for attracting FDI?
QUESTIONS FOR DISCUSSION: LEGAL AND INSTITUTIONAL

- In light of this presentation, how do you view your national investment law?
- Does your country have a negative or positive list approach to allowed sectors?
- What land, property and investment ownership restrictions does your country have on foreign investment? Are these restrictions right, too strict or too flexible?
- How do you rate your overall rule of law in terms of (a) adequate legal protection for foreign investors; (b) due enforcement. Does your country have a national court and dispute settlement system that meets international standards and expectations?
- What other laws does your country have that affects or impacts foreign investors and their investments? For instance in mining, transport, telecommunications, tourism?
- Does your country have a proper IPR regime that fits its current development stage? Is it duly enforced? Is there scope for improvement or is this too premature?
- How many IIAs (in particular BITs) is your country a contracting party to? Do you think these IIAs have helped attract FDI? Do you agree with a broad or rather narrow definition of investment? Should your country agree to pre-establishment related MFN and NT clauses or should you retain your right to screen investment proposals?
- Do you think the current IIA and ISDS regime properly balances investor rights with the state’s duty and need for policy space to pursue sustainable development? How could the regime be improved in its contribution to achieving the SDGs?
- At what level do you think FDI should be best regulated: at national, bilateral, regional or global (multilateral) level?
- Do you think a Multilateral Framework on FDI and/or the establishment of a World Court on Investment would be necessary or desirable?
Your questions please?
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