OECD INVESTMENT POLICY
REVIEW OF SOUTHEAST ASIA

Overview of main issues and challenges

3rd meeting of the Southeast Asia Regional Policy Network on Investment, 7 March 2018, Tokyo

Stephen Thomsen, Ph.D.
OECD Investment Division
Country reviews are undertaken jointly by the OECD and the government in partnership with the ASEAN Secretariat and based on the Policy Framework for Investment.
OECD Investment Policy Reviews using the *Policy Framework for Investment*

Governments undertaking reviews often form multi-agency task forces that can capitalise on and enhance a country’s reform momentum:
- Myanmar – 17 agencies;
- Tanzania – 21 agencies;
- Burkina Faso – 17 agencies;
- Philippines – 18 agencies.

Chile’s investment promotion agency is using the PFI to review its investment promotion strategy and promote investment policy reforms.

Nigeria used the PFI in Lagos State for a state-level investment framework evaluation and is now rolling this out to other states.

The Southern African Development Community (SADC) and the OECD have partnered to develop the SADC Investment Policy Framework using the PFI, offering a peer learning platform for investment reform implementation.

International development partners such as the World Bank Group and development agencies have used the PFI for their technical co-operation programmes.
IPR of Southeast Asia

• 1st of its kind by the OECD
• More thematic focus:
  – FDI liberalisation
  – Services and productivity
  – Investment protection
  – Incentives
  – Responsible business conduct
• Interplay with regional initiatives: AEC Blueprint 2025, ACIA, AFAS, ASEAN FTAs
• Key issues:
  – Ensure the continuing attractiveness of ASEAN for FDI
  – Increase the impact of FDI on productivity/competitiveness, inclusiveness
FDI LIBERALISATION
The OECD FDI Regulatory Restrictiveness Index

A tool for benchmarking performance, showcasing reform and estimating impact

**Statutory restrictions:** All discriminatory measures affecting foreign investors, covering both market access and national treatment:

- **Screening** above a threshold or foreign equity share
- **Equity restrictions** by sector or overall, for acquisitions or greenfield projects
- Restrictions on **key personnel:** managers, directors, experts
- **Operational restrictions:** land ownership, profit/capital repatriation, branching, reciprocity, discriminatory minimum capital requirements, etc.

**What is not covered?**

- Degree of implementation
- State monopoly
- Special treatment accorded to a group of investors, whether by activity or country of origin
<table>
<thead>
<tr>
<th>Sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Agriculture</td>
</tr>
<tr>
<td>2. Forestry</td>
</tr>
<tr>
<td>3. Fishery</td>
</tr>
<tr>
<td>4. Mining &amp; Quarrying (incl. oil extract.)</td>
</tr>
<tr>
<td>5. Manufacturing - <em>Food &amp; Other</em></td>
</tr>
<tr>
<td>6. Manufacturing - <em>Oil Ref. &amp; Chemicals</em></td>
</tr>
<tr>
<td>7. Manufacturing - <em>Metals, Machinery and Other Minerals</em></td>
</tr>
<tr>
<td>8. Manufacturing - <em>Electric, Electronics and Other Instruments</em></td>
</tr>
<tr>
<td>9. Manufacturing - <em>Transport Equipment</em></td>
</tr>
<tr>
<td>10. Electricity (generation, distribution)</td>
</tr>
<tr>
<td>11. Construction</td>
</tr>
<tr>
<td>12. Distribution – Wholesale</td>
</tr>
<tr>
<td>13. Distribution - Retail</td>
</tr>
<tr>
<td>14. Transport (surface, water, air)</td>
</tr>
<tr>
<td>15. Hotels &amp; restaurants</td>
</tr>
<tr>
<td>16. Media (broadcasting and other media)</td>
</tr>
<tr>
<td>17. Communication (fixed &amp; mobile telecoms)</td>
</tr>
<tr>
<td>18. Financial services - Banking</td>
</tr>
<tr>
<td>19. Financial services - Insurance</td>
</tr>
<tr>
<td>20. Financial services - Other financial services</td>
</tr>
<tr>
<td>21. Business Services (accounting, legal, architecture, engineering)</td>
</tr>
<tr>
<td>22. Real estate</td>
</tr>
</tbody>
</table>
Asian economies are more restrictive on average... 2016
...but have nevertheless reformed strongly over time
More restrictive economies tend to have less FDI.
The relationship is even stronger in services
Investors respond to reforms
Deepen ASEAN agreements to advance the unfinished services sector reform agenda

- ASEAN agreements have played more of a role in locking in standards of treatment and market access than in actually driving liberalisation
- Relatively deeper liberalisation achieved in a few key backbone services under AFAS and transport agreements, but still fail to bring ASEAN to levels of openness observed in advanced economies
- ATISA could go further – e.g. by adopting a negative-list approach for services – as many AMS already do in domestic legislation
- Strengthen the agenda for regulatory co-operation and harmonisation with regard to behind the border regulations
INVESTMENT PROTECTION
The legal regime for investment varies across ASEAN...

<table>
<thead>
<tr>
<th></th>
<th>Investment Promotion Act, Omnibus Investment Code, etc.</th>
<th>Foreign Investment Law</th>
<th>Unified (foreign &amp; domestic) Investment Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei Darussalam</td>
<td>No general law on investment or investment promotion</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cambodia</td>
<td></td>
<td></td>
<td>1994, 2003, 2018 (expected)</td>
</tr>
<tr>
<td>Indonesia</td>
<td></td>
<td>1967</td>
<td>2007</td>
</tr>
<tr>
<td>Malaysia</td>
<td></td>
<td>1986</td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td></td>
<td>No general law on investment or investment promotion</td>
<td></td>
</tr>
</tbody>
</table>
Towards a single regulatory block in ASEAN: regional wave of investment legislation reforms

- Different approaches to investment legislation within ASEAN
- Investment laws often cover protection of investment, market access and NT, incentives, sometimes also outward investment.
- Often used as a signaling device to investors
- Strong legislative reforms over time, particularly in CLMV, sometimes influenced by regional developments (e.g. ACIA)
  - Unified laws and progressive introduction of better delineated and more balanced provisions
- Need to close the gap between domestic and treaty-level protection standards but harmonisation is a two-way street
...and the treaty framework is complex

- AMS early adopters of international investment agreements
- BITs, bilateral and regional FTAs, ASEAN agreements (ACIA, AFAS) and now RCEP and CPTPP (for 4 AMS)
- Treaties vary in terms of protection and market access accorded to covered parties and some duplication is inevitable
- But complexity imposes costs on both investors and governments
- Opportunity to review individual agreements – particularly older ones – to assess whether they reflect current practices in terms of their treatment of investors
Investment disputes in AMS: the horizon of dispute prevention policies (DPPs)

• ISDS is being called into question by an increasing number of governments and stakeholders

• How to help avoid investment disputes?
  – Establish policies and institutional mechanisms to **prevent** disputes from escalating into costly international arbitration cases:
    • Introduce dedicated legal and treaty provisions
    • Establish early alert mechanisms or Ombudsman services as part of investor aftercare services
  – AMS are not at the forefront of DPPs; they could draw on other regions’ practices
RESPONSIBLE BUSINESS CONDUCT
Increased attention to RBC in global agendas and expectations on companies to address environmental, human rights and labour risks in their supply chains.

**International standards**

**Global agendas**

**Legislation**

**International agreements**

International investment agreements increasingly include language on sustainable development or responsible business conduct.
Regional RBC initiatives in ASEAN

- AEC Blueprint 2025 calls on Member States to work closely with stakeholders towards promoting CSR activities
- ASEAN Consensus on the Protection and the Promotion of the Rights of Migrant Workers (2017)
- Guidelines for Corporate Social Responsibility on Labour (2016)
- Vientiane Declaration on the Transition from Informal Employment to Formal Employment towards Decent Work Promotion in ASEAN (2016)
National RBC initiatives in ASEAN

ASEAN Member States have been early movers among emerging economies in embracing RBC

- National Action Plans on Business and Human Rights are being developed in Malaysia, Myanmar, Thailand, Indonesia, Philippines
- Better Factories Cambodia
- Investor obligations in Investment Law (Lao PDR)
- RBC language in EU-Viet Nam FTA, as well as side agreement with United States under TPP (now CPTPP)
- RBC part of Myanmar Investment Commission approval (Myanmar)
- Indonesia first introduced CSR obligations in mining sector
Thank you

Stephen Thomsen, Ph.D.
OECD Investment Division

Contact: stephen.thomsen@oecd.org