

## Analytical Study on Myanmar Investment Law

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### Abstract

Myanmar enacted Myanmar Foreign Investment Law in 2012, the Myanmar Citizens Investment Law in 2013, and related rules respectively. While foreign and national investment presents significant opportunities and potential economic benefit, it also can significantly undermine these benefits and other social, economic and environmental values of the host country, on the one hand. On the other, Myanmar has become an investment hub increasingly; as its democratic government takes steps to more open up the economy. Myanmar's effort to have new consolidated investment law represents a significant step to ensure that Myanmar investment legislation and mechanism is properly regulated, and to support the development of the Myanmar economy. This research analyses the new investment law together with comments and suggestions, by comparing with two old repealed laws: Foreign Investment Law and Myanmar Citizens Investment Law, which will attract further foreign investment in Myanmar.

**Key Words:** investment, Myanmar investment law, investment activities, incentives

### I. Introduction

Foreign direct investment is highly beneficial to developing States. FDI pertains to international investment in which the investor obtains a lasting interest in an enterprise in another country.<sup>1</sup> The law that applies to foreign investments consists of a complex bundle of international and domestic law and contracts between investors and states.<sup>2</sup> Domestic law applies to and regulates both domestic and foreign investment. These domestic laws specify when, how, and to what extent foreigners may invest in a country.<sup>3</sup> This paper provides legal implications of new Myanmar Investment Law to local and international investors who are making or will make foreign investments in the country and who not only will get benefits but also may be at risk. The researcher gives comments and suggestions on new Myanmar Investment Law.<sup>4</sup>

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<sup>1</sup> International investment or capital flows fall into four principal categories: commercial loans which primarily take the form of bank loans issued to foreign businesses or governments, official flows which refer generally to the forms of development assistance that developed nations, give to developing ones, foreign direct investment (FDI), and foreign portfolio investment (FPI), a category of investment instruments that is more easily traded, may be less permanent, and do not represent a controlling stake in an enterprise. These include investments via equity instruments (stocks) or debt (bonds) of a foreign enterprise which does not necessarily represent a long-term interests. <http://www.globalization101.org/what-are-the-different-kinds-of-foreign-investment/>.

<sup>2</sup> Investment law is composed of three legal sources: international law (especially investment treaties), domestic law and investment contracts between investors and states. At the international level, the main legal instruments relating to investment are investment treaties. These also include bilateral, regional and interregional level. These primarily aim at protecting the foreign investor in the host state. Domestic law applies to and regulates both domestic and foreign investment. The third source of law applicable to investments is the investment contracts concluded between individual investors and the host state. <https://www.iisd.org/investment/law/>.

<sup>3</sup> For example, investment laws, mining and other natural resource laws, as well as environmental laws and labour regulations, to name just few.

<sup>4</sup> The new Myanmar Investment Law has been recently enacted by Pyidaungsu Hluttaw as Pyidaungsu Hluttaw Law No. 40 on 18 October 2016, and Myanmar Investment Rules was declared with the approval of Union Government on 30 March, 2017.



## II. Myanmar Investment Laws

Myanmar opened its doors for foreign investment in 1988 with the enactment of Foreign Investment Law on 30 November, 1988. 1988 Foreign Investment Law, Law no 10/1988 of State Law and Order Restoration Council, was repealed by now abrogated Foreign Investment Law of 2012 promulgated on 2 November 2012.<sup>5</sup> The law had 57 sections of 20 Chapters. The Foreign Investment Rules were issued on 31 January 2013.

An applicable business which was operated by the foreign investors under FIL was prescribed by the Commission<sup>6</sup> with the prior approval of the Union Government.<sup>7</sup> Moreover, Section 4 laid down the restricted or prohibited areas of investment. On the other hand, under section 5, the Commission allowed by the approval of the Union Government, the restricted or prohibited investments under section 4 for the interest of the Union and citizens especially people of national races.

Forms of business organizations carried out by the foreign investors were provided by sections 9 and 10 of Chapter 5 of FIL. Under Section 9, 100 percent foreign ownership was permitted and joint ventures between local and foreign companies, or foreign companies and the government, were carried out depending on respective shareholding percentages as the parties agree. The FIL also allowed for a project to be undertaken between foreign and local parties based on contract.

In forming the form of investment under section 9:

- (i) shall be formed as company<sup>8</sup> in accord with the existing law;<sup>9</sup>
- (ii) if it is formed as a joint venture under sub-section (b) of section 9, the ratio of foreign capital and citizen capital may be prescribed in accord with the approval of both foreigner and citizen who has made joint venture;<sup>10</sup>

<sup>5</sup> Foreign Investment Law, Pyidaungsu Hluttaw Law no 21/2012 dated on 2 November 2012. Hereinafter referred to as FIL.

<sup>6</sup> Section 2 (b) of FIL defines Commission as the Myanmar Investment Commission formed under this Law.

<sup>7</sup> Section 3 of FIL.

<sup>8</sup> The governing law of the companies in Myanmar is the Myanmar Companies Act 1914. The Myanmar Companies Act which came into force from 1<sup>st</sup> April 1914 was enacted by India Act VII of 1913. Some minor amendments were made to this Act several times. It governs all companies registered in Myanmar. A company with share contribution of the State shall be registered under the Special Company Act 1950 and the Myanmar Companies Act 1914. The Special Company Act which specially deals with the incorporation of private and public companies in which the State has equity are the principal legislations for the establishment of company in Myanmar. While based on sound principles, it needs to be aligned with some of the other significant economic law reforms that have occurred in Myanmar and does not give investors and other stakeholders a sound framework on which to make long term investments in Myanmar. The creation of a robust and efficient legal framework for companies is crucial to facilitate investment and economic growth in Myanmar. The Directorate of Investment and Company Administration is currently undertaking a law reform process to modernize Myanmar Companies Act 1914 with the assistance of the Asian Development Bank and international law firm Baker & McKenzie which has been engaged to undertake the research, drafting and advocacy task. The revised Myanmar Company Law draft in accord with the consultation of Union Attorney General Office is available on the Directorate of the Investment and Company Administration (DICA) website, [www.dica.gov.mm](http://www.dica.gov.mm), in English and Myanmar languages.

<sup>9</sup> According to information uploaded by Directorate of the Investment and Company Administration at its website [www.dica.gov.mm](http://www.dica.gov.mm), the company formed under the Myanmar Companies Act 1914 needs the minimum capital for Service Company is 50,000 USD and for Manufacture Company is 150,000 USD, as of 12- 8- 2017.

<sup>10</sup> Minimum 35% of foreign shareholding percentage requirement under Section 6 (a) (ii) of the old FIL was removed. The MIC, with the approval of the government set minimum foreigner's share investment depending on the project under section 10 (a) (iii) of FIL. Accordingly, under Rule 20 of Foreign Investment Rules 2012

- (iii) in investing by the foreigner, the Commission shall, the minimum amount of investment according to the sector, prescribe with the approval of the Union Government depending on the nature of business;<sup>11</sup>
- (iv) the foreigner may, if a joint venture is carried out with citizen in prohibited and restricted business, propose the ratio of the foreign capital as prescribed by the rule.<sup>12</sup>

The authority under the FIL was the Commission which was formed by the Government. The changes to the FIL included a wider range of permitted forms of investment, greater flexibility on the structuring of joint ventures,<sup>13</sup> enhanced tax and investment exemptions and incentives,<sup>14</sup> and an enhanced legal framework for land use,<sup>15</sup> employment,<sup>16</sup> guarantee against nationalization and suspension of business during contract term<sup>17</sup> and dispute settlement provisions.<sup>18</sup>

Though the enactment of Foreign Investment Law (2012) improved more flexible legal framework for foreign investors, in order to create better investment environment under more complete and stronger legal framework, the Directorate of the Investment and Company Administration (DICA) prepared a new Myanmar Investment Law<sup>19</sup> with the assistance of International Finance Corporation. The new Myanmar Investment Law<sup>20</sup> has consolidated and replaced the Foreign Investment Law of 2012 and the Myanmar Citizens Investment Law

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set the ratio of the maximum foreign investment as “The maximum foreign investment capital ratio shall not be more than eighty percent of the total investment amount if the foreigner has formed joint-venture with the citizen to carry out prohibited or restricted businesses. The Commission may amend the said stipulation by issuing notification from time to time with the approval of the Union Government.”

<sup>11</sup> Although the previous law set minimum capital investment requirements for the company formed by FIL is US\$300,000 for service sector investment companies and US\$500,000 for industrial projects, but this FIL did not set out any specific capital requirements. Instead, it left this to be determined by the Commission on a case by case basis, with the approval of the government, depending on the particular investment sector.

<sup>12</sup> Section 10 (a) of FIL.

<sup>13</sup> Section 17, FIL.

<sup>14</sup> Section 27, FIL. The FIL provided for a tax holiday exemption period of up to five years (this was previously three years under the old FIL) from the start of the projects operations whereas the previous law grant tax holiday. Section 27 (a) provided for tax exemption for a period of five consecutive years and for extended suitable period depending upon the success of the business.

<sup>15</sup> Sections 31 to 36 of FIL. This was the new provision inserted by FIL under Chapter 14. Initial lease period allowable by the Commission was 50 years of period and renewable period was two 10 years. Previously investor's land use right was a 30 year initial lease period with two 15 year renewal periods.

<sup>16</sup> Section 24 of FIL. This new section 24 required the investor to create job opportunity for skilled and unskilled labor and technicians under the set ratio. In an enterprise which needed special expertise, the investors must employ at least 25 percent local staff during the first two years of operation and increase to 50 percent for the subsequent two years and to 75 percent in the following two years.

<sup>17</sup> The FIL Sections 28 to 30 guaranteed not to nationalize and not to suspend any investment business before expiry of the contract without any sufficient cause; and also guaranteed to disburse the capital investment in same category of currency on the expiration of the contract. Section 28 leaves open to the interpretation of “sufficient cause.” It seemed that this interpretation was the discretion of the Commission depending on circumstances of each case.

<sup>18</sup> Section 43 of FIL. This was also the new added provision for the settlement of disputes whereas the old law provided nothing.

<sup>19</sup> Hereinafter referred to as MIL. This law can be downloaded at [www.dica.gov.mm](http://www.dica.gov.mm) in Myanmar language.

<sup>20</sup> The Pyidaungsu Hluttaw Law No. 40/2016 was enacted on 18 October, 2016. The law has 101 sections under 23 chapters.

of 2013; and has added many new provisions.<sup>21</sup> This new Myanmar Investment Law will be discussed here to give feedback and comments.

### III. Discussions and Suggestions on Myanmar Investment Law

Under the new law, there are two different types of investors, namely, Myanmar Citizen Investor<sup>22</sup> and Foreign Investor.<sup>23</sup> Consequently, the law defines investment, direct investment and foreign investment.<sup>24</sup>

This Law applies to any existing investment or new investment made within the Union at the date of the commencement of this Law, but shall not apply to any existing investment disputes any investment which obtained a permit and suspended from their business operation before the date of entry into force of this law. Moreover, any measure adopted or maintained by the Government Departments and Organizations, except the acts done under sections 89 and 90 of this law<sup>25</sup> shall be applicable to this Law.<sup>26</sup>

New introduced sections 6 to 13 under the Chapter 4 are Formation of Commission. Under section 6, the Chairman of the Commission, who is a member of the Government, shall be appointed by the Government with the nomination of President.<sup>27</sup> Under section 6 (b) of draft MIL proposed this draft section 6 in order to establish independent body as “the Commission shall be an independent and autonomous body with perpetual succession. The Chairman of the Commission, who shall be appointed by the President<sup>28</sup>, shall be the Union level authority.” But it is not a good timing for Myanmar to form investment commission with such a status.

The Section 9 of MIL sets out the term of all members of the Commission, except the Secretary, as the same term of the each Government, i.e., a five year term.<sup>29</sup> There are many other detailed sections concerning formation and composition of the Commission, appointment as Commissioners.

Chapter 5 details about resignation, removal from the office and methods of appointment of commissioner in case of vacancy.<sup>30</sup> Section 21 is disclosure clause which assigns any of the commissioners to expressly disclose fact that if he has interest directly or indirectly in the proposed project. This section is welcomed for better investment environment with fair and equitable treatment. Section 22 prohibits the Commissioners not to seek personal interests through its power.

Chapter 6 is duties and powers of the Commission.<sup>31</sup> Under the proposed draft MIL, there was a section, “Commission can make contract; can sue and can be sued; can have its own seal with perpetual succession; and can get, hold, maintain and enjoy benefits from

<sup>21</sup> Section 101 of MIL.

<sup>22</sup> Section 2 (n), MIL.

<sup>23</sup> Section 2 (o), MIL.

<sup>24</sup> Section 2 (q) (r) & (s), MIL.

<sup>25</sup> Section 89 deals with general exceptions and section 90 deals with exceptions for security interests of the Union.

<sup>26</sup> Section 5, MIL.

<sup>27</sup> Section 6 (a), MIL.

<sup>28</sup> Section 7 (a), MIL.

<sup>29</sup> Section 9, MIL.

<sup>30</sup> Chapter 5 composed of 9 sections from sections 14 to 22.

<sup>31</sup> Chapter 6 has total 6 sections.

















