



**INTER-PACIFIC BAR ASSOCIATION**  
**22nd Annual Meeting & Conference**

February 29 - March 03, 2012  
Hotel Taj Palace, New Delhi, India

**IPBA 2012**

New Delhi



Legal Trends, Thoughts and Times

**CROSS-BORDER INVESTMENT COMMITTEE**

**INVESTMENTS IN DYNAMIC ECONOMIES IN CHALLENGING TIMES**

March 2, 2012

Jaipat Singh Jain\*

First of all, I must congratulate Jose Coch for his superb coordination, pre-planning and team approach. I must add that the panelists responded to his call with enthusiasm.

Early on, when we were planning this session, and I was a strong voice for a separate session on this topic, Jose's battle-cry was that the session must "bridge the gap between rhetoric and reality." Now, that's going to be the touchstone of my comments here today!

So, let's do some plain talking today -

Often when we say that a country is open for business or for investments, we mean "it's assets and opportunities are up for sale, and one can grab them." In order to facilitate more profound understanding, we sometimes use terms like "reform," "liberalization," "market-friendly," etc. All mean the same thing - "it's a sale!"

Now, as lawyers, our concern, of course, is with the terms and conditions of the sale. We call it with different names - the fine print, the laws, the procedures, the red flags, the pin pricks and the bottlenecks.

Now that we've cleared the air, let me jump to the main topic.

I have been told I have 5 minutes and I must present two aspects:

- United States as an investee destination; and
- Typical United States concerns as an investor

I am also reminded that our ultimate objective is to create a Lawyers' Do's and Don'ts of Cross-border Investments.

By the end of my comments, I will have 5 Do's and Don'ts for us.

United States is the world's largest investment destination. In many years during the last decade, it took in more investments than all of the BRIC countries combined. In others, more than all of Europe combined. In other words, it's always open for business!

United States seeks to do several things differently from the countries we've discussed today. I'll give four illustrations:

- First, once the foreign owned entity has set up shop in the United States, then for the most part, the U.S. provides a level-playing field between domestic and foreign owned entities. Thus, for instance, most filing obligations with local, state or federal agencies are ownership-neutral. So my first Do's and Don'ts for my U.S. investor is: Do not expect a level-playing field.
- Second, the U.S. does not generally muddle social and business policy. Thus, for instance, it does not require that if an Ikea were to open shop, it must source 30% of its goods from local small scale industries. It would let an Ikea do business on business terms. It might require an Ikea to some additional fee, however, if say, its imports exceed a certain percentage. Thus, for example, employers in the US that are foreign-worker dependent may have to pay an additional fee. That fee is then used to train domestic workers in required skills. The thing to note here is that these employers are not required to train domestic workers. That is the job of another agency. So my second Dos and Don'ts for my U.S. investor is: Expect business policy and social policy to be mixed-up. In other words, enjoy your ride, but expect gas and diesel in the same tank!
- Third, governmental interaction is minimal in the conduct of ordinary business. Most governmental functions are filing functions. Almost everything that needs to be done is well-documented. An ordinary, meticulous lawyer, like an ordinary chauffeur, can get you home safely. It does not require extra-ordinary deftness to work the system, just as it does not require extra-ordinary skills to drive a car on the roads. So my third Dos and Don'ts for my U.S. investor client is: Expect governmental intrusion in everything and get someone experienced to get you home safe. Mind you – it must be an experienced lawyer, not just a big-name law firm.
- Fourth, the American system is not only transparent and user-friendly, it is mostly rational. Disagreements can be reasoned and resolved. Even if there is a dispute and you find yourself in the court, the government is no different from a business that is time and cost-conscious. But in many countries, the government almost never settles a business dispute out of the court. In India, for example, every adverse decision is invariably appealed to the higher court. That is, until it reaches the Supreme Court. So, my fourth Dos and Don'ts is: Avoid getting into a court in opposition to the government.
- Finally, my fifth Do's and Don't takes us to a looming issue – of corruption. Let me relate you an experience I had last week.

My wife acquired some land and a house in India as part of a consensual family settlement. The title deed had to be recorded. The recording fee is based on many elements, such as the location of the property and the quality of the construction work. Our lawyer calculated the recording fee. It was a large sum. So be it, we said. "We are ready to pay it now." Our lawyer, however, persisted that the registrar had discretion to reduce the fees, even cut it down by more than a third. We insisted on paying the full fee and be done with it. "Time," I told the lawyer, "was of the essence." He replied: "Exactly, and that's why we must let the registrar exercise his discretion." "If we do not let him do that, and do not adequately show our gratitude for his having exercised his discretion, the work cannot be done the next day. Not even in a week! In fact, we might even have to get another lawyer!"

Now, the U.S. has something called the Foreign Corrupt Practices Act. It criminalizes certain acts, such as giving money to governmental officers in exchange for a desired outcome. At the same time, Section 103 of the Act contains an exception for "any facilitating or expediting payment...the purpose of which is to expedite or to secure the performance of a routine governmental action..." Would allowing the registrar to exercise his discretion fall within the exception? I do not think so.

So here's my fifth and final Dos and Don'ts for today: be mindful of laws like the Foreign Corrupt Practices Act.

Thank you all.

---

*\*Jaipat is a transactional partner with Lazare Potter & Giacovas LLP in New York City.*

