

THE PROTECTION RIGHT OF FOREIGN INVESTOR IN MYANMAR

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Abstract

Most developed and developing countries are adopting the market oriented economic system and those countries with a surplus in the balance of trade are prospering. The protection and promotion of investment is important for investors, and the host country can increase economic development from the investments of citizens and foreigners. Every country has unique rules regarding investment, with some regulations more restrictive than others. Each national economy has a specific framework that foreigners must abide by in order to regulate domestic investment laws. The Myanmar Investment Law allows the investor the use of land rights depending on the category of business and the volume of investment. In order to promote investment, the protection of intellectual property rights should be considered as a necessary component. A foreign investor's property cannot be taken over by nationalization act or decree of State without payment of adequate compensation. This situation is an emerging issue in that under Myanmar Local Law foreign investors are not entitled to the same protection of person and property as Myanmar nationals.

Keywords: Foreign Investor, Protection, Property Rights, Compensation

Introduction

A foreign investor investing in Myanmar has the option of incorporating a subsidiary or registering a branch of a company incorporated outside Myanmar. A subsidiary incorporated in Myanmar may be wholly foreign owned or may be a joint venture including Myanmar shareholders. The incorporation of a foreign Myanmar company and registration of a Myanmar branch of a foreign company are subject to the procedures and requirements set out in the Myanmar Companies Law (2017) and by instructions of the Directorate of Investment and Company Administration (DICA). The Myanmar Investment Law also contains provisions that address the rights and privileges of foreign investors and the measure that may be taken for their protection.

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Material and Methods

In the presentation of the international framework as well as the international, regional instruments for the protection of foreign investors together with some case-law. A descriptive, comparative and an analytic method are applied in this paper. The materials used for the purpose of the research are books, articles (including articles on the Internet), treaties, agreements, recommendations and case-law.

Economic System and Background

In Myanmar, as a period, economy had unquestionably been the most disastrous in the history. An obsession with maintaining control led to contact with the outside world being reduced to a bare minimum. Not only foreign, but also domestic wholesale and even retail trade were all nationalized. However it was terminated in 1988/1989 within the context of the socialist economic system, consequent to the changes in the political and economic system. After 1988, Myanmar adopted the market economic system with plenty changes of national laws. However many old laws that were enacted prior to 1988 are still alive today.

Socialism was abandoned and a new era of openness to market forces and to the international economy declared. But the government retained a battery of controls over all aspects of the economy. The openness is highly selective, and in effect or applies to enterprises in which the military regime participates either directly or indirectly. Collaboration with foreign governments and enterprise is compartmentalized and far from transparent. Myanmar government had been undertaking a far-reaching program of economic reform marked by the introduction of an "open door policy" designed to transform a market-oriented system. Principal among the changes were policies aimed at encouraging foreign and local investment, introduction private banking and allowing the retention and trading of foreign exchange¹. Currently Myanmar economy is growing faster than before in Asian region and more welcome investors by stimulating investment promotion policies.

¹ ESCAP, Myanmar; Trade and Investment Potential in Asia, 1996, p – xvii.

The Rights of Investors

Property or the ownership of a specific subject is a legal status which is created by the municipal law of each State. The definition of the property was said to include all movable and immovable property, whether tangible or intangible, including industrial, literary and artistic property as well as rights and interests in any property.¹ Foreigners, like citizens, have the right of leasing houses, apartments, offices, etc., for dwelling or business purposes.

Generally, land in Myanmar is owned by the State. Foreigners are prohibited from owning immovable property and accordingly should not be subject to property tax. Land administration is assigned to various government departments. According to the Transfer of Immoveable Property Restriction Act, 1987, Section 5, No person shall grant a lease of immovable property, for a term exceeding one year:

- (a) To a foreigner or foreigner owned company.
- (b) No foreigner or foreigner owned company shall receive a lease of immovable property, for a term exceeding one year.²

Foreigners and foreign companies are not allowed to buy land in Myanmar or lease land for a term exceeding one year unless specially permitted by the government according to the Transfer of Immoveable Property Restriction Law of 1987. Under this law, transfer of immovable property by any person to a foreigner or a company owned by a foreigner by way of sale, purchase, gift, acceptance of a gift, mortgage, acceptance of a mortgage, exchange or transfer and acceptance of a transfer by any other means are expressly prohibited. A company approved under the Myanmar Investment Law is allowed to sign a long-term lease of land, and such long-term lease can be stamped and registered at the Deed Registration Office to secure the foreign investors' rights. The lease can be extended if the project is mutually beneficial to the investor and the State. A foreigner or foreign company is required to apply to MIC with the land lease agreement or other documents that evidence the agreement to lease from the person who has the right to lease. The land lease agreement is concluded upon receiving the approval

¹ Shaw N. Malcolm, *International Law*, 6th Edition, 2008, p- 830.

² Section 5 of the Transfer of Immoveable Property Restriction Act, 1987

from MIC and shall be sent back to MIC. While a foreign investor may not own land, land use right can be obtained in either one of the following two ways:

- obtaining land use right under a lease, from either the government or private citizens, approved by the government; or
- land use rights are contributed to a joint venture by a government agency.¹

Foreign investors may invest in property development on a build, operate and transfer (BOT) basis. The Government recently enacted the Condominium Law on 29th January 2016. Foreigners were allowed to buy Condominiums under the Condominium Law. Collectively owned properties managed for the purpose of being used by co-owners are also included.² The law does not mention local investors, but mentions the right of a foreigner or foreign investor to own part of Condominium which means that the developer can sell not more than 40% of apartments in a condominium to foreigners according to this law. Section 50 of the Myanmar Investment Law 2016, relates to the investor's rights to use land as follows,

(b) Foreign investors may lease land or buildings either from the government or government organizations or from owners of private land or buildings commencing from the date of receipt of the permit or endorsement of the Commission up to an initial period of (50) years in accordance with the stipulation.

(c) After the expiry of the term of the right to use land or building or the period of right to lease of land or building permitted under subsection (b), a consecutive period of (10) years and a further consecutive period of (10) years extension to such period of lease of land or building may be obtained with the approval of the Commission.³ Any Investor who has been issued a Permit or an Endorsement, or who is in the process of applying for a Permit or

¹ <http://www.myanmarlegalservices.com/wp-content/uploads/pdf/Doing-Business-in-Myanmar>

² Section 2 of the Condominium Law, 2016.

³ Section 50 (b) (c) of the Myanmar Investment Law, 2016.

Endorsement, in relation to the Investment may apply for a Land Rights Authorization¹.

The following investors shall not be required to obtain Land Rights Authorization from the Commission through submission in connection with section 50 of the Law:

- (a) Myanmar Citizen Investors: or
- (b) an Investor who has been granted under the laws to make Investment in a company that retains its status as a Myanmar Company after dealing with foreign investors:²

The Investor proposes to sub-lease land or buildings from other Investor who:

- (a) has been previously authorized to use land and buildings;
- (b) has complied with the conditions of land rights authorization; and
- (c) has the right to sub-lease land or buildings under the approval of the Authority who has interests in such land or buildings; to implement as a part of the Investment, it shall not be required to apply for separate Land Rights authorization. In the case, the Investor must notify the Commission in the prescribed form and after that can lease land or buildings for long term according to section 50 of the Law and must comply with registration obligations and other applicable laws³.

Investment Law the "Restricted List",

1. Investment activities allowed to carry out by Government only
2. Investment activities restricted to foreign investors
3. Investment activities permitted with the recommendation of the relevant ministries.⁴

Under the Myanmar Investment Law, Section 47 deals with the protection of investors:

¹ Rule 116 of the Myanmar Investment Rules, 2017.

² Rule 134 of the Myanmar Investment Rules, 2017.

³ Rule 135 of the Myanmar Investment Rules, 2017.

⁴ MIC Notification No.15/2017

- (a) the government shall accord to foreign investors and their direct investments, treatment no less favourable than it accords to Myanmar citizen investors in respect of the expansion, management, operation, and sale or other disposition of direct investments according to this law except any way stipulated in laws, rules and notifications;
- (b) the government shall accord, in liked circumstances, to foreign investors and their direct investments from one country, treatment no less favourable 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;
- (c) the provision of subsection (b) shall not be construed so as to oblige foreign investors with any treatment, preferences or privileges resulting from the following matters:
 - (i) Custom Union, Free Trade Area, Economic Union resulting from Custom Union, Free Trade Area and Economic Union and international agreements;
 - (ii) More favourable treatments to be accorded to investors and their investments included in international agreements, bilateral or regional or international treaties, agreements or arrangements between regional countries, treaties, agreements or arrangements with other countries, or arrangements relating wholly or partially to taxation.¹

In section 48, the government guarantees to the foreign investors fair and equitable treatment in respect of the following;

- (a) the right to obtain the relevant information on any measures or decision which has a significant impact for an investor and their direct investment;
- (b) the right to due process of law and the right to appeal on similar measures, including any change to the terms and conditions under any license or permit and endorsement granted by the government to the investor and their direct investment.²

¹ Section 47 of the Myanmar Investment Law, 2016.

² Section 48 of the Myanmar Investment Law, 2016.

Exemptions and Reliefs for Investors

Under Myanmar Investment Law 2016, investors are entitled to exemptions and relief for their investment. In section 74, the Commission shall, for the purpose of supporting the development of the Union by allowing investment in sectors which need to be developed, and for the proportionate development of Regions and States, scrutinize and may grant one or more tax exemption or relief if the investor applies for such exemptions or reliefs.¹ Tax incentives for investors are available under the MIL, with respect to income tax exemptions which are stipulated according to the region of the investment.

The less developed regions are designated as Zone (1), the moderate developed regions as Zone (2), and the adequately developed regions as Zone (3), the Commission shall, with the approval of the Government, issue a notification and may grant income tax exemption to investment businesses in Zone (1) for a period of 7 consecutive years including the year of commencement of commercial operation, investment business in Zone (2) for a period of 5 consecutive years including the commencement of commercial operation and investment business in Zone (3) for a period of 3 consecutive years including the year of commencement of commercial operation.²

In addition, the relating to treatment of investors in Section 76 provides that the government may undertake subsidies, funding, capacity building and training to Myanmar citizen investors and citizen-owned small and medium-sized enterprises. The government may also allow exemptions and reliefs for the locations where Myanmar citizen-owned businesses are operated or other economic activities.³

If the investor continues to do the business, in Myanmar as noted above, the Government will grant him relief from income tax. Moreover, the MIC may grant exemptions or reliefs from customs duty or other internal taxes or both on machineries, equipment, instruments, machinery components, spare parts, construction material unavailable locally, and material used in the business, which are imported as they are actually required, during the

¹ Section 74 of the Myanmar Investment Law, 2016.

² Section 75 of the Myanmar Investment Law, 2016.

³ Section 76 of the Myanmar Investment Law, 2016.

construction period or during the preparation period of the investment business, exemptions or reliefs from the customs duty or other internal taxes or both on imported raw materials and partially manufactured goods which are used to manufacture products for export and if the volume of investment is increased with the approval of the Commission and the original investment business is expanded during the permitted period of investment, exemption or relief from the customs duty or other internal taxes or both on machineries, equipment, instruments, machinery components, spare parts, materials used in the business, and construction materials unavailable locally, which are imported as they are actually required for use in the business which is being expanded as such.¹

Under section 78 of the Myanmar Investment Law, the Commission may scrutinize and grant the following exemptions and relief, as required, to the investor if applied:

- (a) exemption or relief from income tax if the profit obtained from the investment business that has obtained a permit or an endorsement is reinvested in such investment business or in any similar types of investment business within one year;
- (b) right to depreciation for the purpose of income tax assessment, after computing such depreciation from the year of commencement of commercial operation based on a depreciation rate which is less than the stipulated lifetime of the machinery, equipment, building or capital assets used in the investment;
- (c) right to deduct expenses which are incurred for research and development relating to the investment businesses carried out within the Union and actually required for the economic development of the Union, from the assessable income.

The foreign investors have to pay income tax on their income at the rates applicable to the citizens residing within the Union. This is an equal right for investors. The tax incentives are offered to foreign investors in Myanmar to attract foreign investments which are vital for the economic development a country and also form important investment promotional measures in country.

¹ Section 77 (a) (b) (c) (d) of Myanmar Investment Law, 2016.

Guarantees for Investment

Private ownership rights must be protected by law. Citizens and foreigners must be assured that their legally obtained possessions will not be arbitrarily seized, and that they can obtain a legal remedy before a neutral, independent judiciary if the government disregards this law. The government cannot nationalize businesses or seize private property except in rare circumstances where the public good is at risk and where adequate compensation is paid. The foreign investors' properties are protected under the guarantees.

Under the Myanmar Investment Law, MIL guarantees that no foreign company shall be nationalized during the permitted period of investment.¹

Section 52 of Myanmar Investment Law 2016, pertaining to investors' property, provide that the government guarantees not to nationalize any investment carried 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) actually necessary for the interests of the Union or its citizens;
- (b) non-discriminatory manner;
- (c) measures in accordance with the applicable laws;
- (d) prompt, fair and adequate payment of compensation;²

In Section 53 a fair and adequate compensation shall be designated as an equivalent to the market value prevailing at the time of expropriation of the investment. However, that designation shall be based on fair consideration of public interests well as the interests of the private investor, and shall take into account the present and past conditions of investment, the reason for expropriation of the business or property, the fair market value of the investment, the purpose of expropriating the business or property, the profits acquired by the investor during the term of investment, and also the duration

¹ <http://www.myanmarlegalservices.com/wp-content/uploads/pdf/Doing-Business-in-Myanmar>

² Section 52 of the Myanmar Investment Law, 2016.

of the investment.¹ According to Section 55 of Myanmar Investment Law, if an investor asserts that a measure undertaken under Section 52 are inconsistent with the provisions of such section and amount to an indirect expropriation, the government shall conduct a case by case and fact-based inquiry that take into consideration the following factors:

- (a) whether the measure creates an intentional adverse effect on the economic value of an investment or not;
- (b) whether the measure breaches the prior binding written commitment of the government, contract, license, or other legal documents issued in favor of the investor or not;
- (c) whether the measures of government, including the objective contained in Section 52 (a), are consistent with the public interest or not.²

In Myanmar Investment Law 2016 it is mentioned that before any investment dispute between the investor and the Union or between the investors is brought to any court or arbitral tribunal, all parties involved in the dispute shall make appropriate attempts to settle the disputes amicably.³ The penalties for non-compliance are the same as those under Foreign Investment Law 2012. The Commission may-

- (a) impose one or more of the following administrative penalties against an investor which violates any of the rules, regulations, procedure, notifications, orders, directives, or terms and conditions contained in the permit or endorsement:
 - (i) censure;
 - (ii) temporary suspension of business;
 - (iii) temporary suspension of tax exemption and reliefs;
 - (iv) revocation of the permit or endorsement;
 - (v) adding the business to a blacklist for which no permit or endorsement shall be issued in the future;

¹ Section 53 of the Myanmar Investment Law, 2016.

² Section 55 of the Myanmar Investment Law, 2016.

³ Section 83 of the Myanmar Investment Law, 2016.

- (b) shall inform a prior notice in respect of the administrative penalties to the investor before imposing the administrative penalties according to subsection (a), and the investor has the right to question in writing upon the administrative penalties;
- (c) shall describe the reason for imposing an administrative penalty together with the decision imposing the administrative penalty under subsection (a).¹

In addition, Myanmar Investment Law provides that an investor dissatisfied with any decision made by the Commission under Section 85 shall have the right to apply for an appeal to the government within 60 days from the date of the decision in accordance with the stipulation.² If an investor fails to comply with or violate any provisions of this Law, including the performance of the prohibited investment business under Section 41, he shall be prosecuted under this Law and, if required, any existing Laws.³

In one of the famous case relating to investment in Myanmar, *the Myanmar Foodstuff Industry of the Ministry of Industry No.(1) (Government Company) v Yaung Chi Oo Trading Pet Ltd (Joint Venture Company)*,⁴ the two companies would work together to operate the Mandalay Brewery by joint venture which was approved by the Myanmar Investment Commission on 26 November 1993. On 29 November 1993, the Singapore Company and Government signed a Joint Venture Agreement, which provided the terms under which the company would operate. The Joint Venture Company commenced operation on 1 October 1994.

Over the first four-year period of operations, the Joint Venture Company earned US\$3.2 million in profits and, at the end of the 1997-98 term, it paid US\$0.58 million in taxes to the State. The Joint Venture Agreement would last for five years with an option to renew for an additional 5-years period.

¹ Section 85(a), (b), (c) of the Myanmar Investment Law, 2016.

² Section 86(a) of the Myanmar Investment Law, 2016.

³ Section 88 of the Myanmar Investment Law, 2016.

⁴ 1999.

On 5 August 1998, the Managing Director of the Singapore Company, sent an application to the Myanmar Investment Commission to renew the registration of the Joint Venture Company for another 5-year period. On 11 November 1998, the military took over the Joint Venture Company for the second time. After this take over, the managing Director could not withdraw or transfer money in accounts under her name. The government takeover violated the Joint Venture Agreement and that the Joint Venture Company could not be terminated without the consent of the Singapore Company. On 29 September 1999, the Managing Director of the Government Company, submitted an application to the Yangon Divisional Court to liquidate the Joint Venture Company. On 24 December 1999, the Yangon Divisional Civil Court issued its Judgment in the Myanmar Yaung Chi Oo Company case, ruling in favor of the Government Company. The Court based its authority to terminate the Joint Venture Company on Section 162 (iv) of the Burma Companies Act, which allows a court to wind up a company if it is of the opinion that it is just and equitable to do so.

That is a leading case in Myanmar. In the past government organizations have nationalized a number of foreign companies and foreign properties. The new Myanmar Investment Law however, guarantees not to nationalize foreign properties. This is an important provision since the State needs to invite ever greater numbers of foreign investors and foreign companies to invest in Myanmar. In fact recently, Myanmar concluded bilateral investment treaties with China, India, Japan, Laos, the Philippines, Thailand, Vietnam, the Republic of Korea, Kuwait, Israel and the United States of American.

Myanmar investment has not yet had to deal with the settlement of disputes relating to the Foreign Investment Law 2012 and the Myanmar Investment Law 2016. Most of the cases of disputes which are have been relatively minor and settled out of court. There are, therefore, no reported cases. In practice at the present time, although some disputes between the investors in Myanmar are settled as stipulated in their relevant agreements, that is the investors are brought to court or an arbitral tribunal, they mostly settle their disputes amicably now. When a dispute arises and if the problem is related to the 2016 MIL, it can be settled by the Myanmar Investment

Commission which, in fact, is planning to form an arbitral tribunal, not just in the near future.

Bilateral Investment of Treaty (BITs)

The main goal of developing countries signing BITs or negotiating BITs is to attract foreign investment as a means of fostering economic growth and development. On the other hand, the purpose of BITs for the developed countries is to obtain legal protection for investment and preclude non-commercial risks facing foreign investors in host countries.¹ Indeed, BITs' original name is agreement signed between two countries concerning the reciprocal promotion and protection of investment. It must be noted that most BITs do not explain which contracting party is the source of the investment or which is the recipient². Thus, the promotion and the protection of investment are reciprocal.

However, every positive aspect of foreign investment has a negative aspect as well. In this regard, new issues in BITs are (i) Environmental Concerns (e.g, pollution, harm to natural resources), (ii) Human Rights (e.g, Violations of human rights), (iii) Economic development (e.g, hazardous technology bring about costs to the host state), (iv) International Concerns (e.g, Choice of Arbitral Tribunals), (v) Regulatory space and bilateral treaties (e.g, the right to control investment by the host state).³

As negative aspects, Myanmar recently faces the violations of Human Rights and environment concerns in Lat Pan Daung Copper Project with China Wan Paung Co., Ltd. Both parties resolve and negotiate these issues by regulating conditions under Investigation Commission which may be carried out and compensation awarded. Bilateralism is more appropriate to resolve investment issues than to trade issues.

¹ Dolzer Rudolf & Stevens Margrete, *Bilateral Investment Treaties*, Martinus Nijhoff Publisher, 1995, P-12

² Siquerious Jose Luis, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, California Western International Law Journal, Spring 1994, P-257.

³ M.Sornarajah. *The International Law on Foreign Law on Foreign Investment* 2nd Edition, Cambridge University Press, 2004, P-265.

Another example of Economic cooperation between China and Myanmar, Myintsone Dan Project, was approved by Myanmar government in March 2009 when China and Myanmar concluded "The Framework Agreement on Cooperation in Developing Hydroelectric Resources in Myanmar", and also obtained all necessary approvals from Myanmar Government before construction. However, in September 2011, Myanmar government unilaterally suspended the undergoing Myintsone Dan project due to domestic political pressure arising from the local inhabitants, resulting in huge damages to Chinese investors.¹ It has been noted that it is necessary for government to adopt all means of protection mechanisms to protect investment through consultation and diplomatic channel and to conclude BITs with effective dispute resolution approach by protecting the legitimate rights and interests from expropriation or any other hazard treatments by the host states.

BITs have substantive and procedural rules that secure foreign investment. Although every BIT covers the same issues, there are many exceptions and reservations. Most of the investment disputes are related with expropriation, national treatment issues and most favourite nation treatment principle which are essential substantive rules of the BITs. Most BITs include a clause on expropriation and compensation in order to protect investors against the risk of unlawful expropriation.

Findings

Investment plays significant roles to develop economic both domestic and foreign investment. Myanmar has currently a well-defined vision and framework for implementing policies under the current situation but transparent, clear, legal and predictable regulatory framework for investment is still weak to determine and make decision for the benefit of their investment contribution. The government does not control the real estate market. But, the real estate is restored by crony capitalism and the real estate broker. So, private investors have to pay price higher than the normal market price.

¹ Report on Development and cooperation of China's Outward Investment and Economic Cooperation, 2011-2012, P-100.

Conclusion

With regard to the protection of foreign-owned property, in Myanmar, the Myanmar Investment Law, 2016 contains provisions relating to the investor's right to use to land and guarantees that no foreign company shall be nationalized during the permitted period of investment. Most disputes are settled amicably, out of the court.

Therefore, governments cannot nationalize businesses or seize private property except in rare circumstances where the public good is at risk and where adequate compensation is paid. States must treat their foreign investors in a manner consistent with international standards of human respect and civil rights. Since almost all States nowadays practice a market-economy foreign direct investment has been greatly increased, as more and more foreign investors and foreign companies have taken part in commercial transactions in many States.

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