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| Title  | Analytical Study on Myanmar Investment Law   |
| All Authors  | Khin Khin Oo   |
| Publication Type   | Local Publication  |
| Publisher<br>(Journal name,<br>issue no., page no<br>etc.) | JARC-YU, Vol.6, No.1 & 2, 2017   |
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| Keywords   | investment, Myanmar investment law, investment activities, incentives  |
| Citation   |  |
| Issue Date   | 2016   |

## 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 This research analyses the new investment law together with comments and suggestions, by comparing with two old repealed laws: Foreign Investment Law and Myanmar Citizens Investment Law, which will attract further foreign investment in Myanmar.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.

Applicable businesses 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>

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<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

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 is 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.

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

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<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.

moveable and immoveable property in its own name. Commission will have separate legal personality distinct from its members.” Such a provision, however, was not found either in the repealed Investment Laws or existing new enacted MIL. Instead of such status, section 23 of MIL gives the Commission the authority as “The Commission has the right to freely exercise its duties and powers unless there is contrary to the provisions of this Law.”

Chapter 7 is on convening the meeting and Chapters 8 and 9 deal with submission of proposal and of endorsement application. These 2 chapters have connection sections of more practical procedures. At the time of submission of the draft MIL for public opinion, there was one proposed section which had intended to allow the Commission “to receive financial support from any person or any organization for the protection and promotion of the investment if such support does not detriment the independency and autonomy of the Commission. And consequently, the Commission should have compulsory audit conducted by the Auditor General Office of the Union” under proposed draft MIL section 39. According to these provisions, which would never come into existence to newly enacted MIL, the then drafters aimed to shape the Commission as an independent organ having full autonomy in terms of administration and in terms of finance.

Chapter 10 stipulates the types of the investment businesses. It is consisted of 7 sections from section 40 to 46. Section 41 of MIL prohibits 7 investment activities as follows;

1. investment activities which may bring or cause hazardous or poisonous wastes into the Union;
2. investment activities which may bring technologies, medicines, flora and fauna and instruments which are still being tested abroad, or which have not obtained approvals to use, plant or cultivate, except the investments which are made for the purpose of research and development;
3. investment activities which may affect the traditional culture and customs of the ethnic groups within the Union;
4. investment activities which may affect the public;
5. investment activities which may cause an enormous harmful impact to the natural environment and ecosystem;
6. investment activities which manufacture goods or provide services that are prohibited under the applicable laws.

Section 42 of MIL also introduces new idea of specifying four investment activities in which foreign investment shall be restricted. There are four types of investment activities restricted by the Commission as sectors where domestic and foreign investment is prohibited and shall be carried out solely by the State i.e., State Monopolies; sectors where foreign investment is prohibited; sectors where foreign investment is allowed in the form of joint venture between domestic individual or domestic business organization and foreign counter part; and sectors where investment can be made by domestic and foreign investors with the prior approval of relevant ministries.

Each restricted sector under section 42 will be publicized by the Commission with the prior approval of Union Government.<sup>32</sup> Moreover the Union Government, from time to time, may direct the Commission to reduce or to remove any of these publicized restricted areas.<sup>33</sup>

In order to promote foreign direct investment in Myanmar and in order to give better investment opportunities and better business environment, MIL adopts National Treatment

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<sup>32</sup> Section 43, MIL.

<sup>33</sup> Section 44, MIL.

and Most Favored Nation Treatment principles under Chapter 11 of “Treatment of Investors.”  
Section 47

In dealing with the investors:

- (a) the Government shall accord to Foreign investors and their direct investments, treatment no less favorable than it accords to Myanmar citizen investors<sup>34</sup> in respect to the expansion, management, operation, and the sale, or other disposition of direct investments according to this Law except in any other stipulated laws, rules and notifications;
- (b) the Government shall accord, in like circumstances, to Foreign investors and their direct investments from one country, treatment no less favorable than that it accords to investors of any other country and their direct investments in respect of establishment, acquisition, expansion, management, operation, and the sale or other disposition of direct investments;

Section 47 (c), the proviso of above section 47 (b), states that “The provision of subsection (b) shall not be construed so as to oblige foreign investors with any treatment, preferences or privileges resulting from the matters enumerated in section 47 (c) (i) and (ii).  
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Section 48 regulates transparency and fair and equitable treatment which cannot be found in previous FIL. Union Government shall guarantee the fair and equitable treatment to all investors with one exception under section 76, which gives special and more – favored exemptions and reliefs for Myanmar citizen investors.

In connection with land use right, all investors have right to make long term land-lease for the investment purpose either with Union Government or Government organizations or with private land-owners.<sup>36</sup> For the lease between foreign investor and Union Government or Government organizations, the initial lease period is 50 years based on the type of investment and of business<sup>37</sup> and extendable two 10 years.<sup>38</sup> The investor, he shall register the land lease contract at the Office of Registry of Deeds in accordance with the Registration Act.<sup>39</sup> The Government may grant more favorable terms and conditions for the lease of land and the use of land by Myanmar citizen investors.<sup>40</sup> In addition, for the purpose of the development of the entire Union, the Commission can grant a longer period for the right to lease land or building and the right to use land under this Law, to investors who invest in least developed and remote region.<sup>41</sup>

Though the previous FIL section 24 required the investor to create job opportunity for skilled and unskilled labor and technicians under the set ratio,<sup>42</sup> this MIL allows the investor to appoint qualified persons of any nationality to fill senior management, technical,

<sup>34</sup> It is known as non-discrimination treatment and national treatment.

<sup>35</sup> Any Customs Union, Free Trade Area, Economic Union and international agreements and as such resulting from international agreements and preferential treatment and other more favourable treatment resulting from international, regional and bilateral agreements are some example matters provided by section 47 (c) (i) & (ii).

<sup>36</sup> Section 50 (a), MIL.

<sup>37</sup> Section 50 (b), MIL.

<sup>38</sup> Section 50 (c), MIL.

<sup>39</sup> Section 50 (d), MIL.

<sup>40</sup> Section 50 (e), MIL.

<sup>41</sup> Section 50 (f), MIL.

<sup>42</sup> In an enterprise which needs 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.

professional and advisory positions in his investment business in accord with the existing laws of the Union.<sup>43</sup> This provision would probably give effect for the job opportunity of the local people. If the investor wants to fill these senior positions with local people, the investor shall organize and provide developing skills program.<sup>44</sup> This provision, however, would be beneficial for the citizen employees to equip more technical and professional skills.

Section 52 of Chapter 14 deals with protection against expropriation. Under the repealed FIL, section 28 just guaranteed very briefly not to nationalize the business formed under the permit within the term of the contract or the extended term. Section 52 of this new MIL provides that

The Government guarantees not to nationalize any investment carrying out in accordance with the law. Except under the following conditions, the Government guarantees not to take any measures which expropriate or indirectly expropriate or is likely to effect a result in the termination of an investment:

- (a) necessary for the public interest;
- (b) in a non-discriminatory manner;
- (c) in accordance with due process of law;
- (d) on payment of prompt, fair and adequate compensation;

Union Government shall neither expropriate nor nationalize nor impose any measures that are equivalent to expropriation (commonly referred to as indirect expropriation), of any investments except for public necessity; in a non-discriminatory manner; and prompt, fair, adequate and effective compensation for the expropriated business; and in accord with due process of law.<sup>45</sup>

Sections 56 to 64 of Chapter 15 are the detailed provisions relating to fund which can be transferable and relating to means how and when these fund can be transferred. There are some conditional circumstances in which the Union Government may prevent or delay such a transfer through laws and like means which are fair and nondiscrimination<sup>46</sup> and may adopt and maintain restrictions on payments and transfers.<sup>47</sup>

Responsibilities of the investors are stated in section 65 and exemptions and reliefs are provided in section 74 to 81.<sup>48</sup> The new provision on incentives for the investors given under chapter 18 of Exemptions and Reliefs does not grant automatically any one or more than one given incentives to the investor, but requires the investor's application to receive a non- automatic incentive.<sup>49</sup>

Under section 75, there are three specific zones classified by their relevant development, namely, less developed regions as Zone 1, the moderate developed regions as Zone 2, and the developed regions as Zone 3. If the investment is made within the Zone1, the Commission may grant the investor tax exemption for a period of 7 consecutive years including the year of commencement on commercial scale. If it is within the Zone 2, tax

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<sup>43</sup> Section 51 (a), MIL.

<sup>44</sup> Section 52 (b), MIL.

<sup>45</sup> Section 53, MIL.

<sup>46</sup> Section 62, MIL.

<sup>47</sup> Section 64, MIL.

<sup>48</sup> However, these exemptions and reliefs shall not be concerned with the investments and businesses operated in Special Economic Zones according to section 81 of MIL.

<sup>49</sup> Section 74, MIL.



exemption period will be a-five-year-time and if it is within the Zone 3, tax exemption period will be a-three-year-time.<sup>50</sup> The Commission may determine and classify the status of Zones and publicize by its notification; and may alter these Zones from time to time where and when necessary.<sup>51</sup>

Irrespective of the provision on national treatment under Chapter 11 of treatment of investors, the Union Government may provide and support other special and additional exemptions and reliefs to domestic investors under section 76. In addition to tax exemption above mentioned, the Commission may grant other exemptions on custom duty and internal taxes, which are enumerated in sections 77 & 78, on their application. These are special incentive provisions for the investors, but also a discretion of the Commission.

Means to settlement of disputes are under Chapter 19<sup>52</sup> which is also a new approach to establish dispute preventive mechanism. In implementing this law effectively and efficiently, the Commission shall establish and manage dispute preventive mechanism to enquire, respond, track and settle the grievances before turning into occurrence of legal disputes.<sup>53</sup> The purpose of this mechanism is to offer an alternative mean to settle the potential problems and disputes.<sup>54</sup>

If investment dispute is not reached to settle amicably, procedure is provided by Sections 84 that the competent court or the arbitral tribunal shall have jurisdiction to settle investment disputes if the dispute settlement mechanism is not stipulated in the relevant agreement. If the mechanism is stipulated, it shall be complied with and carried out in accord with the mechanism.<sup>55</sup> However, there is no provision mentioning that any foreign arbitral award in the Union in accord with international law and practices including 1958 Convention on the Recognition and Enforcement of International Arbitration Awards (New York Convention).<sup>56</sup>

Chapter 20 prescribes Administrative Penalties ranging from censure to be blacklisted. The Commission may pass one or more administrative penalties enumerated in section 85 (a) against the investor who violates any provisions of this Law, rules, regulations, by-laws and procedures under section 85 of MIL. If the investor dissatisfied with any decision made by the Commission under section 85, he has right to appeal to the Government within 60 days from the date of the decision in accordance with the stipulations. However,

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<sup>50</sup> Section 75 (a), MIL.

<sup>51</sup> Section 75 (b), MIL. On 22 February 2017, the Myanmar Investment Commission issued the classification order relating to the status of these three Zones.

<sup>52</sup> This chapter consisted of sections 82 to 84, MIL.

<sup>53</sup> Section 82, MIL.

<sup>54</sup> Section 83, MIL. The detailed procedures for this dispute settlement mechanism is prescribed by rule 165 (f) of the Myanmar Investment Rules. It says that "Subject to these Rules, Commission shall establish an Investor Assistance Committee pursuant to section 27 of the Law to assist with the establishment and administration of a grievance and dispute resolution mechanism pursuant to sections 25(n), 82 and 83 of the Law.

<sup>55</sup> Section 84, MIL.

<sup>56</sup> On 15 July 2013, Myanmar formally acceded to the New York Convention on the Recognition and Enforcement of International Arbitration Awards (New York Convention). Myanmar's accession formally took effect on 15 July 2013 as 149<sup>th</sup> party to the Convention. The Arbitration Law was enacted on 5<sup>th</sup> January 2016 as Law No 5/2016 to settle disputes by means of arbitration, to recognize and enforce the foreign award. Myanmar is not a party to the ICSID currently. International Centre for Settlement of Investment Disputes is an international arbitration institution which facilitates legal dispute resolution and conciliation between international investors.

the decision of the Government shall be final and conclusive.<sup>57</sup> Although this chapter was titled as administrative penalties, it provides the availability of the criminal prosecution against the investor if there is credible evidence of describing dishonestly, falsely, or any concealment of information at the time of submission of proposal, accounts and so forth to the Commission, or any relevant government or governmental organization.<sup>58</sup> If an investor fails to comply with or violate any provisions of this Law, he shall be prosecuted under this Law and, if required, any applicable laws and shall be penalized accordingly.<sup>59</sup>

Exceptions of section 89 and security exceptions of section 90 are two new separate Chapters of MIL. General Exception provision allows policy space for the Government.<sup>60</sup> Section 89 of the Law states that “Nothing in this Law shall be construed to prohibit Union Government from adopting or maintaining the 8 listed specific exceptions under this section, which are fair and reasonable in Government’s discretion.”

International Investment Agreements such as ASEAN Comprehensive Investment Agreement<sup>61</sup> always provide for security exceptions. Section 90 of the Law also provides that this Law does not prevent Union Government from taking action that it considers necessary for the protection of its essential security interests,<sup>62</sup> including but not limited to: action relating to the trafficking of arms, ammunition, implementation of war and other equipment and materials for the purpose of supplying a military establishment;<sup>63</sup> or other security force directly or indirectly action taken in time of war or in time of emergency in domestic or international relations.<sup>64</sup>

Last chapter 23 is “Miscellaneous.” Section 91 provides that if there is any provision of this Law contrary to any matter provided for in the international treaties and agreements adopted by the Union, the provisions contained in the international treaties and agreement shall be abided by for such contradictory provision. Again, section 94 of the Law states that “Notwithstanding anything contained in any other law, matters relating to any provision in this Law shall be carried out in accordance with this Law.” By studying these two provisions, if there is any inconsistent between any other laws of the Union and this Myanmar Investment Law, the latter will prevail the former; and if there is any inconsistent provision between this Myanmar Investment Law and any international treaties signed by the Union, the latter will prevail the former. Therefore it may be said that, international treaties signed

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<sup>57</sup> Section 86, MIL.

<sup>58</sup> Section 87, MIL.

<sup>59</sup> Section 88, MIL.

<sup>60</sup> This provision is also provided in ASEAN Comprehensive Investment Agreement, which took effect on 29 March 2012 and many other BITs.

<sup>61</sup> Myanmar has ratified the ASEAN Comprehensive Investment Agreement which came into force in April 2012. In *Yaung Chi Oo Trading Pte Ltd., vs. Government of the Union of Myanmar case (ASEAN I.D. Case No. ARB/OIII at [www.italaw.com](http://www.italaw.com) )*, compensation was sought from Myanmar under the 1987 ASEAN Agreement and the claim failed because the relevant investment was held not to qualify for protection under the 1987 ASEAN Agreement. The 1987 ASEAN Agreement provides that it would only apply to investments made prior to its entry into force if the relevant investment was approved in writing and registered by the host country for the purposes of the 1987 ASEAN Agreement. The investors in *Yaung Chi Oo* made the investment prior to the 1987 ASEAN Agreement’s entry into force (with respect to Myanmar) and although the investment was approved previously when it was first made it had not been subsequently approved and registered. See also at *Doing Business in Myanmar*, Baker & McKenzie 2013, p 2.

<sup>62</sup> Section 90 (a), MIL.

<sup>63</sup> Section 90 (b) (i), MIL.

<sup>64</sup> Section 90 (b) (ii), MIL.

by the Union is, by hierarchal position, higher than the domestic laws of Myanmar, if in any case of conflict. This is the point to be reconsidered.

The decision of the Commission is final and conclusive except any appeal of administrative penalties under section 85.<sup>65</sup> The Ministry of Planning and Finance has the power to make rules, regulations notifications, directives, orders and procedures as may be necessary to carry into effect the purpose and provisions of this Law. The Commission may issue orders, notifications, directives and procedures.<sup>66</sup>

#### IV. Conclusion

Effort to have new consolidated investment law, accession to the New York Convention, signing BITs and enactment of new Arbitration Law prove Myanmar's strong will and commitments to support foreign investments. This new consolidated law ensures consistency with best practices in the ASEAN region and be a sign of the commitment of Myanmar to the establishment of the ASEAN Economic Community.<sup>67</sup> It is clear that new investment law will attract further foreign investment and be more in line with international practice especially at this time of transition period; and every law is necessary to be amended from time to time in accord with the changing situations and environment of the host country and of the international investment practices, on the one side. On the other side, it is also necessary to ensure the stability, predictability, clarity and flexibility of the legislations and practices of the host country for long term benefit of every investor whether citizen or foreigner. An example is that the government enacted one foreign investment law and one citizen investment law in 1988 and 1994; these two laws were repealed by the enactment of new two separate investment laws in 2012 and in 2013 respectively; and one consolidated law for both type of investment is now came into force again.

In addition, it is also important to ensure that new legislations should have the continuity and consistency with the previous investment legislations, if any, and if there remains continuation effect from the old law, at least to some extent of time. Under section 52 of FIL, "the investor who is carrying out by the permit of the Commission under the Union of Myanmar Foreign Investment Law which is to be replaced by this Law continuously (Myanmar Foreign Investment Law, 2012) shall be entitled to proceed and enjoy until the expiry of the term in accord with terms and conditions contained in the permit and the relevant agreement." MIL section 93, however, mentions that "any investment permit given by the Commission under the repealed laws of either Myanmar Foreign Investment Laws of 1988 or 2012; or Myanmar Citizen Investment Law of 2013 shall continue to be effective until the expiry of the term of the permit." According to the literal meaning of above mentioned provisions, there is slight difference between these two. In conclusion, large and new influx of foreign investment in Myanmar can bring significant opportunities and potential economic benefit for the host country when the country has sound and developed legislation and implementation procedures not only in investment field but also in all other investment related fields.

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<sup>65</sup> Section 98, MIL.

<sup>66</sup> Section 100, MIL.

<sup>67</sup> Myanmar Business Guide, *Third edition, July 2015*, p 11. [www.pwc.com/mm](http://www.pwc.com/mm). However, it is important not to imply that such a consolidation is a requirement as a result of Myanmar's AEC membership. [www.myanmar-responsiblebusiness.org](http://www.myanmar-responsiblebusiness.org), p.3.

### **Acknowledgements**

This research work is under the project of and funded by the Asia Research Center, University of Yangon. The researcher would like to convey her special thanks and appreciation to Asia Research Center, University of Yangon for its financial support. She also would like to express her heartfelt thanks to the Rector of University of Yangon, the Director of University of Yangon Asia Research Center and Professor and Head of Department Dr. Khin Mar Yee from Department of Law, University of Yangon for giving her opportunity to do this research.

### **References**

**ASEAN** Comprehensive Investment Agreement

**ASEAN** Investment Guidebook, Jakarta: ASEAN Secretariat, 2010.

**Baker & McKenzie**, 2013, Doing Business in Myanmar.

**Bonnitcha**, Jonathan. June, 2014. Myanmar's Investment Treaties: A review of legal issues in light of recent trends, The International Institute for Sustainable Development.

**Dolzer**, Rudolf and Schreuer, Christoph, 2012. Principles of International Investment Law, second edition, Oxford University Press, Special Company Act 1950.

**Foreign** Investment Law, dated on 2 November 2012. Pyidaungsu Hluttaw Law no 21/2012.

Myanmar Business Guide, Third edition, July 2015. [www.pwc.com/mm](http://www.pwc.com/mm).

**Myanmar** Citizens Investment Law dated on 29 July 2013. Pyidaungsu Hluttaw Law no 18/2013

**New York** Convention on the Recognition and Enforcement of International Arbitration Awards (New York Convention).

**The Myanmar** Companies Act, 1914, India Act VII of 1913.

**Yaung** Chi Oo Trading Pte Ltd., vs. Government of the Union of Myanmar case (ASEAN I.D. Case No. ARB/OI11 at [www.italaw.com](http://www.italaw.com) )