

MYANMAR

THE INVESTMENT LAW OF [2015]

CONSOLIDATING AND REPLACING

The Myanmar Citizens Investment Law, Pyidaungsu
Htluttaw Law No. 18 of 29 July 2013

and

The Foreign Investment Law, Pyidaungsu Htluttaw Law
No. 21, 2012, 2 November 2012

and associated regulation.

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THE INVESTMENT LAW OF 2015

PREAMBLE

Whereas a vibrant private sector supported by direct investment is critical to the economic development of the Republic of the Union of Myanmar;

Recognizing that the economic and social development objectives of the people of the Republic of the Union of Myanmar shall be achieved by a favorable investment environment that will guarantee security and protection of lives and property and will manifest the Government of the Republic of the Union of Myanmar's commitment to policies and regulatory mechanisms necessary for promoting good governance, transparency, accountability, respect for the sanctity of contractual obligations and the desire to attract responsible investment;

Being cognizant that the Myanmar Citizens Investment Law, Pyidaungsu Htluttaw Law No. 18 of 29 July 2013, and the Foreign Investment Law, Pyidaungsu Htluttaw Law No. 21, 2012 have been valuable instruments in stimulating private investment while realizing the necessity to consolidate them to ensure consistency with best practice in the ASEAN region and as a sign of the commitment of the Republic of the Union of Myanmar to the establishment of the ASEAN Economic Community; and

Further realizing the need to enact a consolidated law to enhance the economic development of the Republic of the Union of Myanmar and to encourage private enterprise through a transparent, equitable and non-discriminatory legal framework for investment.

NOW THEREFORE, IT IS HEREBY ENACTED:

PART I: PRELIMINARY PROVISIONS

Section 1: Short Title

This Law shall be known as the “Investment Law of The Republic of the Union of Myanmar”

Section 2: Definition

In this Law unless the context otherwise requires:

“Commission” means the Myanmar Investment Commission (MIC);

"Enterprise" means any juridical person constituted or organized under the law of the Union, whether or not for profit, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

“Direct Investment” means Investment that is made to acquire a lasting interest in a newly formed or pre-existing Enterprise operating in the economy of the Union and intended to give the Investor effective control in, or significant influence over, the management of said Enterprise.

“Domestic Investment” shall be any Direct Investment made within the Union by a Domestic Investor;

“Domestic Investor” means:-

- (a) a natural person who is a citizen or permanent resident of the Union; or
 - (b) a juridical person duly organized under the laws of the Union which is not defined as a “foreign company” under the Companies Act of Myanmar;
- who or which makes a Direct Investment in the Union;

“Foreign Investment” shall be any Direct Investment made in the Union by any Foreign Investor;

“Foreign Investor” means--

- (a) a natural person who is not a citizen or permanent resident of the Union; or
- (b) a juridical person duly organised under the laws of a foreign jurisdiction; or
- (c) a juridical person duly organised under the law of the Union and is defined as a “foreign company” under the Companies Act of Myanmar;

who or which makes an Investment in the Union;

“Freely Usable Currency” means a freely usable currency as determined by the International Monetary Fund (“IMF”) under its Articles of Agreement and any amendments thereto;

“Government Entities” means:-

(a) the Union Government, or any State Government, Regional Government or Local Authority; and

(b) any ministry, department, office, agency, authority, commission, committee, board, council or other body, incorporated or unincorporated, of the Union Government, or of any State Government, Regional Government or Local Authority, whether established under written law or otherwise;

“Incentives” means the provisions that are available under the Laws of the Union to encourage investment and confer a fiscal or non-fiscal advantage to a particular investment. Legal guarantees as provided under Parts IV and VI of this Law are not considered “Incentives” but core investor guarantees that do not require any form of approval;

“Incentive Certificate” means a certificate issued by the Commission to a specific Investor and conferring certain fiscal or non-fiscal privileges to the Investor, when such incentives are not granted automatically under the Laws of the Union;

“Investment” means every asset that an Investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an Investment may take include:

(a) an Enterprise;

(b) movable and immovable property and other property rights, cash, mortgages, liens or pledges, machinery, equipment, components, spare parts and instruments;

(c) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interests derived therefrom;

- (d) industrial property including but not limited to technical know-how, patent, industrial design, trademark, copyright, any rights deriving from industrial property or any derivatives thereof;
- (e) claims to money or to any contractual performance related to a business and having financial value;
- (f) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and
- (g) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.

“Investor” includes a Domestic Investor or Foreign Investor that is making or has made a Direct Investment in the Union;

“Measure” means any measure whether in the form of laws, regulations, rules, procedures, decisions and administrative actions or practice, adopted or maintained by the Union Government, State Government, Regional Government or Local Authorities or non-governmental bodies in the exercise of powers delegated by the Union Government, State Government, Regional Government or Local Authorities;

“Member” means a member of the Commission;

“MIC Approval” means an approval issued by the Commission for an Investor to carry out an investment in specific activities that require such an approval; the list of activities subject to prior MIC Approval will be provided in implementing regulations;

“President” means the President of the Republic of the Union of Myanmar;

“Secretary” means the Secretary of the Commission appointed under section 7 of the Law.

“Union” means the Republic of the Union of Myanmar;

“Union Government” means the Union Government of the Republic of the Union of Myanmar.

Section 3: Objective of the Law

(1) The objective of the Law is to promote environmentally and socially sustainable economic growth and diversification of the productive sector of the Union, providing Investors, domestic and foreign, with a set of fundamental and enforceable legal rights and guarantees to ensure that the Investors and their Investments are protected and treated with transparency, fairness and in strict accordance with the rule of law and accepted international standards and practice.

Section 4: Application of the Law

(1) This Law shall apply to any existing or new Direct Investment in the territory of the Union at the date of its entry into force. However, this Law will not apply to any pending dispute or fact that took place or to any situation that ceased to exist before the date of entry into force of this Law

(2) This Law applies to any measure adopted or maintained by the Union Government and Government Entities after the entry into force of this Law.

Part II: THE MYANMAR INVESTMENT COMMISSION

Section 5: Establishment

(1) A commission with the name of the “Myanmar Investment Commission” is hereby established.

(2) The Commission shall be an autonomous organ of the Union Government with perpetual succession.

(3) The Union Government will provide an annual financial grant for Commission to meet its expenditure requirement.

(4) Subject to and for the purposes of this Law, the Commission shall be capable in its name of:

- (a) entering into contracts;
- (b) suing and being sued;

(c) acquiring, purchasing, or otherwise holding, enjoying and disposing of movable and immovable property; and

(d) doing or performing all such other acts necessary for proper performance of its functions under this Law.

Section 6: Composition and Membership

(1) The Commission shall consist of the following Members:

(a) a Chairman who shall be appointed by the President;

(b) not more than [] other Members who shall be appointed by the President and of whom not more than [] shall represent the private sector; and

(c) the Secretary who shall be appointed by the President upon recommendation of the Chairman, for a mandate of [] years, renewable.

(2) Subject to such terms as may be specified in the instrument of appointment, a Member shall, unless he sooner resigns or vacates his office or his appointment is sooner revoked, hold office for a term not exceeding three years and is eligible for reappointment.

(3) The President may at any time revoke the appointment of any Member appointed without assigning any reason.

(4) A Member appointed may at any time resign from his office by a written notice to the President.

(5) The President may appoint any Member to exercise the functions of the Chairman during any period the Chairman is for any reason unable to perform his functions or during any period of vacancy in the office of the Chairman and such Member shall, during the period in which he is performing the functions of the Chairman under this subsection, be deemed to be the Chairman.

(6) Until an appointment under subsection (5) is made or in default of such appointment or in the absence of the Chairman from any meeting of the Commission, the Secretary shall perform the functions of and be deemed to be the Chairman of the Commission.

(7) The Secretary shall be responsible for the day-to-day administration and management of the functions and affairs of the Commission.

Section 7: Mandate, Functions and Powers of the Commission

(1) The mandate and functions of the Commission are:

- (a) to act as an investment promotion agency for the Union;
- (b) to provide investment facilitation to Investors and their Investments including acting as the main reference agency for investors and other parties interested in investment in the Union;
- (c) to advise the President and/or the Union Government on investment policies including:
 - (i) policies on the list of sensitive sectors where restrictions to invest are maintained (as provided for in Section 9 of the Law);
 - (ii) the definition of criteria and procedures for access to those of the incentives that are not granted automatically under the laws of the Union; and
 - (iii) any requirements for, or expectations of, responsible business conduct by investors.
- (d) To issue policy guidance or recommendations to officers of the Commission;
- (e) To manage and administer financial affairs of the Commission, including allocation from the Union Government and annual budget of the Commission; and
- (f) To establish and manage a mechanism to systematically track, respond and try to address enquiries and grievances related to the effective implementation of this Law before they escalate to legal disputes.

(2) It is the obligation of the Commission to report periodically to the President and Pyidaunhgsu Hluttaw on the progress and issues of investment in the Union.

(3) The Commission shall have the following powers in order to perform its functions:

- (a) To conduct an annual review to propose to Union Government the elimination of any additional sector from the “Negative List” based on the principle of “progressive liberalisation” in which investment restrictions are maintained, as provided in Section 9 of the Law;
- (b) When such incentives are not granted automatically under the laws of the Union, to advise the Government on the criteria and procedures for the granting of incentives to Investors;

- (c) To require all relevant Government Entities to give such assistance and submit such information in their possession as may be required by the Commission in order for the Commission to carry out its functions under this Law;
- (d) To take any necessary measures to ensure the effective implementation of this Law; and
- (e) The Commission may, subject to such terms, limitations or restrictions as it deems fit to impose, delegate to the Chairman, the Secretary or to any other Member the power to exercise or perform on its behalf such powers or functions under this Law as it may determine, except the power to make rules, and any power or functions so exercised or performed by the Chairman or the Secretary or the Members, as the case may be, shall be deemed to have been exercised by and on behalf of the Commission.

PART III: ADMISSION OF INVESTMENTS

Section 8: Freedom to Invest and Investment Procedures

- (1) Any Investor may invest in any legitimate form of enterprise, in any economic sector within the Union, with the exception of the sectors covered in Section 9 and corresponding Schedules,
- (2) Investment into the economy of the Union is realized through the regular process of enterprise registration complemented in certain sectors by requirements to obtain licenses and permits.

Section 9: Restrictions to Invest in Sensitive Sectors

- (1) In application of its right to regulate Investment, pursue national policy objectives based on the principle of progressive liberalisation, the Union Government has identified a limited number of sectors and business activities where restrictions to invest are maintained.
- (2) There are four categories of restrictions to entry as follows:
 - (a) Sectors where both domestic and foreign investments are prohibited (State Monopolies);
 - (b) Sectors where foreign investment only is prohibited;

- (c) Sectors where foreign investment is allowed but only in partnership (joint venture) with an entity or citizen of the Union;
- (d) Sectors where domestic or foreign investment requires prior approval of the Commission.
- (3) Schedules for each of the four categories of restrictions in sub-section (2) will be provided for in the implementing regulations of the Investment Law.
- (4) It is the intention of the Union Government to reduce or remove the above restrictions to invest over time, as part of its commitment to economic openness.
- (5) The Commission is hereby mandated to conduct an annual review of the Schedules under sub-section (2) above in order to propose to the Union Government any changes to the lists. Once an Investment sector is liberalized, such liberalization may not be derogated.
- (6) In conducting the annual review according to sub-section (5) above, the Commission will consult any relevant public and private sector stakeholders it deems appropriate, and will take into account the commitments made by the Union Government under applicable international trade and investment agreements.
- (7) The Union Government may eliminate, on a non-discriminatory basis, sectors from any of the Schedules set forth in this article. Such decision will be made publicly available.
- (8) In sectors where Investors need to obtain prior approval from the Commission under sub-section 2(d), any Investor that has obtained such approval may only transfer the control of the Investment to another Investor with the express approval of the Commission.

PART IV: TREATMENT OF INVESTORS

Section 10: Non-Discrimination

- (1) Subject to the other specific provisions of this Law the Union Government is committed to providing non-discriminatory treatment to all Investors and their Investments, in particular:

(a) shall accord to Foreign Investors and their Investments treatment no less favorable than that it accords, in like circumstances, to Domestic Investors and their Direct Investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of Direct investments in its territory.

(b) shall accord same treatment, in like circumstances, to all Foreign investors and their Direct Investments treatment no less favorable than that it accords, in like circumstances, to investors of any other third country and their Direct Investments.

(c) Paragraph (b) above shall not be construed so as to oblige the Union to extend to foreign investors the benefit of any treatment, preference or privilege by virtue of:

(a) any customs union, free trade zone, economic union and any international agreement resulting in such customs union, free trade zone, economic union;

(b) any international agreement or arrangement relating wholly or mainly to taxation.

Section 11: Regulatory Transparency and Fair and Equitable Treatment

(1) The Union guarantees to all Investors fair and equitable treatment. Fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process.

(2) Fair and equitable treatment as stated in this sub-section shall include, but is not limited to:

(a) The right to obtain information on any action or decision which has an effect on any Investor and its Direct Investment;

(b) The right to due process and right to appeal including, but not limited to, any changes to the terms of approval, permission or license granted to by the Union Government to the Investors and their Direct Investments; and

(c) The due compliance of the Union Government and Government Entities with contracts, if any, that it may have entered into with any Investor.

(3) All laws, regulations, procedures, administrative rulings of general application and adjudicatory decisions respecting any matter covered by this Law are to be promptly published or otherwise made publicly available.

Section 13: Access to Land

(1) All Investors have the right to lease land either from private land-holders or from Government Entities in the case of State land, based on the category of usage including industrial, agricultural, livestock breeding and other forms of investment for a period to be agreed between the investor and the lessor. For Foreign Investors the right to lease land up to a maximum initial period of 50 years is guaranteed with an extension of 10 years and for a further 10 years thereafter.

(2) In the event of any conflict between the rights to lease of land granted under this Law and under the Transfer of Immovable Property Restriction Act of 1987, the provisions of this Law shall prevail.

(3) The Union Government may provide better terms and conditions of land use or lease term to Domestic Investors.

(4) Investors may mortgage the rights over the land and grant security over Investors' assets including rights and security over bank account, as security for lenders providing financing of Investments.

Section 14: Right to Employ

(1) Investors have the right to employ or engage qualified persons of any nationality to fill senior management, technical, professional and advisory positions in the investor's enterprise in the Union in accordance with the existing laws of the Union.

Section 15: Protection against Expropriation

(1) The Union Government shall neither expropriate nor nationalize nor impose any measures that are in effect tantamount to expropriation (otherwise known as indirect expropriation), of any investments except:

- (a) for a public purpose; and
- (b) in a non-discriminatory manner; and
- (c) against payment of prompt, fair, adequate and effective compensation; and
- (d) in accordance with due process of law.

(2) Expropriation shall not include non-discriminatory measures of general application which governments normally take for the purposes of regulating economic or social activity in their jurisdiction, including without limitation the measures enumerated in General Exception in Section 22.

(3) For a measure or series of measures to be indirect expropriation as in sub-section (1) above, there must be a case-by-case, fact-based inquiry that considers at least the following cumulative factors:

- (a) whether the action creates an adverse effect on the economic value of an Investment;
- (b) whether the action breaches the government's prior binding written commitment to the Investor (by contract, license, or other legal document); and
- (c) whether the government action, including its objective, is disproportionate to the public purpose.

Section 16: Transfer of Funds

- (1) Investors are allowed to remit amounts related to :-
- (a) capital, which is subject to Central Bank of Myanmar capital account rules;
 - (b) profits, capital gains, dividends, royalties, license fees, technical assistance and technical and management fees, interest and other current income in connection with any Investment under this Law;
 - (c) proceeds from the total or partial sale or liquidation of a business or property owned in connection with the business;
 - (d) payments made under a contract, including a loan agreement;

(e) awards resulting from any settlement of disputes in respect of a business enterprise;

(f) Compensation or other payments made pursuant to expropriation or nationalization; and

(g) earnings and other remuneration of expatriate personnel legally employed in the Union.

(2) All remittances shall be allowed, only after all tax obligations have been met.

(3) Expatriate personnel with legal work permits shall be permitted to make remittances abroad through commercial banks established in the Union, subject to such tax obligations as are contained in the income tax act, if applicable.

(4) Investors may:

(a) make transfers of items in sub-section (1) which are within the classification of current account under the Foreign Exchange Management Law of 2012 through commercial banks legally established in the Union, in freely usable currencies at the prevailing market rate of exchange, freely and without delay.

(b) make transfers of items in sub-section (1) which are within the classification of capital accounts under the Foreign Exchange Management Law of 2012 through commercial banks legally established in the Union, in freely usable currencies at the prevailing market rate of exchange, subject to the capital account rules issued under said Foreign Exchange Management Law of 2012.

(5) The Union Government may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and other written measures relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) criminal or penal offences and the recovery of the proceeds of crime;

(c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(d) ensuring compliance with orders or judgments in judicial or administrative proceedings;

(e) taxation;

(f) social security, public retirement, or compulsory savings schemes; and

(g) severance entitlements of employees.

(6) The Union Government shall allow the transfer of funds from abroad, including foreign loans, to the Investors and their Investments where such funds are used for the capital or expenditure of the Investors and their Investments within the Union.

(7) In the event of serious balance-of-payments and/or external financial difficulties or threat thereof, the Union Government may adopt or maintain restrictions on payments or transfers related to investments which are consistent with the Foreign Exchange Management Law of 2012 and the Union's other international obligations.

Section 17: Obligations of Investors

(1) All Investors shall fully abide by the Laws of the Union as well as with the terms and conditions of the special licenses, permits, and certificates issued to them, as the case may be.

(2) Investors shall immediately inform the Commission if natural mineral resources or antique objects and treasure trove, which are not related to the permitted business, are found above or under the land which the investor is entitled to lease or use.

(3) Investors shall ensure that books of account, annual accounts and related fiduciary and fiscal requirements are kept in proper and acceptable form.

(4) This Law does not create retroactive obligations or responsibilities for investors. Investors who are not in compliance with ongoing obligations and responsibilities shall seek to enter into compliance as soon as possible [and within 12 months] of the entry into force of this Law.

PART V: INVESTMENT INCENTIVES

Section 18: Availability of Incentives

- (1) The Government of the Union will define in the applicable laws and rules Incentives that are available to investors.
- (2) Until new laws on Incentives are adopted and published, the existing laws shall continue to apply.
- (3) Irrespective of the provision on National Treatment under Section 10, the Union Government may provide special and additional Incentives to domestic investors, including small and medium size-enterprises, through the provision of grants, financing, capacity building, training and other measures.

Section 19: Procedures to Access Incentives

- (1) In all cases where a given Incentive is not granted automatically under the Laws of Myanmar but require approval from a Government Entity, the Commission will be the competent authority to process and approve applications for such Incentives.
- (2) An application to receive a non-automatic Incentive, as provided under sub-section (1) above, shall not be treated as an application to undertake an Investment or, in the case of Foreign Investors, as an application to be admitted into the country.

PART VI: DISPUTE PREVENTION AND RESOLUTION

Section 20: Investment Grievance Mechanism

- (1) The Union Government shall establish and manage a mechanism to systematically track, respond and try to address enquiries and grievances related to the effective implementation of this Law before they escalate into legal disputes.
- (2) The purpose of the grievance mechanism is to prevent the occurrence of disputes by offering a mechanism for early detection of issues and grievances and their resolution before they can escalate into a dispute. As such the grievance mechanism is separate from and complements the dispute settlement mechanism provided for under Section 21 of this Act.

Section 21: Dispute Settlement Mechanism

(1) In the event of any dispute between the Union Government or any Government Entity and an Investor in relation to the Investor's Investment where the Investor has incurred loss or damage by reason of an alleged breach of any rights conferred by this Law with respect to the Investment of that Investor, the Investor shall have access to a dispute settlement mechanism, either domestic court or tribunal or arbitration or other procedures, under the existing laws of the Union or the relevant laws which will be enacted in due course.

(2) In the event of any dispute referred to in sub-section (1) above is between the Union Government or any Government Entity and a Foreign Investor the disputing Foreign Investor may submit a claim referred to in sub-section (1) above to:

- (a) domestic courts or administrative tribunals; or
- (b) Arbitration under relevant Myanmar law; or
- (c) Arbitration under the Rules of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules; or
- (d) Arbitration under the International Convention on the Settlement of Investment Disputes (ICSID) between States and Investors;

Provided that resort to any arbitration rules or fora under sub-section (2) shall exclude resort to the other.

(3) In any case arising from sub-section (1) above, the Union Government and the Government Entities are assumed to have given express advanced consent to court proceedings, arbitration or any other dispute settlement procedures.

(4) The disputing Parties, namely the disputing Investor and the Union Government shall initially seek to resolve the dispute through alternative dispute resolution mechanisms including mediation, consultation and negotiation, which may include the use of non-binding, third party procedures. Such consultations shall be initiated by a written request for consultations delivered by the disputing investor to the Union Government.

(5) In the event of any award made by a foreign arbitral tribunal, such award shall be recognized and enforceable in the Union according to international law, including the New York Convention on the Recognition of Foreign Arbitral Awards 1958.

PART VII: FINAL AND TRANSITIONAL PROVISIONS

Section 22: General Exceptions

(1) Nothing in this Law shall be construed to prevent the Union Government from adopting or maintaining reasonable non-discriminatory measures for prudential reasons, such as:-

- (a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
- (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
- (c) ensuring the integrity and stability of the Union's financial system.

(2) Nothing in this Law shall be construed to prevent the Union Government from taking any actions that it considers necessary for the protection of its essential security interests:

- (a) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment; and
- (b) taken in time of war or other emergency in international relations.

Section 23: International Agreements

(1) Any international agreement, whether bilateral, regional, or multilateral having been duly signed, approved and ratified by the Union Government shall prevail over any conflicting provisions in this Law and any other domestic legislation.

(2) Should provisions of the international treaties, to which the Union is a party, provide a more favorable treatment to Investors than the treatment provided by domestic legislation of the Union, the provisions of such international treaties shall prevail.

Section 24: Power to Make Rules and Regulations

(1) The Union Government has the power to make Rules and Regulations, including amendments to the Schedules referred to in this Law, as may be necessary to carry into effect the purposes and provisions of this Law.

Section 25: Repeals and Transitional Arrangements

(1) The Myanmar Citizens Investment Law, Pyidaungsu Htluttaw Law No. 18 of 29 July 2013, and the Foreign Investment Law, Pyidaungsu Htluttaw No. 21, 2012 are hereby repealed.

(2) Notwithstanding the repeal under sub-section (1) above, all rules and regulations made under the repealed Laws shall remain in force until new Rules and Regulations are made under this Law.

(3) Any investment approval granted by the Commission based on the Foreign Investment Law and/or the Citizens Investment Law shall remain effective until the expiration of their period of validity.