The Politics of Investing in Myanmar[1]

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Introduction

Why is investing in Myanmar still seen as a controversial or questionable decision? Why are foreign firms likely to be subject to more than the normal level of scrutiny if they decide to invest in Myanmar? Why do some Burma activists focus so much attention on investing in Myanmar? In the past, why were companies investing in Myanmar deemed worthy of including on a “dirty list”, regardless of their actual record or actions?[2]

Investing in Burma was one of the first economic sanctions included in the economic measures introduced bilaterally by the US Congress in 1997. Even that was accompanied by a political struggle because the powerful US oil company, Texaco, was already involved in a joint venture in Myanmar to produce off-shore gas from the Yetagun gas field, and had no intention of withdrawing from the project which was to begin production shortly afterwards. So in the end, it was only “new investment” that was prohibited, but even this was mainly a “feel good” measure for US politicians rather than genuinely effective policy. (In 2009, then Secretary of State Hillary Clinton would commission a review of US policy towards Myanmar on the grounds that all existing policies had failed.)

There were only a few other significant countries whose companies had foreign investment interests in Myanmar, and they were equally not keen to have such a debate in their own parliaments, so no other country ever sought to ban investing in Myanmar as such. However, the effect of some of other Western economic sanctions (such as the assets freeze or prohibition on financial transfers, as adopted by Australia, Canada and the EU) was almost the same. Even though investment bans against Burma were not actively pursued by any other country which imposed economic sanctions, banning investing in Myanmar remained an attractive idea for some members of the Burmese democracy movement.

The United Nations also seems to avoid specifically targeting investment in its sanctions. Sometimes, investment is certainly comprehended in the financial sanctions that are prescribed,[3] but “investment” as such is possibly too broad in scope and not sufficiently discriminating.

No Australian Government sought to ban Australian investment in Myanmar; indeed, until 2007, Australia refused to impose ineffective, non-universal economic sanctions against Myanmar. Eventually, Australia’s sanctions on financial transfers with Myanmar were formally lifted in June 2012. In response to the reforms initiated by the Thein Sein government, Australian policy shifted back to the normal policy of encouraging trade and investment in Myanmar. Then, in October, 2013 Minister for Workplace Relations Bill Shorten led an Australian “labour, trade and investment” business delegation to Myanmar, which seems to have been intended to kick-start the normalisation of Australia-Myanmar commercial relations.[4] This was essentially a “familiarisation” visit, but it was followed by an important development in terms of promoting investment, the

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[1] Based on a joint presentation for the ANU Asia Pacific Learning Community, Bruce Hall ANU, 24 April 2013.

[2] The Burma Campaign Australia maintains a “dirty list” of companies it claims “are directly or indirectly financing and supporting one of the most brutal regimes in the world. Companies on this list are helping to keep Burma’s military junta in power”. No actual evidence of these companies’ “support” for the military regime has ever been produced.
http://www.aucampaignforburma.org/AUDirtyList.htm (accessed 27 April 2013)

[3] I am indebted to Dr Jeremy Farrell of the ANU for pointing out how paragraph 4 of UNSCR 661 on Iraq, namely: "All states shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to [the Government of Iraq] or to any [public utility undertaking in Iraq or Kuwait] any [funds or any other financial or economic resources] and from remitting any other funds to persons or bodies within Iraq or Kuwait..." at pp 265 in his book “United Nations Sanctions and the Rule of Law”, Cambridge University Press, 2007.

[4] See the Ministerial Media Release at:
http://ministers.deewr.gov.au/shorten/investment-labour-rights-and-education-key-focus-australian-trade-delegation-myanmar

opening of an ANZ Bank representative office in Yangon. (A senior ANZ representative was a member of the Shorten mission.)

On the face of it, Myanmar now seems to have great potential as an investment location. As a country, it boasts an enormous natural resource endowment only partially developed, a hard-working work force, and many attractive low cost-factors. In terms of general economic activity, it is like a greenfield site.

During March-April 2013, the Burma Campaign Australia (BCA) mounted a national speaking campaign to question the benefits of foreign investment in Myanmar. While the BCA claims not to oppose investment in Myanmar, it still operates under a broad approach urging Australians "do not deal with Burma".[5]

Why is FDI Significant for Myanmar

Economists traditionally regard FDI is important in stimulating economic growth, something on which Myanmar is noticeably lagging behind its ASEAN neighbours. FDI is especially useful for promoting export-oriented development and connecting developing economies with international markets. Nowadays, economists tend to see FDI as bringing both benefits and problems for countries like Myanmar.[6]

Myanmar is conspicuous for the very low levels of FDI it has attracted compared with other ASEAN countries, despite being supposedly in favour of FDI since the State Peace and Development Council Investment Law of 1989.
However, Myanmar is committed to becoming a full member of the ASEAN Economic Community in 2015, which will incorporate principles of the ASEAN Comprehensive Investment Area. This is premised on open investment regimes, operating without discrimination. Myanmar's leaders will be pushing hard to achieve this goal.

Attitudes of Myanmar's Political and Business Leaders to investment

One of the first acts of the new Thein Sein government in 2011, like the military regime that preceded it in 1988, was to announce that a new FDI law would be introduced. Given the limited availability of domestic capital to funds resource development projects, the Myanmar Government realised from the outset that it would have to rely on FDI for funds, technology and markets. In 2011, one of Thein Sein's most trusted ministers, former Navy Chief Soe Thane, was appointed as head of the Myanmar Investment Commission (MIC) which is charged with the job of scrutinising FDI applications. In the first cabinet reshuffle carried out by President Thein Sein in August 2012, he moved Soe Thane to become Minister (without portfolio) in the President's Office, retaining his MIC responsibilities.

Passing the new FDI law, which took place in the second half of 2012, turned into one of the lengthiest legislative processes so far in the new Myanmar parliament. Considerable discussion revolved around the provisions designed to attract FDI such as the tax holiday period, the extent of foreign ownership, and the option of purchasing land. Domestic business interests, including some of the business "cronies" of the former military regime, are anxious about the ability of local firms to survive competition from much larger foreign firms and opposed making the terms for FDI too favourable to foreign participants. Finally signed by President Thein Sein in November 2012 (after he declined to sign parliament's first version), the law embraces a range of tax and other "holidays" and permits certain land ownership for the purposes of the investment. [7]

[5] According to their website, the Burma Campaign Australia encourages "Australian corporations looking to invest in Burma to operate ethically, respect human rights and adhere to international standards of best business practices". http://www.aucampaignforburma.org/NationalSpeakingTour.htm

[6] See the article "FDI and Burma's future development" by the Peterson Institute economist Theodore Moran carried by Democratic Voice of Burma:
http://www.dvb.no/analysis/fdi-and-burma%e2%80%99s-future-development/23571

[7] A summary of the provisions and implication of the law was prepared for the US Chamber of Commerce in Myanmar by the legal office DFDL. See their website:
http://www.dfdl.com/easyblog/entry/myanmar-new-foreign-investment-law

Some Burma activists seem to have assumed that Aung San Suu Kyi would oppose FDI coming into Myanmar, but this was not to be the case. Aung San Suu Kyi certainly called for transparency, accountability and respect for human rights to be integral to any foreign commercial operations in Myanmar. She also made it clear that any decision on investing in Myanmar needed to be taken cautiously, and when the investment occurred it needed to be subject to some strict conditions. The problem is that there are no universal laws governing FDI globally, and governments have been unwilling to endorse anything more than voluntary measures and the Codes of Conduct applying to members of the OECD.[8]

As early as January 2011, Aung San Suu Kyi raised investment in her messages to the international community. In her very first address to an international economic forum (a video address to World Economic Forum in Davos, Switzerland, 28 January 2011) she "appealed to investors and potential investors "to put a premium on respect for the law, on environmental and social factors, on the rights of workers, on job creation and on the promotion of technological skills. Such an approach would not only be in line with a global sense of responsibility, it would lead in the long run to greater benefits for all concerned."[9]

At the World Economic Forum in Bangkok in June 2012, on her first overseas trip since her release from detention, Aung San Suu Kyi called for investment that would help the people of Myanmar in developing employment and education.[10] However, she also "cautioned potential foreign investors about the legal and ethical minefield that exist in Myanmar, emphasising the need for it to occur under effective "rule of law".[11] She also warned against "reckless optimism" and instead counselled "healthy scepticism" of Burma's reforms". But she was not perceived as opposing investing in Myanmar, because she again spoke of the importance of investing in Myanmar leading to better employment opportunities for young Myanmar citizens.

Aung San Suu Kyi was also considered to be conveying a message to Japanese business sector about investing in Myanmar when she visited Japan in April 2013. According to Agence France Presse, in an address in Tokyo on 16 April 2013, she "called for investments in technology and infrastructure, as well as a reformed legal system to attract foreign direct investment and encourage development." She also called for Japanese investment and economic aid that would create jobs in the Southeast Asian economy. Aung San Suu Kyi was reported to have said: "The young people of Burma need the kind of education that has enabled Young Global Leaders…to excel so early in their careers." In other words: "The people cannot improve their livelihood without a job." [12]

What are the potential positive and negative outcomes from FDI flows into Myanmar?

Generally, successive Myanmar governments since 1988 have actively encouraged FDI as being in Myanmar's broader interests. When President Thein Sein was in Australia, he mentioned another objective for his government in seeking to attract foreign investment: "We are trying to create employment opportunities for those 3 million workers who are now abroad, and that is the reason that we now would like to invite your business people, SMEs and industries to come and set up ... in Myanmar,"[13] the President told an Australian business audience in Sydney.

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[8] The OECD codes of conduct cover: human rights, employment and industrial relations, environment, bribery and extortion, consumer interests, science and technology, competition and taxation.

[9] See World Economic Forum website/ http://www.weforum.org/news/aung-san-suu-kyi-addresses-world-economic-forum-annual-meeting-davos

[10] See World Economic Forum website:
http://www.weforum.org/news/aung-san-suu-kyi-calls-investors-focus-how-help-myanmar

[11] For an independent assessment of the state of the rule of law in Myanmar, see: "The Rule of Law in Myanmar: Challenges and Prospects" International Bar Association, December 2012.
www.ibanet.org/Document/Default.aspx?DocumentUid=DE0EE11D-9878 (accessed 26 April 2013).

[12] See "Suu Kyi calls for Japanese investment in Myanmar", AFP 17 April 2013.
[13] See Asialink dinner address by President U Thein Sein, Sydney 19 March 2013. http://www.asialink.unimelb.edu.au/calendar/Recent_Events/Myanmar_President_emphasises_benefits_of_investment

The prominent Australian entrepreneur, Andrew Forrest, who has himself visited Myanmar, described the economic benefits in the following terms, when speaking at the same Asialink-sponsored Sydney event “On an impact basis, to not look just so much for the profit in an enterprise – that’s important for it to be sustainable – but look at the great benefit which your investment in Myanmar can make in the long-term interest of tens of millions of people whose lifestyle may not improve without your investment.” (Asialink dinner, Sydney 19 March 2013).

The negative impacts of investing in Myanmar are often misstated by Burma activists. They point to serious problems – such as the appropriation of land for large projects such as the gas pipelines, and the impacts of dam construction on Myanmar’s major rivers where villagers have had to be relocated – in both sets of cases, without adequate compensation. They seem not to take account of the employment benefits, the skills transfers[14], and the overall positive economic impact. Not to mention the positive side effects funded by the foreign companies who practise “corporate social responsibility” and provide schooling and health facilities for the populations in their project areas.[15]

What does Myanmar need to do to maximise the beneficial effects of FDI and to minimise the negative effects?

Essentially, control over FDI inside the country rests with the Myanmar authorities and their regulators, primarily the Myanmar Investment Commission (MIC). Of course, the main legal framework for controlling FDI in Myanmar is the new foreign investment law which was signed into law in 2012, and which will be overseen by the MIC. The provisions of the new law are not greatly out of line with best-practice FDI laws elsewhere, although the MIC will have very broad discretion to make decisions about projects, and very broad power to issue orders, directives etc.[16] The Myanmar Government’s foremost task now is – quite simply – to promote certainty, fairness and transparency for all business activities in Myanmar. Without these, FDI will not come in the volumes or patterns desired.

Basically, the Myanmar Government needs to create legally binding frameworks that embed compliance with the rule of law in all economic activities, whether in terms of labour law, environmental regulation, or arrangements covering social impacts. In Myanmar there is still some way to go before all of these are in place – for example, while there is a new environment law (as of 30 March 2012), whether its implementation is complete is not clear. But this should be no excuse for irresponsible corporate (or individual) behaviour. Given the new openness of the Myanmar press, any such “misbehaviour” would quickly come to notice.[17]

The Myanmar Government also needs to put in place equitable and effective taxation, employment and environmental arrangements that allow true accountability, and to deal with problems of corruption. Measures to address these matters are already under consideration.

How should the international community react to Myanmar’s opening up to more FDI?

With its abundant and relatively undeveloped natural resources, Myanmar is on the surface quite an attractive destination for FDI.[18] Evidence of this can also be found in the large numbers of “would-be” investors who flooded into Myanmar after the reforms began in 2011.[19] There are

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[14] For example, visiting the Total gas platform off Yangon in 2002, the large number of skilled local employees was especially striking, even in the highest level positions.

[15] In some cases, “independent” reports on the CSR programs are commissioned and published. See for example, Premier Oil’s Myanmar Report “Social and Environmental Responsibilities 2005”.
http://www.docstoc.com/docs/69843080/Social-and-Environmental-Responsibilities-2005

[16] Explanations about the law can be found at: http://www.dfdl.com/easyblog/entry/myanmar-new-foreign-investment-law
I am also indebted to comments on this subject by an Australian legal consultant in Yangon.

[17] See the author’s "Starting the presses on Myanmar's historic reform agenda", *The Conversation* 22 April 2013
http://theconversation.com/starting-the-presses-on-myanmars-reform-agenda-13216

[18] See Macquarie University Professor Sean Turnell’s assessment in the September 2012 *East Asia Forum* article “Myanmar: Asia’s next ‘tiger’?”: http://www.eastasiaforum.org/2012/09/08/myanmar-asias-next-tiger/

[19] See also Kate Kelly’s “Australia joins the race to invest in Burma”, *Democratic Voice of Burma*, 13 June 2012.

almost no global rules governing FDI, and there are few cases where Australian laws have extra-territorial reach – but there are some! However, conditions for FDI in Myanmar are not necessarily very favourable; indeed, with the continuing insurgency in Kachin State, and communal violence between Muslims and Buddhists, many foreign firms have paused before proceeding with their investment decisions.[20] It is no surprise either that some international risk analyses rate Myanmar as an “extreme risk” case.[21]

Naturally, the international community should encourage foreign firms (traders and investors) to comply with Myanmar law, and to follow best international practice in terms of employment and socio-economic (including environmental) impacts. This is the best basis on which to pursue FDI in Myanmar that is politically and morally sustainable and that can withstand changes of governments and the inevitable vagaries of the political situation there. Any companies investing in Myanmar must expect that there activities will be closely scrutinised, as international interest in Myanmar is likely to remain strong and sometimes emotionally charged.

International assistance could certainly help Myanmar develop its own regulatory framework for foreign firms, and provide capacity building for Myanmar institutions and regulators. Such assistance would undoubtedly be welcomed by the Myanmar Government, which has so far been extraordinarily open about its reform agenda and very receptive to outside ideas on how to move forward.[22] Australian assistance could also be valuable in enhancing Myanmar to strengthen its own regulatory and supervisory arrangements, as part of a program to improve governance capacity across the board, in accordance with Prime Minister Julia Gillard’s “Partnership for Reform”.[23]

The Australian Government should ensure Australian firms (traders and investors) are well informed about requirements for trading and investing in Myanmar. The Gillard government’s decision to re-open an Austrade Office in the Australian Embassy Yangon is clearly aimed at meeting this sort of need.[24] The Australian Government should make it clear that it will penalise Australian firms (traders and investors) who break any Australian laws when trading or investing in Myanmar (e.g. over corruption).

Business groups such as the Australia Myanmar Chamber of Commerce and Asialink’s Myanmar Business Taskforce can play a valuable role in aiding Australian firms enter the Myanmar business environment. They have specialised knowledge of the circumstances in Myanmar and have access to a network of useful contacts in Myanmar and sources of reliable advice about Myanmar.

What does the international community need to do to maximize the beneficial effects of FDI and to minimise the negative effects?

It is wrong to assume that FDI is automatically good or bad. There are many, many instances of FDI playing a key role in prudent and rounded economic development that has brought enormous benefits to the country and the people hosting FDI. Of course, not all FDI is beneficial and there are also many cases where the negative examples of FDI can be observed. At the moment, there is no work under way through formal international regulation to improve the operation of FDI around the world, but this is not to say that this will not happen.

[20] See William Boot ‘s article: “Western firms dither on Burma infrastructure”, *The Irrawaddy*, 7 August 2012.

[21] For example, that currently available from the influential international risk analysis firm Maplecroft. http://maplecroft.com/about/news/rule_of_law_index.html (accessed 26 April 2013).

[22] Since 2011, the Thein Sein government has organised many “workshops” to consider different reform issues, and has invited respected international experts to participate in these along with its own political and ethnic representatives. A number of Australians, private citizens as well as corporate representatives have already participated in these workshops.

[23] Julia Gillard, “Australia's Support for Reform in Myanmar” *Media Release*, 18 March 2013. http://www.pm.gov.au/press-office/australias-support-reform-myanmar

[24] Austrade had an office in Yangon until 2002, but has not assigned any Australian staff to their office since the 1990s, when official Australian Government policy was to “neither encourage nor discourage” trade and investment.

There are no mandatory or legally binding international laws applying to foreign investment, although many provisions are given legal effect through bilateral investment promotion and protection agreements. (Australia does not at present have many such agreements, which are not especially effective.) However, the Organisation for Economic Cooperation and Development (OECD) has adopted a variety of voluntary guidelines, many of which apply to overseas investment and which Australian companies are encouraged to observe. The OECD Guidelines provide voluntary principles and standards for responsible business conduct in a variety of areas including human rights, anti-corruption, taxation, labour relations, environment, information disclosure and consumer protection.[25] In the absence of universal international legal standards, these codes are the best available tools to guide FDI in a fair and reasonable way. The United Nations also promotes better arrangements between companies and communities through its "Global Compact".[26]

Another way of achieving better impacts from FDI is to follow some of the precepts of corporate social responsibility (CSR). CSR has already been used in Myanmar both consciously and in unplanned ways, including by some of the better known foreign investors such as Total and Premier Oil (the predecessor of Petronas in the Yetagun gas development project).[27] Even some of the Myanmar business "cronies" such a U Zaw Zaw, the head of Max Myanmar, now proudly claims to be a convert to CSR.[28] But simply declaring that CSR is being applied is obviously not sufficient, and would not persuade sceptical democracy advocates. Some "independent" assessments of CSR in Myanmar are available and document the good, and some bad, results from CSR programs.

The Australian Government could help improve international and regional frameworks that effect business activities in Myanmar (such as the Extractive Industries Transparency Initiative (EITI), and implementation of the ASEAN Economic Community, etc).[29] The Annual Conference of the EITI will be held in Sydney in May 2013, when Myanmar's interest in joining the group will be considered. Lack of transparency, especially on the part of the Myanmar Oil and Gas Enterprise (MOGE), has been one of Aung San Suu Kyi's complaints about existing investment practices.

[25] An explanation of the guidelines adapted for Australian firms can be found at: http://www.ausncp.gov.au/content/Content.aspx?doc=oecd_guidelines/business_conduct.htm

[26] Some 45 Myanmar firms have signed the Global Compact. They include Serge Pun & Associates, City Mart, KMD Computers.
The UN Website is at: http://www.unglobalcompact.org/

[27] http://www.docstoc.com/docs/69843080/Social-and-Environmental-Responsibilities-2005

[28] See Htet Naing Zaw's article "A 'Crony' with a Conscience", in *The Irrawaddy,* 24 April 2013.

http://www.irrawaddy.org/archives/32887

[29] According to William Boot's article "MOGE Nudged toward Openness by Australian Lawyers", (*The Irrawaddy*, 20 April 2013) this is already happening.