Chapter 3
Evaluation of the New Foreign Investment Law in Myanmar: Is it Market-Friendly, or Not?

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Abstract

The amended foreign investment law (the Law of the Union Assembly No. 21/2012) was signed by President U Thein Sein after passing the Assembly of the Republic of the Union of Myanmar on November 2, 2012, the detailed "Negative lists" (Notification No. 1), and the sub-clauses of the new foreign investment law (Notification No. 11/2013) were issued on January 31st, 2013. This paper explains and evaluates the new foreign investment law and these notifications by focusing on several points;1) Reflection on the political reforms, 2) The number of days needed for the investment application process and one-stop service, 3) Reflection on the financial reforms in the new foreign investment law, 4) Tax incentives and negative lists, 5) The numerical target for employing Myanmar nationals, 6) Orientation for environmental protection, and 7) The attitude for securing resources. In order to maintain objectivity, the author compares the new foreign investment law with the old law (the State Law and Order Restoration Council Law No. 10/1988). Then the new foreign investment law is compared with investment-related laws in Cambodia and Lao PDR. By these comparisons, the author examines if the new law is an improvement compared with the old law, and also, whether the new law is in fact market-friendly.

1. Introduction

The Foreign Investment Law, the Law of the Union Assembly No.21/2012 (called "The new foreign investment law of Myanmar," hereinafter)[1] was signed by President U Thein Sein after passing the Assembly of the Republic of the Union of Myanmar on November 2, 2012. Myanmar has conducted a series of political and economic reforms since U Thein Sein became the first President in March 2011 (Ishida, 2013a:85) and Myanmar has been one of the countries attracting much attention from investors around

[1] The author writes this chapter in accordance with the laws, notifications, decrees, and sub-decrees in English version. This material is an "unofficial translation", even though the volume was issued by the government.

the world. This means that nobody can deny the importance of Myanmar's new foreign investment law.

Regarding the political process of amending the foreign investment law, there were many twists and turns. More concretely, there was a gap between President U Thein Sein, who has shown the intention to reconstruct the economy by attracting capital and knowledge from foreign companies, and the group of conservative protectionists who fear losing their vested interests. For example, the draft for the amended law included a clause that the minimum capital shall be five million dollars, but the Union of The Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) expressed concern about the clause by holding an emergency press conference on September 5, 2012. As a result, the draft was only passed by both the Upper and Lower Houses by deleting the clause.[2] President U Thein Sein, however, refused to sign the draft because some protective clauses remained and he directed the lower house to re-examine the matter. During the next term, the parliament discussed the points and passed a further amended draft and it was finally signed by the President. Sugita (2012), in accordance with the arguments mentioned so far, concluded that as the protective factors have been retired it is good news for foreign companies.

This chapter evaluates the new investment law by focusing on some key points. However, it is not easy to evaluate and maintain objectivity. Thus, the author compares the new foreign investment law with the old law (the State Law and Order Restoration Council Law No. 10/1988), and the new law is also compared with investment-related laws in Cambodia (the Law on Investment in the Kingdom of Cambodia passed by the National Assembly on August 4, 1994, CDC/CIB 2010:6), and Lao PDR (the Law on Investment Promotion enacted by the National Assembly on July 8, 2009). These two countries are categorized as the least developed countries (UNCTAD, 2011:6) as of 2011, with Myanmar, in the ASEAN, and several investors like to compare these three countries.

The composition of this chapter is as follows. Section 2, shows the reflection of political reforms and democratization in the new foreign investment law. Section 3, shows how many days it takes for an investor to receive approval after submitting an investment proposal and how the importance of a one-stop service is reflected in the relevant laws in Myanmar, compared with Cambodia and Lao PDR. Section 4, shows

[2] As a result, Article 10 of the new foreign investment law stipulates that the minimum capital amount may be determined by the MIC sector-wise basis with approval of the Union Government. On the other hand, Article 6 of the old foreign investment law stipulates that the minimum share of the foreign capital in the case of a joint venture used to be 35% (Article 6).

what has been improved and what has not yet been made market-friendly in the financial procedures, including remittances. Section 5, shows the improvements in the tax incentives and evaluates these improvements by comparing with Cambodia and Lao PDR. Section 6, evaluates the negative lists issued as notifications. Section 7, refers to some key points including setting numerical targets for employing Myanmar nationals, the trend for environmental protection, and the government's attitude about securing national resources. Finally, the concluding remarks summarize the evaluation.

2. Reflection of the Political Reform on the New Foreign Investment Law

As shown at the beginning of the introduction, political reforms have progressed alongside economic reforms since U Thein Sein became the first President in March 2011. At first, the author refers to the influences of the political reforms and democratization on the new foreign investment law. This clarifies the differences between the old law and the new law.

To begin with, some differences can be seen regarding membership of the Myanmar Foreign Investment Commission (MIC). This commission scrutinizes and issues permits for submitted proposals (Article 13). In accordance with Notification No. 11/88 of the Government of the Union of Myanmar, the Chairman of the MIC was specified as the Minister of Planning and Finance, and another ten members were also appointed from specific ministries, such as the Minister of Industry No. 1, and the Minister of Industry No. 2, the Minister for Trade, and so on. However, the new law stipulates the chairman shall be a Union level person (Minister level) and thus is more flexible than the old law to some extent. For the qualification to become a member, it stipulates the experts and appropriate persons from Union ministries, Government departments, and non-governmental organizations (Article 11). The flexibility has been increased by the point that the qualification has been expanded to include non-governmental organizations.

In addition, the MIC is responsible for reporting performance to the Union Parliament biannually in the new law (Article 20), while the MIC was responsible for reporting to the government in the old law (Article 12). In other words, the political power is now separate, whereas the political power used to be concentrated in the military government in the old law. The name of the country has been also changed from the "Union of Myanmar" in the old law (Article 2) to the "Republic of the Union of Myanmar" in the new law (Article 2). The Cambodian Investment Board (CIB) of the Council for the

Development of Cambodia (CDC) and the Ministry of Industry and Commerce or the Ministry of Planning and Investment of Lao PDR are in charge of approving submitted investment proposals, in Cambodia and in Lao PDR, respectively. The CDC is responsible to the Council of Ministers (a part of the government) for their actions (Article 12 of the Sub-decree on the Organization and Functioning of the Council for the Development of Cambodia), and the Ministry of Planning and Investment and the Ministry of Industry and Commerce of Lao PDR have the duty to regularly summarize and report about investments to the Government (Article 86 of the investment promotion law in Lao PDR). Thus, it is only in Myanmar that the implementation body for investment related matters, the MIC, is responsible to the parliament.

Regarding the effects of political reform and democratization, the point that the MIC is responsible to the parliament instead of the government can be effective in avoiding any runaway action by the MIC. Since many business people in Myanmar have lobbied the parliament in the process of law making to protect their vested interests against foreign investors (*The Myanmar Times*, July 9-15, 2012), this system makes it more difficult for the policies conducted by the MIC to become market-friendly, and foreign investors might be frustrated with policies indirectly influenced by parliamentary lobbying activities of such domestic businessmen.

3. The Investment Application Process and One-Stop Service

3.1 The one-stop service as a key concept in Cambodia and Lao PDR

The "One-Stop Service" is one of the most important concepts in the investment law of Cambodia and the investment promotion law in Lao PDR. For example, Article 3 of the investment law of Cambodia states that "The CDC is the sole and One-Stop Service organization responsible for the rehabilitation, development, and oversight of investment activities". In Lao PDR, one chapter (Chapter 6 in Part III) of the investment promotion law is allocated to the one-stop service for investment. The chapter prescribes that offices of the one-stop service are located at the Ministry/Department of Planning and Investment, Ministry/Department of Industry and Commerce, and in special and specific economic zones (Article 44),[3] and implementation of the one-stop service operation is stated as also one of the responsibilities of the departments/offices at provincial, district, and municipality level (Articles 87 and 88).

[3] The Department of Planning and Investment and the Department of Industry and Commerce are the offices at provincial level while the ministries are offices of the central government level.

In Cambodia, the Chairman of the CDC is the Prime Minister, Mr. Hun Sen, and the CDC is composed of related-ministers, the Governor of the National Bank, the Chairman of Supreme National Economic Council, and the Secretary General of the CDC. Representatives of the ministers, the governor, and the chairman can be members of the CDC (Article 1 of the Sub-decree on the CDC). The procedure for investment approval is composed of two phases. As shown in Table 1, in the first phase, the CDC issues a Conditional Registration Certificate to the applicant within three working days after receipt of the investment proposal, or issues a Letter of Non-Compliance to the applicant, accordingly. Then The CDC has to obtain all the licenses from the relevant ministries-entities listed in the Conditional Registration Certificate on behalf of the applicant. Then the CDC has to issue a Final Registration Certificate within 28 working days after issuing the Conditional Registration Certificate if the relevant ministries-entities do not issue letters of Non-Compliance with clear reasons. Therefore, it takes a maximum of 31 working days from submission of an investment proposal to final registration (Article 7 of the investment law).

Table 1

In Lao PDR, the Ministry/Department of Industry and Commerce is the one-stop service for an investment for general business and the Ministry/Department of Planning and Investment is the one-stop service for an investment in a concession business and for the special and specific economic zones (Article 44).[4] The one-stop service offices of these ministries and departments convene weekly meetings that consist of representatives appointed by the relevant sectors and local authorities in order to examine problems related to an investment. Through the weekly meetings, as shown in Table 1, the one-stop service offices issue the registration certificate within 10 working days in the case of general business, and not later than 13 working days in the case of a controlled business in the Negative list (Article 18), and not later than 45 official working days in the case of an investment in the special and specific economic zones or a concession investment in the investment promotion list (Article 31 and Article 35), within 15 working days in the case of a representative office (Article 47), and within five working days in the case of a branch of a foreign legal entity (Article 48).

[4] Specific Economic Zone means an area developed for a specific purpose such as an industrial zone, touristic city, or duty free zone. On the other hand, a Special Economic Zone is developed for comprehensive objectives, the area is at least one thousand hectares, and has its own incentive policy (Article 3 of the investment promotion law in Lao PDR).

Regarding the new investment law in Myanmar, it takes 15 days from submission of a proposal to receive the reply, whether the MIC accepts or rejects it, and the permit is issued within 90 days; totally 105 days from submission to permit issue (Table 1).

According to the detailed regulations, the Notification No. 11/2013 issued on January 13 2013 (called the "Sub-clauses of the new foreign investment law"), shows the application process in detail (Figure 1). After an investment proposal is submitted, the Proposal Review Group, composed of high-ranking officers,[5] scrutinizes the proposal as the preliminary phase. The meeting of the Proposal Review Group is held once every seven days. Subject matter experts from the relevant government departments are invited as necessary. If the proposal is acceptable, the proposal is presented to the MIC. After the proposal is accepted, the MIC requests comments and remarks from the Nay Pyi Taw Council, or the relevant government of the Region or State, and the Ministry of Environmental Protection and Forestry, regarding the social-environmental impact, and these organizations should reply within seven days. In the case that it is necessary to respond to a request, the relevant Union minister shall form an investment assessment group headed by a director or any officer at the same level. After reviewing the remarks, the MIC presents the proposal to the next commission's meeting. After the proposal is approved by the MIC, the permit form is issued within 90 days from the date the proposal was approved. Without including the days needed for the assessment by the investment assessment group, 104 days are required. In other words, it can be longer than the 105 days in accordance with the calculation based on the new foreign investment law.

In addition, the words "One-stop service" cannot be found in the new foreign investment law of Myanmar, while an economic zone is stipulated as a zone that operates the one-stop service in Article 7 of the Special Economic Zone Law issued on January 27, 2011. The Directorate of Investment and Company Administration opened a one-stop service office for company registration at Nay Pyi Taw on May 18, 2011 and at Yangon on April 10, 2013 (*The Myanmar Times*, June 12, 2011, and April 23, 2013, respectively). This does not coincide with the content of the new foreign investment law. The actual investment climate might have become more investor-friendly than the law.

3.2 Evaluation of the process of applying for investment projects

[5] It is composed of 1) Directorate of Investment and Company Administration, 2) Myanmar Customs Department, 3) Internal Revenue Department, 4) Department of Labor, 5) Ministry of Electric Power, 6) Department of Human Settlement and Housing Development, 7) Directorate of Industrial Supervision and Inspection, 8) Directorate of Trade, 9) Reporting Department of Project Scrutinizing and Development 10) Environmental Conservation Department.

In order to avoid receiving controversial investment projects like the Monywa Copper Mine Project, the multiple layers of the screening process can be effective. Especially, screening by the state or district and by the Ministry of Environmental Protection and Forestry must be effective in order to protect Myanmar's nationals from any negative impact due to environmental pollution. In some countries, several months might be given for environment and social impact assessment needs.

The number of days needed from the application to issuing permits, however, is too long compared with Cambodia and Lao PDR. Considering Myanmar will be faced with competition with other countries including Cambodia and Lao PDR, the decision-making process for approval should be simplified except a case that time-consuming environment and social impact assessment is needed, as both the MIC itself and the Proposal Review Group are composed of related government departments. As can be seen in the case of Lao PDR, the weekly meeting of representatives of the relevant departments has the decision-making authority and this mechanism enables the government to conduct the one-stop service effectively. Thus, the important thing is not to increase the layers of screening, but to enhance the quality of the members of the MIC and to avoid corruption by the MIC members. Thus, a capacity-building program is needed to enhance the skills of the MIC candidates and members to distinguish whether a specific project is effective or not, and whether a project may have negative effects on Myanmar's people or not. Holding a periodic meeting composed of highly qualified government officials from the related ministries can form the one-stop service. Thus, participation by members of NGOs in the MIC is not so important and the more important point is that members from all the related ministries join the MIC meeting.

4. Financial Aspects

4.1. Improvement in flexibility compared with the old law

Compared with the old law of 1988, the financial flexibility for foreign companies has improved. More concretely, the number of banks and the choices for investors has expanded.

For example, the definition of a bank is stipulated as "Any bank within the country permitted by the Union Government" in the new law (Article 2) while it used to be "Any bank of the State" in the old law (Article 2); the definition of the bank used to be limited to the State bank.

Secondly, within the powers of the MIC, the MIC could prescribe the bank to transact

financial matters under the old law (Article 15) and the old law stipulated that the investor shall open an account in a foreign currency and in Kyat in the bank prescribed by the MIC (Article 27). On the other hand, the new law stipulates that the MIC may allow or reject the bank proposed by the promoter or investor for financial transactions (Article 13), and that investors and foreigners working in Myanmar have to open a foreign currency and a Kyat account at any bank authorized to conduct foreign banking business (Article 40 and 41). In the new law, the investor has the freedom of choice of the bank for transactions and for opening the accounts; on the other hand, the freedom of choice was limited to the banks prescribed by the MIC in the old law. However, regarding the point that foreign investors are obliged to open two accounts, both a foreign currency and a Kyat account, the obligation to open an account in a foreign currency and a Kyat is not clear, while it might be convenient to open accounts in both currencies. In Lao PDR it was a requirement that foreign investors open accounts in Kip and a foreign currency in the past (Article 17 of the Law on Promotion and Management of Investment of 1988 and in Article 13 of the law in 1994) while this requirement is not mentioned in the current investment promotion law in Lao PDR.

Thirdly, the insurance company that investors could choose was limited to the Myanmar Insurance Corporation (Article 19) in the old law, while the freedom of choice has been expanded to any insurance company authorized by the government (Article 20). However, as well as the obligation to open a Kyat and a foreign currency account, the reason why foreign companies are forced to effect insurance is not clear. According to the sub-clauses of the new foreign investment law, foreign companies are obliged to effect machinery insurance, fire insurance, marine insurance, physical injury insurance, natural disaster insurance, and life insurance. Of course, it might be necessary to have such insurances. In China, factories that use or produce chemical goods, or dangerous goods, or if they could potentially cause environmental pollution, are forced to effect "Environmental insurance".[6] Thus, the above-mentioned types of insurance should be divided into a voluntary basis and an obligatory basis.

Fourthly, the currency for registration of foreign capital has become any foreign currency accepted by the bank in the new law (Article 37), while the currency for the registration was the Kyat in the old law (Article 24). Fifthly, the exchange rate for remittances used to be the prevailing official rate of exchange in the old law (Article 26), and this has been changed to the prevailing exchange rate (Article 40); an investor used to be forced to exchange at the official rate (around 5-6 Kyat per US dollar) even though the market rate around was 1,000 Kyat per US dollar, for example. Thus improvements

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[6] Website of NTT Data Institute of Management Consulting, Inc.

in the flexibility of the financial processes can be seen in the new foreign investment law, but the obligation of opening accounts in both a foreign currency and the Kyat and of effecting insurance could be further liberalized.

4.2 Comparing the regulations on remittances

Payments categorized as a remittance are stated as:

a) Foreign currency entitlement by a person who has imported foreign capital.
b) Foreign currency permitted for withdrawal by the MIC for a person who has imported foreign capital.
c) Net profits after deducting prescribed funds related to all taxes out of the annual profits earned by a person who has imported capital.
d) Legitimate balance, after payment of taxes and after deductions in the prescribed manner for living expenses incurred for himself and his family, out of the salary and lawful income obtained by foreign personnel during performance of service in the country.

in Article 39 of the new foreign investment law. The types of remittance from a) to c) relate to "A person who has imported foreign capital" as an investor or a foreign company. Type d) is personal money earned by the foreign staff of a company. In addition to these, the sub-clauses in the new foreign investment law also state:

e) Entitled share proceeds received by a foreign investor after transferring shares in accordance with the law.
f) Transfer of entitled distributions after liquidating an invested business.
g) Foreign currency received after returning the Permit to the MIC upon expiry of the Permit's term.
h) Foreign currency equivalent to the amount reduced from an investment due to scaling down of that investment.

These four types are also related to capital.

In Lao PDR, foreign investors are allowed to remit capital, assets, and income, such as profits from an investment, personal cash and assets, or the assets of an enterprise, through banks located in Lao PDR, after full payment of duties, taxes, and other fees in accordance with the regulations and laws according to Article 68 of the investment promotion law. However, the types of remittance permitted are not stipulated in detail.

In Cambodia, investors are allowed to remit:

1) Payments for imports and repayment of principal and interest on international loans.
2) Payment of royalties and management fees.
3) Remittance of profits.
4) Repatriation of investment capital in compliance with the dissolution rules.

The cases of 3) and 4) are equivalent to c) and f) in Myanmar, respectively. On the other hand, 1) and 2) are not stipulated in the new foreign investment law, while remittance for payments for imports and repayment of principal and interest probably might be allowed. In addition to these, capital gains from selling shares in the stock market, and dividend remittances should also be permitted once the stock market in Myanmar has developed. Furthermore, royalty payments should be also permitted, and these types of remittances are permitted by Thailand.

Other than these types of payments, and remittances abroad may influence the monetary policy of the central government. I consider that this issue is too complex to discuss in detail in this chapter.

5. Tax Incentives

5.1 Incentives for corporate income tax

The content of the rule on corporate income tax exemption is almost the same between the old law and the new law; however, the length of the tax exemption period has been extended from three consecutive years (Article 21) to five consecutive years (Article 27). Regarding tax exemption, the new law allows an investor to have the right to deduct from the assessable income any expenses incurred in R & D and the right to carry forward and set-off up for up to three consecutive years from the year the loss arose within the two years immediately following the enjoyment of exemption or relief from income tax (Article 27).

In Cambodia, Article 14 of the investment law stipulates that the corporate tax exemption period is composed of:

A trigger period + 3 years + Priority Period.

The trigger period is the first year of earning a profit or three years after the company earns its first revenue, whichever is sooner. In other words, the maximum trigger period is three years even if the company continues to have a deficit for more than three years. On the other hand, the priority period is stated as determined in the financial management law.[7] Thus, three years have been guaranteed as a minimum and there is a possibility that an investor may enjoy nine years at maximum.

In Lao PDR, the exemption periods are different depending on the level of the promoted sector and on the promoted zone (Table 2). In the case of investments for development of hospitals, kindergartens, schools, vocational schools, colleges, universities, research centers, and some public utilities, such investments are entitled to an additional five years tax exemption (Article 54). Article 49 of the investment promotion law declares that the promoted sectors are agriculture, industry, handicrafts, and services. Details of promoted activities in the sectors are determined by the government and classified into three different levels based on the prioritized activities of the government, activities related to poverty reduction, improvement of the living conditions of the people, construction of infrastructure, human resource development, and job creation, etc. The levels are divided into three according to the level of promotion:

Level 1: Activities with the highest level of promotion
Level 2: Activities with a medium level of promotion
Level 3: Activities with a low level of promotion

And in Article 50, the zones are categorized into three types:

Zone 1: Zones having the least socio-economic infrastructure development to facilitate investments; mainly mountainous and remote areas.
Zone 2: Zones having moderate socio-economic infrastructure development, enabling partial implementation of investments, and having a less difficult geographical situation compared with Zone 1.
Zone 3: Zones having good socio-economic infrastructure development to support investments.

Table 2

[7] As far as the financial law is concerned, the prioritized sectors are not clear in Cambodia.

Comparing the corporate income tax exemption systems of the three countries, the tax exemption period in the foreign investment law in Myanmar is fixed at five years, and it can be shorter and longer than that in Cambodia and Lao PDR. However, Article 27 of the new foreign investment law of Myanmar adds that the exemption or relief period may be extended for a further reasonable period depending upon the success of the enterprise in the case where it is beneficial for the State. Moreover, relief from corporate income tax of up to 50% is accrued if the goods produced are exported. Furthermore, if an investor maintains a reserve fund for re-investment and re-invests within one year after the reserve is made, the profit from the reinvestment is exempted or reduced. These rules cannot be found in Cambodia and in Lao PDR.

Regarding the commencement of the exemption period, the foreign investment law of Myanmar stipulates this as the start date of commercial operations. In Cambodia, it is regarded as the year of earning the first profit, or it starts three years counting from the date of earning revenue, if the company fails to earn a profit for three years. In Lao PDR, it is basically the as same as in Myanmar; however, for manufacturing new products, and research and development of new technology activities, the exemption period commences from the first profit-making year (Article 51). Also in Myanmar, if the company fails to earn a profit for two years after the exemption period, the company has the right to carry forward or set-off the loss for up to three consecutive years. Carrying forward the loss for three consecutive accounting years after tax finalization with the tax office is also permitted in Lao PDR (Article 52).

5.2 Exemption and reduction of the import tariff

Import tariffs and other kinds of tax are not imposed on capital goods at the initial stage, and intermediate goods and raw materials for exported products. We find these kinds of regulations in most investment-related laws, but they are different depending on the country.

In Myanmar, the import tariff and other internal taxes on machinery, equipment, instruments, machinery components, spare parts, and materials required for use during the period of construction and during the originally permitted period for expansion of the business are exempted or reduced. Regarding exemption or relief of import tariffs and other internal taxes on raw materials, they are exempted or reduced for three years after commencement of commercial production (Article 27). The exemption period for relief of import tariffs on raw materials is limited to three years.

In Lao PDR, import tariffs on raw materials, equipment, spare parts, and machinery, which are used directly for production, are exempted. The exemption period is not

limited and there are no conditions on the percentage of goods for export. At the same time, however, it also stipulates that the exemption of import tax shall comply with the relevant rules and regulations (Article 52). According to Article 37 and Article 38 in the Decree on the Implementation of the Investment Promotion Law (called the "decree on implementation" hereinafter), companies shall submit documents including an annual import plan to the financial sector. After submission, the financial sector sends the documents to the relevant sectors and the relevant sectors shall provide comments within 10 working days. Then the financial sector convenes a joint meeting with the relevant sectors to consider approval of the import plan and issues the certificate within 30 working days. Thus the process is not prescribed. Regarding capital goods, import tariffs for construction items and tools for construction of factories and buildings, office equipment such as computers, printers, copy machines and fax machines, and the authorized number of vehicles are exempted (Articles 39, 41, and 42 of the decree on implementation). In addition, the import tariff on spare parts for replacement included in the company's annual import plan is exempted (Article 40).

In Cambodia, investors are categorized into three types; 1) Export investor, which means an investor that sells or transfers a proportion of its product to a purchaser or transferee outside Cambodia, 2) Supporting industry investor, which means an investor that has its entire production (100%) supplying the export industry as extra production for a regular export industry, or as substitution for regularly imported raw materials or accessories, and 3) Domestically oriented investor, which means an investor that does not aim to export (Article 1 of the investment law and Article 3 of sub-decree on the amendment). The import tariff exemption rules are different according to the category of the above-mentioned investors as shown in Table 3. The import tariff on capital goods is exempted for all investors for "Production equipment" and "Production input construction materials." The import tariff on raw materials, intermediate goods, and production input accessories is exempted for export companies and companies that supply all their products to exporting companies. The exemption period is not limited and the rules are more transparent than those of Lao PDR and Myanmar.

Table 3

6. Negative Lists

6.1 Negative lists in Myanmar

Article 8 of the new foreign investment law states the types of industries encouraged according to the following basic principles; (f) Benefitting highly skilled technology and development by advanced technology, (k) Development of modern industries, (m) Supporting access to obtain and exchange information and technology, (o) Development of knowledge and skill of Myanmar nationals, and (d) Production of goods for import substitution. These principles cannot be found in the old foreign investment law. The restricted or prohibited businesses, the "Negative list" in other words in Article 3 of the new foreign investment law, includes manufactures, services, farming agriculture, and husbandry, which is affordable by Myanmar's people, and fishing within Myanmar's territorial seas.

Notification No. 1/2013 issued by the Republic of the Union of Myanmar on January 31, 2013 includes more detailed lists composed of three types of economic activity:

1) Prohibited economic activities.
2) Economic activities allowed in the form of a joint venture with Myanmar nationals.
3) Economic activities that comply with specific circumstances.

List 1) is consists of 21 economic activities and states the activities that may threaten national defense and security, activities that are harmful to the environment and public health, activities that deplete natural resources, activities protected as domestic SMEs, and activities related to public media. Regarding activities that threaten national defense and security, "Manufacturing related to arms and ammunition" is stated first. "Administration of the electricity power system", "Trading in electrical power", "Inspection of the electricity supply infrastructure", "Air navigation services" and "Pilotage services" can also be classified into this category by a broader meaning. Seven types of activities, such as management of natural forests, manufacturing of hazardous materials, and installation of a factory utilizing imported waste material, are related to those that are considered harmful to the environment and public health. "Prospecting, exploration, and production of jade/gem stones" are classified as activities that deplete natural resources, "Production of minerals on a medium scale or small scale" belongs to activities protected for SMEs, and "Joint printing and broadcasting services" and "Periodicals in national ethnical languages including Myanmar" are activities related to the public media.

List 2), is a list of economic activities allowed subject to a joint venture with Myanmar nationals, and includes 42 economic activities, of which 24 activities are

manufacturing and marketing related and include food and beverages, paper, chemicals, and specific products such as "plastic ware", "rubber and plastics" and "hides, skins, and leathers". Two activities are related to seeds, another two activities are related to minerals, eight sectors are related to construction and development, four activities belong to the transport sector, and two activities are classified as service sectors.

List 3) of the economic activities that are allowed subject to the specific circumstances is composed of three sub-lists:

a) Economic activities permitted with the recommendation of the relevant ministry.
b) Economic activities permitted and subject to other conditions.
c) Economic activities that require an environmental impact assessment.

Sub-list a) includes economic activities that are subject to conditions imposed by i) The Ministry of Agriculture and Irrigation (7 activities), ii) The Ministry of Livestock and Fisheries (5), iii) The Ministry of Environmental Conservation and Forestry (18), iv) The Ministry of Mines (5), v) The Ministry of Industry (10), vi) The Ministry of Electricity (1), vii) The Ministry of Transport (23), viii) The Ministry of Communications and Information Technology (2), ix) The Ministry of Energy (5), x) The Ministry of Health (12), xi) The Ministry of Construction (6), xii) The Ministry of Hotels and Tourism (3) and xiii) The Ministry of Information (18). The activities in sub-list a) total 115 activities. Investors require specific approval, recommendations, or are required to comply with specific laws, rules, and/or regulations, or utilize local materials to some extent, or the share of the foreign investment is regulated to specific percentages.

As for sub-list b), these economic activities (27 activities) are permitted subject to other conditions. Activities related to livestock and fisheries must comply with specific rules such as the Good Animal Husbandry Practice (GAHP), Good Manufacturing Practice (GMP), Hazard Analysis Critical Control Point (HACCP), and the ASEAN's rules. Investment in exploration and production of coal requires a joint venture with the State. The hotel business is open to 100% foreign investment only in the case of three stars and higher-level establishments. Investment in activities related to the trade and service sectors shall be larger than the specified scale. Regarding sub-list c), these are 30 economic activities that are subject to an environmental impact assessment. They must pass the relevant environmental and social impact assessment before receiving approval, and two activities (production of electricity and construction of the national grid for electricity power transmission) shall comply with the requirements of the

Ministry of Environmental Conservation and Forestry.

6.2 Negative list in Cambodia and in Lao PDR

In Cambodia, the government states three lists:

1) Investment activities prohibited by the relevant law and sub-decrees.
2) Investment activities not eligible for incentives.
3) Investment activities with specific characteristics eligible for custom duties exemption, but not eligible for profit tax exemption.

The government regulates the business scale, such as the areas and quantities by sector in order to protect SMEs and cottage industries. However, investment in these sectors is not prohibited, and they only lose the opportunity for some kinds of incentive. The regulation mechanism is less stringent than in Myanmar, and only small-scale manufacturing sectors are in list 2) and list 3) in Cambodia (Ishida 2013a: 107).

In Lao PDR, five lists are stated as follows (Suzuki 2009: 46-58):[8]

1) Sectors promoted for investment.
2) Sectors that allow foreign investment.
3) Sectors allowed for foreign investment subject to special conditions. [9]
4) Sectors that require qualifications for approval.
5) Sectors not available for foreign investment.

Sectors 1) and 2) are not relevant to this discussion. The sectors that require a joint venture with Lao nationals are six sectors; "Manufacturing of all kinds of alcohol," "Manufacturing of beer", "Manufacturing of drugs and medicines", "Manufacturing of all kinds of automobiles", "Wholesaling of beverages and tobacco", and "Wholesaling

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[8] Materials on the negative list in Lao PDR are written in Japanese and the author has translated the Japanese into English.

[9] The conditions are: i) Require Special approval by the Government of Lao PDR, ii) Require to enter into an agreement with the Government of Lao PDR, iii) Require a joint venture with Lao nationals, iv) 100% of the products must be for export, v) More than 50% of the products must be for export, vi) Local content has to exceed 50%, vii) Requires processing in Lao PDR, viii) Possible only if there is no national plan in the sector, ix) Utilization of up-graded technology is necessary, x) No negative environmental and social impact, xi) Production and manufacturing process must be in Lao PDR, xii) Camping ground and guest house is approved only domestically, xiii)Tourism operation is prohibited for foreign investors, xiv) Land ownership by foreigners is prohibited (land lease is available), xv) Need to comply with the fishery rules in the provincial fishery department, xvi) New investment in the sectors is not allowed and xvii)Require to comply with the rules prescribed by the Ministry of Health.

of textiles, fabrics, and garments".

Regarding the sectors that need specific qualifications for approval, 1) Investment in sectors related to telecommunications, communications, transport, and land ownership, requires a Memorandum of Understanding (MOU) and a contract for operation with the government of Lao PDR; 2) Investment in exploration, surveying, mining, and processing of mining resources, requires an agreement with the government of Lao PDR for a) Exploration and surveying and b) Mining and processing, 3) Investment in energy resources requires a license to utilize water resources, air resources, and heat resources and a MOU and contract for the operation and agreement on the license with the government of Lao PDR.

The sectors that are not acceptable for foreign investment are activities that threaten national defense and security, that may harm the traditional culture, the environment and public health, and central banking, and so on.

6.3 Evaluation

Regarding the list of prohibited economic activities, such activities are also prohibited in other countries in the ASEAN (Ishida 2013a: 103 -106). Regarding the list of economic activities permitted but subject to specific conditions, especially the sub-list of economic activities permitted subject to the recommendation of the relevant ministry, there are some rules that force foreign companies to comply with local content regulations. Such regulations are evaluated as not market-friendly. Approval and recommendation from the relevant ministries are mostly needed in order that Myanmar's government may supervise these economic activities, and these requirements are also a requirement for domestic companies. Regarding the list of economic activities that require an environmental impact assessment, it is necessary since some controversial foreign investment projects have caused negative effects on the environment and human health are operating in the CLM countries.[10]

Regarding the list of economic activities allowed in the form of a joint venture with Myanmar nationals, let us consider a research question; is it possible to promote industrialization by protecting the domestic industries? I have visited several factories in the industrial zones in Mandalay, Mawlamyaine, Monywa, and Pakokku. In such areas, I studied the operation of food processing, metal-processing, machinery-processing, and plastic molding. The machines are usually not modern units and I saw outdated

[10] Ishida (2013b: 24-27) refers to the negative impact of agricultural investment by using chemical fertilizers, plantation of natural rubber, mining of metals, and hydro-power generation in the triangle area in the Greater Mekong Sub-region.

machinery that was made maybe 40 or 50 years ago. However, the technicians are skillful enough in the case of a factory producing a rolling machine for producing rubber sheets, for example. A joint venture between such factories with skillful technicians and a foreign company with advanced techniques and machines can expand the opportunities for upgrading such skillful technicians. Thus, the obligation for foreign companies to join a joint venture with Myanmar nationals can promote improved industrialization.

From the view point of foreign companies, however, it would be more market-friendly to be free to choose to either invest with 100% foreign capital or form a joint venture with local partners. For foreign companies, 100% foreign capital is easy for decision making. When forming a joint venture with local partners, the decision making process becomes more difficult, especially if the foreign company withdraws from Myanmar and the majority of the share is owned by the local partners. Usually a foreign company chooses to form a joint venture with local partners in the case that the company sells the products in the local market because the local partner is more familiar with the local market. In the case of exporting 100% of the products, does a foreign company have to form a joint venture with a local partner since the local companies in the same sector are not at risk of losing their domestic market share?

Forcing foreign companies to form a joint venture with Myanmar nationals can reduce the incentive for foreign companies to invest in Myanmar. It can be beneficial for domestic companies in Myanmar as they can be free from tough competition. However, it can result in perpetuating the inefficiencies of such domestic companies and can suppress support for upgrading the industrial infrastructure in Myanmar. The rules to protect domestic industries should be time-limited, or could be more effective by offering higher incentives to foreign companies that cooperate in upgrading domestic industries by forming a joint venture with Myanmar nationals, instead of forcing foreign companies to form a joint venture with Myanmar nationals.

7. Other Significant Points

7.1 Numerical target for employing Myanmar nationals

One of the outstanding features of the new investment law is the point that sets the numerical target for employing Myanmar's skilled workers, technicians, and staff for skilled work as 25% in the first two years, and 50% for the next five years, and 75% for the next two years, of the total numbers employed (Article 24). The old law just

stipulated that in appointing personnel, preference should be given to Myanmar nationals (Article 20). In addition, the new foreign investment law forces foreign companies to employ only Myanmar people for work where skill is not required (Article 24).

Usually, the labor-related articles in the investment laws in other countries stipulate the maximum percentage of foreign workers and the conditions according to which the foreign companies are permitted to employ foreign employees. For example, the maximum percentage of foreign manpower is stipulated to be 10% out of the total manpower for office workers (3%), skilled employees (6%), and unskilled employees (1%).[11] The investment law in Cambodia provides the conditions that if qualifications and expertise are not available in Cambodia among Cambodian nationals the foreign companies have to submit appropriate documentation, such as a certificate and/or degree, and a curriculum vitae, and a letter asserting the need to hire foreign employees (Article 18 of the investment law in Cambodia). A foreign employer/employee is required to have a legal work permit, a valid passport, and a valid residency permit (Article 261 of the Labor Law in Cambodia issued on March 13, 1997).

In Lao PDR, companies are allowed to employ foreign employees as a group and the percentage of foreign skilled employees and foreign employees with intellectual expertise are stipulated as not more than 10% and 20% respectively of the total number of employees and subject to necessity. The companies are also required to give priority to Lao nationals (Article 25 of the labour law issued on December 27, 2006).

In this way, it is normal to have a numerical limit or target percentage of foreign employees. The new foreign investment law in Myanmar states the percentage target for Myanmar nationals instead of the foreign employees and restricts the number or denominator to skilled workers, technicians, and staff for skilled work, while the number or denominator in Cambodia and Lao PDR is the total manpower. Thus, it is impossible to conclude which country is the most restrictive in employing foreign employees. In other words, Myanmar can be both more restrictive and less restrictive than Cambodia or Lao PDR.

7.2 Orientation for environmental protection

Reviewing the sections written so far, the orientation for environmental protection is very clear in the new foreign investment law. In the procedure of an investment application the MIC requests the Ministry of Environmental Protection and Forestry to

[11] "Prakas on Employment of Foreign Manpower," issued by the Ministry of Social Affairs, Labour, and Veteran's Affairs, No. 185/PRK/MOSALVA, at Phnom Penh on May 30, 1997.

give comments and remarks. This ministry is the only ministry specified in the application procedure. Also in the Negative list, the “Economic activities that require environmental impact assessment” are specified as a sub-list. In the sub-list, “Exploration and production of minerals”, “Hydropower and other heavy electricity generation”, “Manufacturing of chemicals and insecticides”, “Manufacturing of batteries”, “Manufacturing of iron, steel, and minerals”, “Manufacturing of cement”, and “Production of petrochemicals” are stated. Furthermore, it should be noted that an investment in the 18 economic activities permitted with the recommendation of the relevant ministry also requires a recommendation by the Ministry of Environmental Conservation and Forestry. The procedures and sub-lists reviewed so far are a part of the governmental notifications.

The rules in the governmental notifications are based on the new foreign investment law. The law indicates the principles of environmental protection and energy conservation. For example, the basic principles in Article 8 in the new foreign investment law also states; (h) Exploration for a business that consumes less energy, (j) Exploration/production of new energy and for the discovery of resources of renewable energy such as bio-energy, (l) Preservation of the environment, and r) Long-term or short-term efficiency of local consumption of national energy and resources. Actually, these principles cannot be found in the old law. On the other hand, Article 4 in the new law states, as restricted or prohibited businesses, industries that may damage public health, the environment, and the ecosystem, as well as factories that produce or use any harmful chemicals prescribed in the relevant international agreements. Article 12 of the new law stipulates that scrutinizing a proposal in accordance with the basic principles in Chapter 4, including Article 8, financial credibility, feasibility of the business, as well as preservation of the environment, are duties of the MIC. On the other hand, the expression, “Preservation of the environment” cannot be found in Article 9 in the old law, which stipulates the responsibilities of the MIC. The clear procedures and sub-lists related to environmental protection reviewed in the previous paragraph are based on these principles.

As mentioned so far, protecting Myanmar nationals from unfavorable investment projects that threaten the environment and public health is an important MIC task. In fact, controversial investment projects have increased in number, especially in the CLM countries. However, multiple layers of screening, which may include duplication, can be seen as market-unfriendly by foreign investors, and should be streamlined as far as enough time is provided for a process of environmental and social impact assessment. It is more important to establish a system that avoids corruption of government officials

than a condition that approves an investment project that threatens the environment and public health. At the same time, it is also necessary to enhance the capacity of the government officials in the Ministry of Environmental Protection and Forestry not to overlook problematic investment projects.

7.3Attitude for securing resources

The new foreign investment law and relevant notifications show the clear policy of the Government of Myanmar to secure resources in the articles relating to the investigation and exploration of oil and gas and in the articles on the duties of investors to report the discovery of natural resources, minerals, or treasures found above or below ground on land granted a lease for such activities.

In the case of investing in oil, gas, and mineral exploration, the new foreign investment law of Myanmar requires adoption of the production sharing system (Article 44). Under this system, revenue from the commercial production of oil, gas, and minerals is divided between the investor and the government in accordance with the following rules if the feasibility study and exploration survey achieve commercial production. Firstly, the cost of exploration and the feasibility study is recovered by the investor from the production. The residual of the production is divided by the investor and the government with the specific share according to the law. Secondly, the cost is borne by the investor if the exploration and feasibility study fail to achieve commercial production.[12] Thirdly, the right to conduct a feasibility study, exploration survey, and development of an oil/gas field belongs to the government. In the case of Indonesia before 2003, as shown in Figure 2, the profit was divided among the national treasury, Pertamina (the State Oil and Natural Gas Mining Company), and the foreign oil companies in a ratio of 71.5:14.9:13.5 (Sato 2008: 118-120).

On the other hand, investment in minerals, electricity power generation, and telecommunications follows the concession system in Lao PDR (Article 15). According to the concession system, the investors are authorized to utilize the ownership and other rights of the government for a specific period and the investors are required to pay a royalty and some kinds of tax.

In the case that treasures, natural resources, ancient heritages, or minerals discovered above or below ground on the land granted a lease and use, the investors have a duty to report any discovery to the MIC within 24 hours. If the MIC allows the investor to continue business on the land, the investor may continue. On the other hand, if the MIC does not allow, the investor may propose to the MIC to relocate to other places and

[12] Website of INPEX.

continue the business at the relocated place (Article 17 of the new foreign investment law and Article 121 of the sub-clauses).

As for the production sharing system, the profit share is determined by negotiation between the government of Myanmar and the foreign investor on a market-basis. Regarding the cases of discovery of natural resources or treasures, the investor should be compensated appropriately if the investor is forced to replace the land. As far as the law and the notifications are concerned, such clauses cannot be found. However, the intention to secure natural resources discovered in the territory of Myanmar should be understood.

8. Concluding Remarks

Now let us review the evaluations. Firstly, we would like to focus on the improvements in the new foreign investment law including the related notifications.

To begin with, democratization is reflected in the new foreign investment law, as the organization that the MIC is responsible to has changed from the government to the parliament. This change, however, does not necessarily enhance the market-friendliness of the new law. On the contrary, the policy of the MIC might become easily influenced by domestic businessmen who are against attracting foreign investment. Regarding the financial aspects, the options of banks and insurance companies has expanded whereas formerly investors were forced to choose the State bank and the Myanmar Insurance Corporation. A more important point is that investors do not necessarily have use the official exchange rate (around 5-6 Kyat per US dollar while the market rate is around 1,000 kyat per US dollar) for remittances. These improvements have enhanced market-friendliness. Concerning corporate income tax exemption, the extension of the exemption period from three consecutive years to five consecutive years should be highly evaluated. Regarding the increase in screening levels to protect the environment and public health, it should be highly evaluated given the background where problematic investment projects that threaten the environment and public health have been increasing in the CLM countries, including Myanmar.

Next we would like to focus on whether the new investment law is market-friendly or not. First, regarding the days taken from submission of an application to approval, there is much room for improvement. The multiple layers of scrutiny are far removed from the principle of a one-stop service. Including the prompt decision-making system of the MIC, the process should be streamlined by increasing the scrutinizing quality.

Concerning the financial aspects, there is also space for improvement about the obligation to open bank accounts in both a foreign currency and the Kyat, and about the obligation to effect various kinds of insurance. Regarding the corporate income tax exemption scheme and the target to employ Myanmar nationals, it is not easy to conclude whether they are more market-friendly than Cambodia and Lao PDR or not. On the other hand, the exemption of import tariff for capital goods at the initial stage and for intermediate goods and raw materials, it is necessary to clarify the scheme for the investors, similar to the scheme in Cambodia. As for the Negative lists, more industrial sectors are listed than I imagined. The foreign investors are forced to conclude a joint venture with Myanmar nationals in some sectors even if they export all the products. Many sectors listed in the negative list could reduce the incentives offered to foreign investors, and some of the activities listed could be time limited, in order to protect domestic industries. Regarding the possibility that an investor has to replace the land if natural resources, treasures, or ancient heritages are discovered above or below ground on the leased land, the relevant articles cannot be market-friendly without appropriate rules that allow compensation for the investor.

Finally, after reviewing all parts of the new investment law, I conclude that it is more like a series of amendments to the old foreign investment law, which was control-oriented, rather than a completely new law that is investment-promotion-oriented. The wording in the rule on corporate income tax exemption is almost the same between the old law and the new law except for the numbers. As shown in the appendix, the composition of the new and old foreign investment laws is not really so different. Foreign investors, however, should not be too pessimistic. Although the new law is an amendment of the old law and there is much room for improvement, the new version of the foreign investment law is an improvement and it is more market-friendly.

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Table 1

Days needed from application to issuing permits

Cambodia

1	for Conditional Registration Certificate	3 working days
2	for Final Registration Certificate	28 working days
	Total	31 working days

Lao PDR

1) Certificate for a branch of foreign legal entity	5 working days
2) Registration certificate for general investment	10 working days
3) Registration certificate for investment on negative list	13 working days
4) Registration certificate for a representative office	15 working days
5) Registration certificate for investment in SEZ or for concession	45 working days

Myanmar (based on the new investment law)

1	from submission to MIC until getting reply	15 days
2	days needed for issuance of investment permit	90 days
	Total	105 days

Source: Created by the author in accordance with Investment Law in Cambodia, Investment Promotion Law in Lao PDR and New Investment Law in Myanmar.

Table 2

Tax exemption period (years) by zone and level

	Level 1	Level 2	Level 3	Specific Promotion
Zone 1	10	6	4	15
Zone 2	6	4	2	10
Zone 3	4	2	1	3

Notes: 1) Profit tax exemption commences from the first commercial operational date.
2) For the manufacturing of new products, and research and development of new technology activities, the profit tax exemption commences from the first profit-making year.
3) In case of investments in specific promotion, the lease or concession fees are exempted and additional five years corporate income tax period is given.

Source: Article 49 – 51 and Article 54 of investment promotion law of Lao PDR.

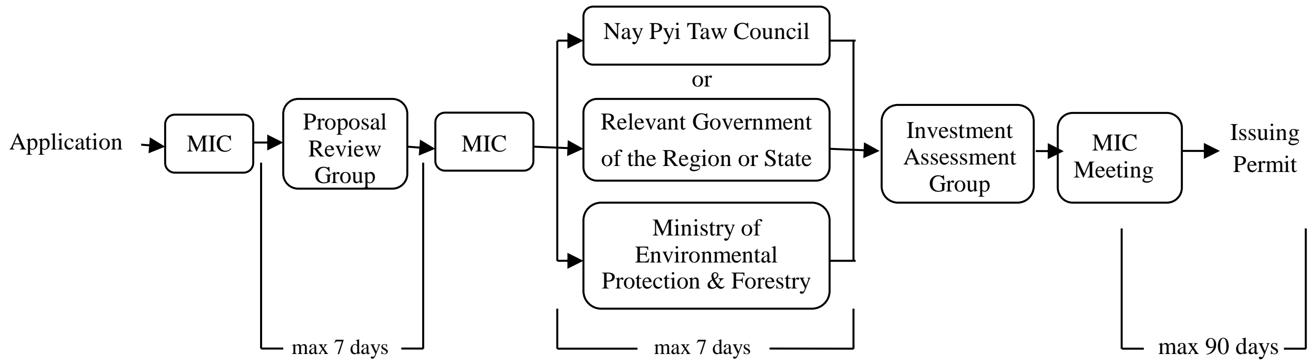
Table 3
Import tariff exemption rules by type of investors in Cambodia

	Production equipment	Construction materials	Raw materials	Intermediate goods	Production input accessories
Domestically oriented QIP	Yes	Yes[2)]	No	No	No
Export QIP	Yes	Yes	Yes	Yes	Yes
Supporting Industry QIP	Yes[3)]	Yes	Yes	Yes	Yes

Notes: 1) QIP is an abbreviation of qualified investment project which means an investment project received a final registration certificate.
2) It is mentioned as "production input construction materials" in Article 14.
3) It is mentioned as "import production equipment" in Article 14.
Source: Article 14 of the investment law.

Figure 1

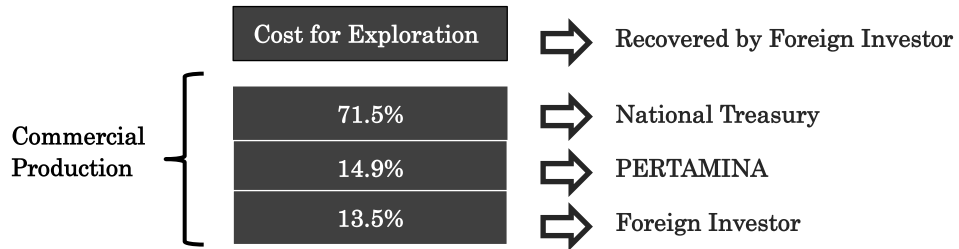
Procedure for investment proposals from application to permission



Source: Created by the author based on Sub-clauses of new foreign investment law.

Figure 2

Production sharing system: a case of Indonesia in the past



Source: Created by the author based on Sato (2008) and website of INPEX.

Appendix

A1. Outline of the new Foreign Investment Law

The new foreign investment law is composed of 20 chapters as shown below and the number of Articles is 57.

Chapter 1	Title and Definition
Chapter 2	Applicable Economic Businesses
Chapter 3	Objectives
Chapter 4	Basic Principles
Chapter 5	Forms of Investment
Chapter 6	Composition of the Commission
Chapter 7	Duties and Powers of the Commission
Chapter 8	Duties and the Rights of Investors
Chapter 9	Permit Application
Chapter 10	Insurance
Chapter 11	Employment of Staff and Workers
Chapter 12	Exemptions and Reliefs
Chapter 13	Guarantees
Chapter 14	Right of Land Use
Chapter 15	Foreign Capital
Chapter 16	Rights on Remittance of Foreign Currency
Chapter 17	Matters Relating to Foreign Currency
Chapter 18	Administrative Penalties
Chapter 19	Settlement of Disputes
Chapter 20	General Provisions

The "Title and definition" in Chapter 1 introduces the name of the law, "Foreign Investment Law," (Article 1) and explains the meaning of the major terms contained in the law (Article 2). The "Applicable economic businesses" in Chapter 2 makes clear that this law applies to the prior approval of an investment (Article 3), and lists the restricted and prohibited business ("Negative list") in Article 4.

The "Objectives" in Chapter 3 states the objectives of the law; such as, the efficient utilization of natural resources, employment creation, human resource development, infrastructure development, and so on. The "Basic principles" in Chapter 4 state the business sectors that are permitted (Article 8). The "Types of investment" in Chapter 5

categorizes the types of foreign investment; such as, investment by 100% foreign capital, a joint-venture, and investment based on a specific contract (Article 9). In the case of a foreign investment, the minimum capital amount may be determined on a sector-wise basis (Article 10).

The "Composition of the commission" in Chapter 6 and the "Duties and powers of the commission" in Chapter 7 stipulate the composition, duties, and authority of the MIC. The "Duties and rights of investors" are stipulated in Chapter 8 and the application process for foreign investors is prescribed in Chapter 9, "Permit application". Regarding the duties of investors, several duties are stated; for example, investors have to comply with the relevant laws and rules and have to register the transfer if selling all or some of the shares (Article 17). As regards the rights of investors, the investors have the right to reduce the assessed capital subject to approval by the MIC, increase the investment, and apply for more benefits, including an extension of the tax exemption period subject to suitable reasons (Article 18). The "Insurance" in Chapter 10 states the requirement for an investor to effect insurance as authorized by the State (Article 23). The "Employment of staff and workers" in Chapter 11 states the duties of foreign investors about employing staff and workers in Myanmar.

Chapter 12 stipulates the rules on exemptions and relief of corporate income tax and import tariffs. The tax exemption period for corporate income tax is stipulated as five years and the exemption period can be extended if the investment project is beneficial for the State (Article 27). The guarantee in Chapter 13 declares that the government shall not nationalize or terminate the invested project during the permitted term. Chapter 14 contains articles regarding land use. The land use period is 50 years and an extension for ten years is allowed twice according to Article 31 and Article 32. In Chapters 15 to 17, the rules on foreign capital and foreign currency are stated. Chapter 15, "Foreign capital" prescribes that the MIC shall register the foreign capital in the name of the investor in the types of foreign currency (Article 37) and the investor may withdraw the same amount as the registered capital if the business terminates (Article 38). Chapter 16, "Rights for remittance of foreign currency," lists the cases that remittance in the relevant foreign currency is allowed; the foreign currency that the investor was entitled to bring in, the foreign currency permitted by the MIC for the case of a withdrawal, the net profits after paying and deducting taxes and salary, and lawful income of foreign staff after paying and deducting taxes (Article 39). Chapter 17, "Matters relating to foreign currency", stipulates that the investor and the foreign staff shall open a foreign currency account in both foreign currency and in Kyat at any bank authorized to conduct foreign banking business in Myanmar.

Chapter 19 and Chapter 20 prescribe the "Administrative penalties" and "Settlement of disputes", respectively. Regarding the administrative penalties, the MIC shall impose a penalty or penalties on investors who violate the laws and regulations including this law by issuing a warning, imposing a temporary suspension of the relevant tax incentives, revoking the Permit, or black-listing (Article 42). Regarding the "Settlement of disputes", this refers to disputes arising from investment matters that shall be settled amicably between the parties concerned, and shall be settled in accordance with the existing law in Myanmar, or the provisions of the contract, if the parties fail to settle (Article 43).

The general provisions in Chapter 20 are composed of 14 Articles and cover the rules on investment for oil, gas, and mineral exploration and production, the relationship with the rules according to the old law, administrative procedures, and so on. Firstly, regarding investment for oil, gas and mineral exploration and production, such investments shall be implemented in accordance with the production sharing basis between the investor and the government (Article 40). Secondly, for the relationship with the old investment law (the State Law and Order Restoration Council (SLORC) Law No. 10/1988), the new law declares that the old law shall be repealed by the new law (Article 57). However, investors approved according to the old law, shall be deemed as investors approved according to the new law (Article 45) and shall continue business and enjoy the relevant new benefits (Article 52). For any rules and procedures that have not yet been enacted and if not contrary to the new law, such procedures shall continue in compliance with the old law. Thirdly, regarding the administrative procedure, the MIC shall hold meetings in the manner prescribed (Article 48) and the decisions of the MIC made according to the powers conferred by the new law shall be final and conclusive (Article 49). On the other hand, the organizations that handle the office work for the MIC and bear the expenses of the MIC are the Ministry of National Planning and Economic Development or any other organization specified accordingly. As for other matters, in the case of any inconsistency with international treaties ratified by the Republic of the Union of Myanmar, they shall comply with the agreements in such international treaties.

A2. Compared with the composition of the old Foreign Investment Law

The composition of the foreign investment law in 1988 is shown as below. Most of the chapters are covered by the new investment law and a chapter in parenthesis means a chapter in the new investment law that coincides with a chapter in old law as follows:

Chapter I	Title and Definition (Chapter 1)
Chapter II	Applicable Economic *Activities* (Chapter 2)
Chapter III	Basic Principles (Chapter 4)
Chapter IV	Form of *Organization* (Chapter 5)
Chapter V	*Composition* of *the* Commission (Chapter 6)
Chapter VI	Duties and Powers of the Commission (Chapter 7)
Chapter VII	Contracts
Chapter VIII	Insurance (Chapter 19)
Chapter IX	*Appointment of Personnel* (Chapter 11)
Chapter X	Exemptions and Reliefs (Chapter 12)
Chapter XI	Guarantees (Chapter 13)
Chapter XII	Foreign Capital (Chapter 15)
Chapter XIII	Rights *to Transfer* Foreign Currency (Chapter 16)
Chapter XIV	Matters Relating to Foreign Currency (Chapter 17)
Chapter XV	General Provisions (Chapter 20)

The italicized characters mean an expression that is different from that in the new investment law in English, while the substantial meaning is the same. In addition, there are possibilities that the translated text may be different, but the same text and meaning in Burmese is the same.

As shown above, the old foreign investment law and the new law have the same structure that makes clear the possible business options as basic principles, the types of foreign companies, such as fully owned by foreign capital, or a joint venture, and the format of an organization (investment), and the establishment of the MIC and its duties and powers, including issuing approvals for proposals submitted by foreign investors, and the rules on employment of staff and workers (appointment of personnel), the relevant tax exemptions and reliefs, the registering and termination of foreign capital and remittances, and the general provisions are prescribed. Both laws also stipulate the duties of foreign companies to effect insurance and the guarantee that foreign investment projects shall not be nationalized.

However, compared with the list of chapters in the new investment law, there are no "Objectives" in Chapter 3, "Duties and the rights of investors" in Chapter 8, "Right of land use" in Chapter 14, "Administrative penalties" in Chapter 18, and "Settlement of disputes" in Chapter 19 (see section A1 for details). On the other hand, there are no chapters on "Contracts" in the new law. However, a foreign investment based on a contract is allowed as a form of investment in the new foreign investment law (Article

9).

A3. Comparison with the Investment Law in Cambodia

In Cambodia, the Law on Investment in the Kingdom of Cambodia was passed by the National Assembly on August 4, 1994 (CDC/CIB 2010: 6). The Law on the Amendment of the Law on Investment was adopted by the National Assembly on February 3, 2003 (CDC/CIB 2010: 6). Both the original law and the amended law are composed of nine Chapters and 27 Articles as follows:

Chapter I	General Provisions
Chapter II	The Council for the Development of Cambodia
Chapter III	Investment Procedures
Chapter IV	Investment Guarantees
Chapter V	Investment Incentives
Chapter VI	Land Ownership and Use
Chapter VII	Employment Practices
Chapter VIII	Disputes and Dissolution
Chapter IX	Final Provisions

Seeing the composition of the chapters in the Cambodian investment law, the equivalent chapters as in the Cambodian law can be found in the composition of the new investment law of Myanmar. More concretely,

1) "General provisions" in Ch. I and "Title and definition" in Ch. 1.
2) "The Council for the Development of Cambodia" in Ch. II and "Composition of the Commission" in Ch. 6.
3) "Investment procedures" in Ch. III and "Permit application" in Ch. 9.
4) "Investment guarantees" in Ch. IV and "Guarantees" in Ch. 13.
5) "Investment incentives" in Ch. V and "Exemptions and reliefs" in Ch. 12.
6) "Land ownership" in Ch. VI and "Right of land use" in Ch. 14.
7) "Employment practices" in Ch. VII and "Employment of staff and workers" in Ch. 11.
8) "Disputes and Dissolution" in Ch. VIII and "Settlement of Disputes" in Ch. 19.
9) "Final provisions" in Ch. IX and "General provisions" in Ch. 20.

are equivalent to each other. However, the general provisions in the new investment law

in Myanmar contain more matters.

As for an "Applicable economic business" in Chapter 2 of the new foreign investment law of Myanmar, the restricted and prohibited businesses in Article 4 are comparable to the Negative list in Article 6.1 of the Sub-decree on the implementation of the amendment to the law on investment in the Kingdom of Cambodia, No. 111 ANK/BK dated on September 27, 2005 (called the "sub-decree on the amendment"). The "Form of investment" in Chapter 5, Article 9 classifies the form of investment into three types; a company with 100% foreign capital, a joint venture between a foreigner and a national citizen, and a company based on a contract. This is almost the same as Article 8 in Part II of the investment promotion law of Lao PDR. However, according to the Cambodian investment-related laws, the forms of investment are divided into two; a Cambodian entity with 51% or more of the shares of the company held by a person with Cambodian nationality (Article 2), and a foreign legal entity, which is not a Cambodian entity (the Cambodian share is 49% or less than 49%), or is not created in compliance with Cambodian law (Article 3 of the Sub-decree on the amendment), while Article 13 in the sub-decree defines the joint ventures. About the "Duties and powers of the Commission" in Chapter 7, the role and responsibility of the Council for the Development of Cambodia (CDC) is not included in the investment law, but in the Sub-decree on the organization and functioning of the Council for the development of Cambodia (called the "sub-decree on the CDC").[13]

"Foreign capital" in Chapter 15, is divided into the duties of the MIC to register the foreign capital and the rights of investors to withdraw the same amount of foreign capital as registered in the case of termination of the business; the former is contained in Article 7 of Chapter III, "Investment procedures" and the latter is stipulated in Article 23 under Chapter VIII, "Disputes and dissolution" in the Cambodian investment law. Concerning the "Remittance of foreign currency" in Chapter 16 (Myanmar), Article 11 of Chapter IV, "Investment guarantees" and Article 19 of Chapter VII, "Employment practices" (Cambodia) allow investors and foreign employees to remit money abroad, respectively. Regarding the "Administrative penalties" in Chapter 18, the penalties are mentioned in the respective articles.

As for the "Objectives" in Chapter 3, the objectives are a matter of course, but are not stipulated in the investment law in Cambodia. Regarding the "Basic principles" in Chapter 4 of the new investment law, promoted businesses as shown in the basic principles in Chapter 4 cannot be found in the Cambodian investment law, while the

[13] The CDC is composed of the Cambodian Rehabilitation and Development Board (CRDB), the Cambodian Investment Board (CIB), the Cambodian Special Economic Zones Board (CSEZB), and the General Secretariat of the CDC. Among these, the CIB is equivalent to the Foreign Investment Commission (MIC).

length of the priority period for corporate income tax exemption is stated as determined according to the financial management law (Article 15.4 of the Sub-decree on the amendment). Concerning matters relating to foreign currency in Chapter 17, the duties of investors and foreign employees to open accounts in both foreign currency and the local currency are not stipulated in the investment law of Cambodia.

A4. Comparison with the composition of the Investment Promotion Law of Lao PDR

In Lao PDR, the Law on Promotion and Management of Foreign Investment was enacted on April 19, 1988. The management (control-orientation) was more emphasized than the promotion-orientation in the law. The law was amended by the Law on Promotion and Management of Foreign Investment by the National Assembly on March 14, 1994. At this stage, a feeling of fear against foreign investment was still felt. With the adoption of the Law on Promotion of Foreign Investment by the National Assembly on October 22, 2004, the word “Management” disappeared from the title with the background that Lao PDR had to make efforts for regional economic integration as a member of the Association of Southeast Asian Nations (ASEAN). In preparation for membership of the World Trade Organization (WTO), the law on investment had to comply with the principles of equal treatment of domestic and foreign companies; then the Law on Investment Promotion (called the “Investment promotion law”) was enacted by the National Assembly on July 8, 2009, after unifying foreign and domestic investment (Suzuki 2010).

The investment promotion law in Lao PDR is composed of 11 Parts and 99 Articles. Part III, Part IV, and Part IX are composed of seven chapters, three chapters, and three chapters, respectively.

Part I General Provisions
Part II Investment Forms
Part III Investment Activities
  Chapter 1 Types of Investment
  Chapter 2 Investment in General Business
  Chapter 3 Investment in Concession Business
  Chapter 4 Investment in the Projects or Activities Listing in Investment Calling List
  Chapter 5 Investment in the Special Economic Zones and Specific Economic Zones

Chapter 6 One-Stop-Services for Investment
Chapter 7 Representative Office and Branch
Part IV Promotion and Protection of Investment
Chapter 1 Customs Duty and Tax Incentive
Chapter 2 Other Incentives Applicable for Investment Promotion
Chapter 3 Protection of Investment
Part V Rights and Obligations of Investors
Part VI Prohibitions
Part VII Suspension, Change, Cancellation, and Termination of an Investment
Part VIII Dispute Resolution
Part IX Management and Inspection
Chapter 1 Management
Chapter 2 Management Authorities
Chapter 3 Inspection
Part X Awards for Good Performance and Sanctions against Violations
Part XI Final Provisions

As shown in the composition, the number of articles in the investment promotion law of Lao PDR is the largest of the three countries in this study. Firstly, it covers not only the process of application and approval, but also the concessions, the special and specific economic zones, and the representative offices and branches. For example, the rules on these matters are separate in Cambodia, such as the law on concessions and sub-decrees for the special economic zones. Secondly, decentralization has progressed in Lao PDR and the rights and duties at central government level, provincial government level, district government level, or municipality government level, and the commissions for the special economic zones or specific economic zones are stipulated as "Management" in Chapter 1 and "Management authorities" in Chapter 2, Part IX. In Cambodia, the "Anukret (sub-decree) on the establishment of a sub-committee on investment in the provinces-municipalities of the Kingdom of Cambodia" (No. 17 ANK/BK) dated on February 9, 2005, prescribes the decentralization of the function of the CDC to the provincial and municipality levels. In Myanmar, on the other hand, a function of adjustment between the MIC and provinces has just now been provided in Article 12. Thirdly, the rules on suspension, change, cancellation, and termination of an investment are stated in more detail in the investment promotion law in Lao PDR. Fourthly, the "Awards for good performance and sanctions against violations" covers broader aspects compared with the "Administrative penalties" in Chapter 18 of the new foreign

investment law in Myanmar.

Comparing the composition between the investment promotion law of Lao PDR and the new foreign investment law of Myanmar, equivalent relationships between the former and the latter can be seen as follows:

1) “General provisions” in Part I and “Title and definition” in Ch. 1.
2) “Investment forms” in Part II and “Form of investment” in Ch. 5.
3) “Investment in general business” in Ch. 2, Part III and “Permit application” in Ch. 9.
4) “Customs duty and tax incentives” in Ch. 1, Part IV and the “Exemptions and reliefs” in Ch. 12.
5) “Protection of an investment” in Ch. 3, Part IV and “Guarantees” in Ch. 13.
6) “Rights and obligation of investors” in Part V and “Duties and rights of investors” in Ch. 8.
7) “Dispute resolutions” in Part VIII and “Settlement of disputes” in Ch. 19.
8) “Inspection” in Ch. 3, Part IX, and “Management Authorities” in Ch. 2 and “Composition of the commission” in Ch. 6 and “Duties and rights of investors” in Ch. 7.
9) “Final provisions” in Part XI and “General provisions” in Ch. 20.

However, the general provisions in the new foreign investment law in Myanmar contain more details.

The promoted sectors as shown in the “Basic principles” in Chapter 4 of the new foreign investment law in Myanmar are not listed in Lao PDR law. Instead, “Investment in the projects or activities listed in investment promotion list” in Chapter 4, Part III stipulates that the government shall compile an investment promotion list. Regarding the “Right of land use” in Chapter 14 of the new foreign investment law of Myanmar, it is not mentioned in Lao PDR law in detail that prescribes that “Foreign investors with a registered capital of US$500,000 or more are entitled to purchase land use rights” (Article 58 “Other incentives applying for investment promotion” in Chapter 2, Part IV). Concerning the “Rights on remittance of foreign currency” in Chapter 16 of the new foreign investment law of Myanmar, the rule on remittance is prescribed in Article 68 “Rights and obligations of investors” in Part V. About “Employment of staff and workers” in Chapter 11, Article 66 stipulates the rights of investors to hire labor in the investment promotion law in Lao PDR.

The Negative list as shown in the “Applicable economic business” in Chapter 2,

“Insurance” in Chapter 10, and “Matters relating to foreign currency” in Chapter 17, are not found in the investment promotion law of Lao PDR. The assets of a joint venture company also required to be insured based on the agreement of both parties in Article 9 of the Law on Promotion and Management of Investment of 1988. The duties of investors to open accounts in Kip or a foreign currency were stipulated in Article 17 of the Law on Promotion and Management of Investment of 1988 and in Article 13 of the law of 1994. In Myanmar, investors and foreign workers are also still requested to open accounts in both Kyat and a foreign currency in the new foreign investment law (Article 41 of the new foreign investment law of Myanmar).