Issues in Myanmar Investment Law: Toward Better Policy Balancing

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Introduction:

Investment law has been given special importance by the government of Myanmar, which intends to catch up with the economic growth of neighboring ASEAN countries led by the constant inflow of foreign investment. The process of formation of the law in this area is, however, a continued struggle. The initial Foreign Investment Law (Law No.10/1988), promulgated soon after the 1988 coup d'état that deposed the Burmese socialist regime which ruled under the 1974 Constitution, together with the 1989 Notification No.1 on the implementation thereof and coupled with the Myanmar Citizen Investment Law (Law No. 4/1994), encouraged an investment boom from Japan in the mid-1990s. This initial investment boom declined when Myanmar's participation in ASEAN invited a critical political campaign in 1997, which triggered the tightening of economic sanctions by the US and the EU throughout the 2000s. After a decade of economic severance, an investment boom was revived upon the 2008 Constitution coming into force in January 2011, followed by a series of regulations, namely, the Foreign Investments Law (Law No.21/2012, hereinafter "2012 FIL"), Notification No.11/2013 as revised in 2014 (MIC Notification No.49/2014) as its implementation rule, and the Myanmar Citizens Investment Law (Law No.18/2013). To further encourage the inflow of foreign investment, the Framework of Economic & Social Reforms for the years 2012 through 2015 (hereinafter the "FESR") issued by the Ministry of Planning and Economic Development, under the auspice of the OECD (OECD 2006, OECD 2014), envisaged

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the drafting of a new investment law to integrate the management of foreign and domestic investments. Based on this Framework, the Myanmar Investment Commission (hereinafter the "MIC"), the organization in charge of formation and implementation of investment law and policy under the Ministry of Planning and Economic Development, publicized a draft Investment Law of 2015 (MIC/DICA-Draft-V.2/2015) for public comment during February and March 2015. However, the parliamentary submission of this draft was suspended and replaced with a draft amendment to the 2012 FIL in July 2015, which resulted in a minimal amendment in December 2015 (Law No.67/2015) as well as the revised notification on restricted areas in March 2016 (MIC Notification No.26/2016). Also worthy to note is Law No.1/2014 on Myanmar Special Economic Zones, and Notification No.1/2015 on the Rule on Myanmar Special Economic Zones issued by the Ministry of Planning and Economic Development, which integrated the former Law No.8/2011 on SEZs with the Law No.17 (specifically provided for the Dawei SEZ), which features special privileges beyond the standards given by the normal investment law.

In the following, the authors investigate the issues surrounding policy choices concerning investment, as reflected in the series of law changes in Myanmar.

1. Entry Restriction under the Permit System

(1) Discretionary and Broad Negative List

One of the most prominent characteristics of the present 2012 FIL as amended in 2015 is the multiple-layered system for permitting the entry of investors, which applies to not only foreign but also domestic investors. We may recognize that the basic structure of a controlled economy has been succeeded from the former 1988 Foreign Investment Law, where entry into the market is prohibited in principle and permitted as an exception. The 2012 FIL imposes three barriers for market entry, namely, (i) permission required for the entry of an investor into restricted industries (art.5), (ii) corporate registration with the Directorate of Investment and Company Administration (hereinafter "DICA") under the MPED (art.10; Rule art.18), and (iii) permits for investment incentives (art.20). Even though procedures and criteria for (ii) (corporate registration automatically made upon the fulfillment of preconditions) and (iii) (investment incentives to be decided according to the given procedure and standards as defined in art.27, etc.) are standardized, the arbitrary nature of (i) entry permission is an apparent impediment. Even though nearly 20% of countries throughout the world operate certain types of entry permission systems (World Bank 2010, p.32), the entry permission system in Myanmar is extraordinary in both terms of the width of restricted areas and the degree of discretion held by the MIC.

Broad Range of Restricted Areas: Restricted areas are designated by MIC notification, with the approval of the Union Government, under the delegation defined in the 2012 FIL (art.4). This is a typical authoritarian-style investment permission system in the sense that the legislation merely provides for general categories of restricted industries (e.g. adverse effects on culture, health, environment, primary industries) while delegating the substantive decision-making authority to the administrative decision of the MIC. MIC Notification No.1/2013 had an extremely long list of restricted areas that covered a variety of target industries, which was slightly narrowed by series of revision by MIC Notification No.49/2014 and No.26/2016 (see Table 1).

MIC Discretion on Restriction and its Exemption: The MIC can also use a wide discretion in allowing exceptional permission for entry to individual investors in restricted areas (FIL art.5), while the criteria for consideration are only given in general terms (art.7, 8, and Rule art.3 referring generally to various economic benefits such as increase in employment, export, import substitution, regional development, etc.). Although a similar strategy of setting a negative list for investor entry and allowing exceptional entry thereto in exchange for various performance requirements has been applied by many of the neighboring ASEAN countries in their attempt to utilize foreign investors for development policies, the vastness of the negative list in Myanmar is extraordinary, which results in a similar effect to an extremely narrow positive list, capturing almost all investors of substantial size in the permission system before stepping forward to the succeeding procedures for investment incentives. Particularly, List-B in each Notification requires almost all possible industries contributing to import substitution to come under the obligation to form a joint venture, while List-C closes the areas already subject to investment by state-owned enterprises.

Table 1: Changes to the Restricted Areas under MIC Notifications

2013 Notification		2014 Notification	2016 Notification
List A: entry prohibited	21 areas: security, environment, agriculture, importation of waste material, toxic chemicals, forestry development, small- and medium-sized mining, electricity, industrial, pollution, transportation by water, etc.	Reduced to 11 areas (Prohibition lifted for agriculture, importation of waste, toxic chemicals, refinery, gas, etc.)	12 areas (one addition: Enterprises harmful for farmland, water and religious places)
List B: entry admissible if under a joint venture	42 areas: seeds, grain products, confectionaries, food-processing, beverages, ice, drinking water, cotton yarn, plastic goods, packing, bags, papers, petro-chemical products, pharmaceuticals, vaccines, large-scale mining, construction materials, construction of road and bridges etc., large-scale mining, civil engineering, golf courses, real estate, residential area development, air services, cargo transport, manufacturing of train carriages, hospitals, tourism	Reduced to 30 areas (100% foreign shareholding made possible for: large-scale mining, construction materials, construction of road and bridges etc., manufacturing of train carriages, hospitals, tourism)	Reduced to 27 areas (100% foreign shareholding made possible for: production and distribution of seeds; rubber industries)
List C: entry admissible based on certain conditions	・Permit based on ministerial guidelines: 115 areas (e.g. Ministry of Agriculture and Irrigation regulates seeds, fertilizers, agricultural machinery; Ministry of Environment regulates forestry; Ministry of Industry regulates beverages, tobacco and cosmetics; Ministry of Construction regulates construction materials, etc.) ・Permit based on international standards: 27 areas (animal breeding, construction, hotels, etc.) ・Permit based on Environmental Impact Assessment: 34 areas (mining, oil and gas, dams, electricity, pipelines)	・Permit based on ministerial guidelines: reduced to 108 areas ・Permit based on international standards/ Environmental Impact Assessment abolished ⇒ Permit upon Joint-venturing: 21 areas (e.g. Joint-venturing with Ministry of Energy for oil and gas exploration and pipelines; with Ministry of Construction for urban development; with Ministry of Railway Transport for railway business and related services, etc.)	・Permit based on ministerial guidelines: maintained ・Permit upon Joint-venturing: 22 areas (one addition: prevention and distribution of vaccine)

(Compiled by the authors)

(2) Infringement of International Commitments

Given the international trend of investment liberalization, Myanmar's structure of discretionary entry permission has been a target of criticism (World Bank, ibid. p.115). The OECD's Regulatory Restrictiveness Index ranks Myanmar as the world's second-worst (OECD 2014, p.97). There should be a study to balance the pursuit of national interest with the need to avoid the infringement of international commitments made by Myanmar under bilateral, regional, and multilateral forms of trade agreements. Myanmar has concluded nine (9) Bilateral Investment Treaties (hereinafter "BIT") including five (5) already in force with the Philippines (1998), China (2002), India (2009), Thailand (2012) and Japan (2014), is also a member of regional frameworks including the ASEAN Comprehensive Investment Agreement (ACIA) that was declared in 2009 and came into force in 2012, as well as a number of free trade agreements (hereinafter "FTA") which have been concluded by the ASEAN organization with China (2002), Japan (2008), Korea (2007), India (2009), etc., as well as all WTO agreements.

The principle of "national treatment" is one of the most fundamental commitments. It is true that the ASEAN core countries used to be negative towards the inclusion of a "national treatment" clause in BITs and FTAs, with an intention to secure freedom to implement policy strategies that utilize foreign investors for industrial development by way of "performance requirements" in exchange for the exceptional lifting of entry restrictions. The APEC Non-Binding Principles on Investments introduced in 1994 excluded the term "admission" or investment entry from the target list of national treatment. The 1994 Framework Agreement of the ASEAN Investment Area (AIA) guaranteed each member country the discretion to maintain negative lists, namely the Temporary Exclusion List to be phased out by 2010 (2015 for Myanmar) and the Sensitive List (art.7). Nevertheless, after the establishment of the WTO, which established a rigorous liberalization framework for service investments under the General Agreement on Trade in Services (GATS),[i] followed by a liberalization agenda of the conditionality of the World Bank and the IMF after the 1997 Asian Currency Crisis, the ASEAN core countries have had limited choice other than to revise each foreign investment law to narrow the negative list for foreign entry, including the strategic state-monopoly sectors such as telecommunications, transportation, energy, finance, and other areas of socio-economic infrastructure. This liberalization drive was further accelerated when the US-led "Enterprise for ASEAN Initiative" was initiated in 2003 towards a networking of bilateral FTAs with the US as a hub vis-à-vis each ASEAN member country as spokes, based on the model of the North American Free Trade Agreement (NAFTA).[ii] The ASEAN Comprehensive Investment Agreement (ACIA) was a result of compromise between the ASEAN-style investor-utilization and the US-led FTA, in which the asset-based broad definition of "investment" under the NAFTA is duplicated to decide the broad target of national treatment (art.3) including the "admission" of investments (art.5), while each ASEAN member country maintains the freedom to set up a negative list subject to future negotiation (art.9, 10) as well as various bases for exemptions such as a local government exception (art.9 (a) (iii)).

The aforementioned draft Investment Law proposed by the MIC in early 2015 unveiled a strategy centered on national treatment while integrating the FIL and domestic investment law. It makes free entry the principle for both foreign and domestic investments (art.8), narrows the exceptions to the principle into four categories, namely (i) areas of state monopoly where both foreign and domestic investments are prohibited, (ii) areas where only foreign investors are prohibited, (iii) areas where joint venturing is required, and (iv) areas where prior permission is required for both foreign and domestic investors (art.9, sec.2), and explicitly provides for the responsibility of the MIC to phase out all such entry restrictions according to the set schedule (art.9, sec.6, etc.). However, from the viewpoint of domestic industrial incubation, it seems controversial to extend the same restriction to domestic industries in order to enable national treatment. It must be a natural consequence that the recent amendment to the 2012 FIL (art.12 (g), 13 (a)) in December 2015 (Law No.67/2015) resulted in a minimum revision, without changing the separate treatment between foreign and domestic investments.

(3) Possible Solution: Rule-Based Approach

A balanced design of law is needed to enable domestic policies such as industrial incubation without overly restricting the interests of foreign investors, at least to the extent they can contribute to the domestic policy needs. Such a balanced design would include the clarification of requirements for entry restrictions, as expressed in the national treatment clause of the Japan and Myanmar Economic Partnership Agreement (JMEPA) concluded in 2013 (art.2, sec.2) as "a measure that prescribes special formalities in connection with investment activities". It further provides that "such special formalities do not impair the substance of the rights of such investor," which requires the protection of the interests of the very investor applying for the entry. This provision is clearly different from the narrower requirements under the ACIA (art. 10), which provide that "such measures or modification shall not adversely affect the existing investors and investments." The Myanmar FIL and the Rule should be amended so as to establish a clear and minimal negative list which can ensure foreseeability for future investors by minimizing the discretion of the MIC in the implementation of both the entry restriction and the exceptional lifting thereof.

2. Performance Requirements and Investment Incentives

(1) ASEAN-style Discretion

Despite increasing international pressure in the era of the WTO and FTA, the ASEAN countries have somehow maintained investor-utilization policies by way of imposing special policy-linked obligations (hereinafter "performance requirements") upon investors in exchange for various investment incentives. This policy-bargain strategy has been applied by the ASEAN core member countries since the renowned Investment Promotion Act in 1986 of Malaysia, and survived even after the WTO's General Agreement on Trade-Related Investment Measures (hereinafter "WTO-TRIM"). WTO-TRIM (Illustrative List) introduced the 5 categories of prohibition of performance requirements which go obviously against the GATT's core principles, including the obligations to attain the local contents of quantity or quality base, to balance imports and exports, to balance foreign exchange, and to export. TRIMs were duplicated in the prohibition of trade-affecting subsidies under the General Agreement of Subsidies and Countervailing Measures (SCM Agreement) of the WTO. Although the prohibition of the TRIMs extends not only to performance requirements imposed as a condition for lifting entry restrictions, but also to those imposed in exchange for receiving advantages (investment incentives), it has been the present trend led by the US-led FTAs to admit the non-TRIM categories of performance requirements when they are given in exchange for investment incentives. Even the so-called "TRIM-minus" approach is supported in the recent trend of international investment rules, as shown in the ACIA (art.7, sec.1) providing for the possible modifications to be made by the ACIA to the WTO-TRIM.

However, effectiveness of such performance requirements is questionable as the policy goals can never be easily fulfilled by a manipulation of carrot (investment incentives) and stick (lifting of such incentives) without active policy commitments by the government (UNCTAD 2007). Further, such a policy-bargain strategy between investment incentives and performance requirements can result in a distortion of international capital flow, and can increase the fiscal burden on the host countries (see e.g. OECD 1998, Incentives, Alternative-2). Moreover, in the broader context of the ACIA that constitutes the basis of the ASEAN Economic Community (AEC), the distortion of capital flow may occur against the interest of such new member countries as Myanmar,[iii] since the continuation of competition for more investment incentives would only result in the re-investment of existing hi-tech industies (e.g. Japanese investors) in ASEAN core countries which would aim at exporting to the market of the new member countries, widening a serious trade imbalance between ASEAN member countries particularly after the completion of zero tariff in 2015. Further risk for a new member country such as Myanmar is a failure of import substitution policy, in which the discretionary provision of additional investment incentives would only result in the exploitation of economic advantages by the low-tech ASEAN investors. A consequence is that the governmental intervention supports the foreign investor at the sacrifice of domestic industries. The FIL cannot easily avoid such a controversial result unless it achieves a narrow success to invite high-value added investors for competing with ASEAN-origin imports or promptly incubate domestic investors.

(2) ASEAN-style Discretion under Myanmar's FIL

Given the scarcity of performance requirements other than the obligation to employ domestic workers (art.24),[iv] the 2012 FIL of Myanmar at a glance seems less controlling in comparison with the typical policy-exchange strategy of ASEAN core member countries. However, a general blanket provision in the 2012 FIL (art.17(c)) can offer a basis for government discretion to oblige investors to fulfill various policy requirements. Also in regards of investment incentives, despite the generally liberal basis of numerically fixed standards, [v] the law incorporates a provision for discretionary approval of additional incentives (art.18(f), art.27(a)). These seemingly simple provisions can be the basis of arbitrary regulation on investments. The 2012 FIL also contains several bases of discretion of the MIC in dealing with individual investors, such as abstract goals which can be used as the basis of arbitrary consideration in addition to the basic principles (art.7, 8), and unclear requirements to be fulfilled within 15 days of the acceptance of an application and 90 days of a decision on investment incentives (art.20).

In the authors' interviews with Japanese investors in Myanmar, [vi] some complaints were heard about the arbitrary implementation of investment permits by the MIC as the means of letting investors assume performance obligations, which can harm the investors' expectation of transparency and predictability.

(3) Possible Solution: Rule-Based Approach

What should be the alternative legal design? The Draft Investment Law issued in February, 2015 attempted to delete all mention of performance requirements, including employment obligations (art.14), offering the appeal of an advantageous investment climate in which investors can enjoy incentives even without any promise to contribute to the local economy. Supposing this approach is economically acceptable (on an assumption that every investment can somehow contribute to the local economy), it turned out to be politically unacceptable when the Draft was replaced by an amendment Bill to the 2012 FIL as of the year end of 2015 (Law No.67/2015).

The amended FIL not only maintained the discretionary blanket clause on the combination of performance requirements and investment incentives but also newly introduced a decentralization of investment permits (for investments of less than USD10,000 coming under the jurisdiction of Region/ State governments under Schedule II of the 2008 Constitution), which seems to be an attempt to make use of the local government exception as the basis of justification for the continued imposition of obligations in the name of rural development, which is often referred to in various international investment treaties (e.g. SCM Agreement, art.9 (a) (iii)). It should be noted, however, that the local government exemption is not an absolute justification. Under the interpretation of SCM Agreement, for example, local government projects as well as privately owned projects cannot enjoy exception when they are deemed to implement national policy.

A reference should rather be made to a newly emerging rule-based approach taken by the JMEPA to increase the transparency and foreseeability of the policy-bargain strategy by establishing a closed list (instead of an arbitrary open list) of performance requirements admissible in exchange for investment incentives (art.6). Specifically, this list limits the obligations to choose a particular site, perform particular services, provide employment and training, introduce specific facilities, and perform research & development (art.6, sec.3 (a)). When such a closed list is further clarified in terms of the reach and the mode of performance requirements, a compromise will be enabled to balance the policy strategies of host countries within the limit of the substantive interests of investors.

3. Extraterritoriality

(1) Superiority of Foreign Investment Law

The 2012 FIL provides that this Law prevails over any other provision in any existing law (art.47). The FIL also provides that the decisions of the MIC are final and conclusive (art.49, 50). The implication of these provisions is the extraterritoriality of matters of foreign investment law, resulting from the special rule-making power of the MIC beyond the limits of legislative and judicial controls. There is a question whether this infringes the rule of law as the corollary of the balance of power based on the superiority of legislature under the 2008 Myanmar Constitution. Moreover, the 2012 FIL also declares the superiority of international treaties over domestic law (art.54), which invites a natural interpretation that the Law admits extraterritoriality as far as foreign investments are concerned. This result reminds us of the colonial period when the Western suzerain countries concluded unequal treaties with Asian protectorates as a means of economic (and ultimately political) control.

(2) Special Economic Zone

The concept of Special Economic Zones (hereinafter "SEZ") is to establish a geographical area where the application of normal laws is exempted and extraordinary rules are applied, to create a more beneficial climate for investments. As such, the law on SEZs can constitute an exception to the FIL which is itself an exception to the other areas of domestic law, to further increase special benefits to encourage the investors. The SEZ law might be further utilized to legalize a deviation from international commitments under the investment treaties which bind the FIL, creating room for the government to extend special treatment to certain investors even beyond the established international investment rules, including national treatment, prohibition of performance requirements, and rationalization of investment incentives that are discussed in the above sections.

It is often said that there are more than 3,000 SEZs presently operating worldwide in more than 130 countries. Myanmar as well has introduced the 2014 Law on Myanmar Special Economic Zones (Law No.1/2014), detailed by the Rule on Myanmar Special Economic Zones (Notification No.1/2015 by MPED), which provides the procedural and institutional framework to establish SEZs with the expectation of increasing employment opportunities, promotion of exports, and other economic merits driven by industrial concentration (art.4). One of the features of the 2014 SEZ Law is the general declaration of its superiority over the other laws and regulations, as if admitting an extraterritoriality (art. 89). Accordingly, special provisions to supersede existing legal provisions are incorporated throughout the chapters, such as special provisions overriding the existing system of investment permits in the Foreign Investment Law (art.11), environmental law (art.35), labor law (art.70), and land law (art.80).

However, the economic effects of SEZs are much debated. Positive economic effects are, on one hand, being dispelled by recent empirical studies (see e.g., IDE-JETRO 2013). On the other hand, negative effects are reported as the result of extraterritorial deregulation of normal laws, such as the infringement of fundamental labor rights (ILO 2012). Although deregulation in SEZs is contended to enable experiments in institutional innovation, as in the case of socialist market reform initiated in Chinese special zones since the late 1970s (see e.g. World Bank 2008), such experiments are problematic to a legal system if they go beyond the limit set by the fundamental principles of the existing law.

Particularly for such a late-comer host country as Myanmar, a SEZ may be faced with further calls for more deregulation compared to the rival countries and can invite the bottom. The Dawei SEZ, for example, at US$8 billion the largest development plan among the three existing SEZs in Myanmar, has been faced with serious land-related disputes. Although the SEZ Law (art.80) provides that the developer and the investors in the SEZ should be responsible for the expense of relocation and compensation for land acquisition, the Japanese government-sponsored study report questions the economic feasibility of the project due to the failure of the Thai developer to assume the cost of fair compensation according to the law (Pacific Consultants, 2013). This is an episode demonstrating the risk of overly discretionary implementation of the SPZ that goes beyond the rule of law.

(3) Risk of WTO Infringement

A further threat of the utilization of SEZs is the infringement of the fundamental principles of the WTO and other international investment rules. National treatment (GATT, art.3) and most favored nation treatment (GATT, art.1) are at stake when a SEZ is used as a shelter for discriminative treatment between investors. Various restrictions on the flow of goods and services across the border of the free zone can go against the elimination of quantity restrictions on trade (GATT, art.11). The abundance of investment incentives often given in SEZs that are contingent upon the achievement of certain performance requirements such as export obligations and local content obligations can constitute export subsidies and import substitution subsidies prohibited under the SCM Agreement, as well as the prohibited TRIM under the General Agreement on Trade-Related Investment Measures in the WTO.

Governments of developing countries seem indifferent to these WTO rules, on an assumption that SEZs developed or owned in the name of local governments or private developers are exempted from the WTO rules which in principle bind national governments (e.g. NAFTA art.1108, sec.1 (a); ACIA art.9 (a); SCM Agreement art.11). However, such exemptions would not easily be claimed if such SEZs are a vehicle of governmental policy. In 2001 the United Nations International Law Committee, as a part of its endeavor to codify the customary international law, issued "the Articles on State Responsibilities" which emphasized an idea to treat a non-state actor as a "State Entity" when it is entrusted to implement a state policy or is under the control of a state. Also the Convention on the International Center of Settlement of Investment Disputes (ICSID) includes "any constituent subdivisions or agency of a Contracting State designated by that State" as subject to its jurisdiction (art.25, sec.1), which has been referred to in many cases of international arbitration (Schicho 2012, p.48-55). In the practice of SEZs in Myanmar, though the government has arranged to have private entities act as developers and to have the management committee include local State or Region governments as the stakeholders that operate the SEZ, they are all operating under the governmental policy provided in the SEZ Law, and hence it is difficult for them to be exempted from recognition as a "State Entity."

On the other hand, Special and Differential Treatment under the SCM Agreement (art.27) is understood to extend general exemptions to least-developed countries and low-income countries with a GNP per capita under US$1,000 in 1990 dollars, even though these exemptions are only tentative adjustments which are to be eliminated within a certain period (8 years with the possibility for extension for the export requirement under art.27, sec.2, sec.4; 8 years for LDCs and 5 years for other development countries for the import substitution requirement under art.27, sec.3). However, it must be controversial to pursue economic development by way of a policy that is only usable for as long as Myanmar retains LDC status. It is also remembered that the countries under socialist market reform such as China and Vietnam, which Myanmar has identified as an economic model, are no longer allowed to apply special measures in an SEZ, according to the commitments made by each protocol upon their entry into the WTO.[vii]

If we review the present 2014 SEZ Law, there are a number of provisions raising questions of WTO infringement. First, the significant difference in the entry permission systems between the normal law (2012 FIL's two-tier permission by the MIC for entry and for investment incentives, subject to the negative list including joint-venturing obligations) and the SEZ Law (unified permission system by the SEZ Managing Committee for both entry and investment incentives within 30 days, art.30; without restriction for 100% foreign ownership, art.24) can invite an allegation of infringement of treatment clauses such as most favored nation treatment, and fair and equal treatment. Second, the material difference in the investment incentives between the normal law and the SEZ Law (increased tax exemptions for a total of up to 15 years under art.32, 44; increased land lease term of up to 50 years, public infrastructure developments for electricity and water, and the one-stop services under art.11 (d) (l), art.79, etc.; deregulation of the implementation of laws on labor, environment, tax, etc. delegated to the SEZ Management Committee under art.11 (d) (p), art.70, etc.). These especially beneficial treatments for SEZ investors, given that they are also privileged to sell a certain portion of products in the domestic market (art.25) and hence can be a rival of non-SEZ investors aiming at the domestic market, can be found to be against the treatment clauses in the WTO and other international investment treaties. Third, there is the risk of infringement of the WTO-TRIM and the SCM agreements in regards to export obligations and local contents requirements as aforementioned.

(4) Possible Solution

It is probably not a wise approach to emphasize the economic merits of excessively flexible implementation of FIL and SEZ, without paying attention to the demerits of extraterritoriality that are causing harm to the rule of law and international commitments. To the end of realizing the economic benefits of investment promotion while reducing the negative impacts such as the exploitation of labor and environment (see UNCTAD 2013), it is the role of the FIL as well as the SEZ Law to set the limit of extraterritoriality by establishing the basic principle of respecting the domestic regime of substantive law as well as the procedural frameworks for their implementation. The Law should also standardize the permit system for entry and incentives in order to reduce discretion and avoid the accusation of unfair treatment against the WTO principles.

4. Dispute Resolution Clauses

(1) Divergence in ISDS Clauses

Myanmar investment law shows an obvious divergence in regards to Investor-State Dispute Settlement (hereinafter "ISDS"). The 2012 FIL used to refer only to the general rule of investment dispute resolution that an amicable settlement shall first be sought, and that, in its failure, the parties shall resort to the agreed mechanism, or the means given by the Myanmar law in case of absence of any agreed mechanisms (art.43), without particular mention of ISDS, except for a slight mention in the Notification No.11/2013 to the procedure for application to the MIC in cases where the summons of government officials to court is required (art.169). The 2014 Law on SEZ (art.53-54) provided for similar mechanisms as the 2012 FIL. On the contrary, the dispute resolution clause in the draft Investment Law in February, 2015 (art.21) centers on an ISDS, after referring to newly-added investment grievance mechanisms (art.20, sec. 2 through sec.5). This ISDS clause is unique as a closed list of available dispute resolution forums categorized basically according to the procedural rules to be applied (sec.2), namely, domestic litigation and arbitration, arbitration based on Myanmar law, arbitration based on the rule of the United Nations Committee on International Trade Law (UNCITRAL), and arbitration based on the International Convention on the Settlement of Investment Disputes (ICSID). This closed list of forums is an interesting contrast to the generality of the choice of rules of dispute resolution, which declares that any of the domestic or other mechanisms are available as long as it is based on Myanmar law or any other relevant laws (art.21, sec.1), provided that amicable settlement should be sought prior to engaging such mechanisms (sec.4). The fundamental implication of such a closed list of forums is in its legal effect to realize the prior general consent by the Myanmar government to submit itself to the jurisdiction of all such listed arbitration forums (sec.3). On the other hand, the draft made it a procedural prerequisite to first resort to amicable settlement (art.4), the infringement of which can constitute a basis for challenging the procedural maturity of the contest in future arbitration.

The draft amendment to the 2012 FIL issued in July, 2015, however, turned to the other extreme, declaring the general jurisdiction of the domestic court for investment disputes (art.86), while ambiguously adding that arbitration and other dispute resolution mechanisms shall be allowed for the ISDS (art.87), upon the prior requirement of 90 days' of attempting amicable settlement (art.90), the infringement of which could be the basis for contests on a procedural mistake in future arbitration. It is not obvious why the final draft compelled arbitration for disputes between investors (including disputes between joint venture partners), while excluding litigation (art.88). The amendment in December 2015 (Law No.67/2015) resulted in the deletion of any change to the present dispute resolution clauses.

(2) Risk of ISDS

This divergence in dispute resolution clauses seen in recent Myanmar investment legislating may reflect the recognition of the risk of ISDS clauses, which have been torturing developing countries with numbers of cases at stake. This is seen particularly in arbitrations at the ICSID, which has a tendency to make awards in the favor of investors, and has resulted in a number of awards that have imposed a tremendous amount of compensation as well as lawyers' fees on the shoulders of host countries. This is often understood to be as a result of ICSID's consideration being centered upon investment-related laws and policies without much attention given to other indispensable aspects of national law, such as labor and environment.

Different from the pre-1980s international trend, when many developing countries' FIL explicitly made it a principle to first exhaust the domestic means of dispute resolution based on the spirit of the historical Karubo clause, a de facto standard has been established by the present trend of the ISDS clauses under FTAs and BITs so as to explicitly declare general consent to ICSID-based arbitration in regard to any kind of investment-related disputes. This is often further strengthened by the introduction of the "model BIT" that duplicates such submission to the ISDS clause. The threat of intervention by foreign investors in domestic policy-making is increasing, as the governments of developing countries increasingly accept the super priority of investor protection in the fear of ICSID-based arbitration awards which often award excessive compensation against host governments.

(3) Possible Solution

Then, what kind of provision should be made in the Myanmar FIL to mitigate the risks of ISDS? A general consent to future arbitration, as attempted in art.21, sec.3 of the aforementioned draft Investment Law, may not be appropriate. Instead, law-makers should study the various endeavors by other countries to avert foreign pressure to insert a general consent clause. Other countries have attempted to narrow the targets of consent by adding more requirements to invite interpretations.[viii]

Some alternative strategies have been tried by host countries to narrow the target of ISDS by manipulating the wordings of the FIL. The ACIA, for example, takes this strategy in its definition of the term "covered investment" (art.4 (a)), allowing some room for interpretation that can narrow the application of major clauses which have been used as the basis of ICSID arbitration, such as "fair and equitable treatment" (art.11), expropriation (art.12), and other relevant clauses in the investment guarantees to be made by the government. Myanmar can also mitigate the risk of ISDS by using a similar narrowing technique. Lastly, the strategy to increase the procedural requirements for dispute resolution can be effective, as attempted in the ACIA and the aforementioned clauses on a prior settlement requirement in the Myanmar draft FIL amendment in July 2015, as the basis of contests in the future stages of domestic courts' involvement, either in the litigation to protest against the jurisdiction of the arbitration tribunal or in the final stage of the recognition and enforcement of an arbitration award.

5. Conclusion

This article attempted a comprehensive reading of major investment-related laws and regulations in Myanmar with an intention to identify the general characteristics and analyze their policy implications. The 2012 FIL, as the central law to both encourage and control foreign investment in Myanmar, has revealed a tendency to duplicate the discretionary framework of the investment permit and the investment incentives which can be linked to the imposition of various performance requirements as have been utilized by the ASEAN core countries particularly as a tool of industrial policy under the authoritarian regime. This series of discretionary policy tools are, however, a double-edged sword, which can be both a beneficial tool to utilize foreign investors for industrial policy objectives, and a risky means of investment promotion by way of arbitrary exclusion of existing laws, which can trigger the ISDS clause as if extraterritoriality of foreign investors is admitted. Even the beneficial aspect of foreign investor utilization is no more easily available, given the WTO commitments such as national treatment and the prohibition of TRIMs. Possible bases of justification for continued utilization of such arbitrary industrial policies (e.g. local government, regional development, technology transfer, LDP status, etc.) are narrowed, due to the rigorous negotiation for further commitments for liberalization under the WTO as well as the increasing mutual competition under the regional frameworks such as the AEC.

Given this policy stack, perhaps, it might be worthy to consider the investment law-making in Myanmar as pursuing the goal of national treatment in a genuine sense, starting from a gradual lifting of the negative list for permits and the arbitrary provision of excessive incentives, ultimately reaching towards a fair, competitive market equally open to both domestic and foreign investors who are equally regulated by the normal law as the basis of balanced, sustainable development. This will enable both the fulfilling of international commitments and the maintaining of the integrity of the domestic regulatory regime (Table-2). A transparent application of the domestic regime of labor law, environmental law, competition law as well as the consumer protection law should, instead of the discretionary implementation of the FIL, take a central role in the necessary intervention in the market by the government to mitigate the risk of foreign monopoly. Industrial policy goals can be pursued by the government through a pro-WTO, market-friendly approach by way of such indirect support as the provision of qualified vocational training, information on technology transfer contracts, matchmaking for joint-venturing, and the access to soft loans for the incubation of SMEs, instead of direct imposition of TRIMs on foreign investors.

Table-2: Policy Options for Investment Law-Making Compared

Policy Options	International Commitment	Integrity of Domestic Law	Response to Foreign Monopoly
ASEAN-style Discretion	Disturbed	Disturbed	Foreign Investment Law
National Treatment	Fulfilled	Fulfilled	Competition Law

(Complied by the authors)

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Notes

i WTO postponed negotiation of the investment rule as of its establishment in 1995. Although efforts were made at the OECD towards concluding the Multilateral Agreement on Investment (MAI) for 1995 through 1998, the negotiation resulted in failure when the US withdrew in 1998. The WTO negotiation was further postponed by the Doha Millenium Round Agenda in 2001 to the Cancun Ministerial Meeting in 2003, which was suspended by the July Package in 2004, and finally abandoned without any result as of the closing of the Millenium Round in 2011.

ii The US-Singapore FTA in 2003 was considered as the base model of the US's Enterprise for ASEAN Initiative, including the on-going negotiations with Malaysia, Indonesia, Thailand, etc.

iii Although the ACIA (art.24) refers to special consideration for the intra-ASEAN late comer countries, no concrete measures are referred to in the agreement.

iv Art.24 of the 2012 FIL provides that 100% domestic employment has to be attained within 6 years for skilled workers, and upon the start of operation for unskilled workers.

v The term for corporate tax exemption is, for example, as short as five years from the start of operation (art.27 (a)), which can be finished by the time an investment project starts to make any profit.

vi Information obtained from the authors' interviews as of March 2016 with the Japanese investors who applied for the investments in the Mingaradon Industrial Park and the Thilawa Special Economic Zone.

vii See e.g. WTO (2001) at para, 218-228.

viii See the Model Bilateral Investment Treat of China in 2012.