

27 March 2015

Myanmar Directorate of Investment and Company Administration
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Re: Comments on the Myanmar Investment Law

MCRB welcomes DICA's continued consultation via website and through face to face discussion on the draft Myanmar Investment Law with both civil society and business stakeholders, and the fact that many of the earlier comments we have made have been included in this second draft.

MCRB also welcomes the addition of an Explanatory Note to facilitate a more effective consultation process, which represents another example of DICA leading within the government in promoting transparency and good practice (although we note that this is not currently available on the DICA website).

It is clear that an effective Investment Law is very important for Myanmar, both to ensure that investment is properly regulated, and to support the development of the Myanmar economy. While the merging, streamlining and simplifying of the two laws as recommended by the OECD should result in greater clarity and a level playing field, it raises complex issues, including the interplay with other Myanmar laws and processes. A number of these complexities require further consideration and analysis.

As a general point, MCRB therefore believe therefore that the quality of the law will be enhanced by further consultation and refinement, that would include the development of a suite of draft Regulations/Notifications to replace previous secondary legislation, so that all stakeholders, including the legislature, can understand the full suite of investment regulation and its impacts at the time of discussion of the Law.

As the discussion at both UMFCCI and with civil society at the Chatrium Hotel earlier this month demonstrated, there is scope for confusion about what the law does and does not seek to regulate, including specific sectoral issues as well as the interplay with other regulation. Further development of

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supporting explanatory material would help to address this. We therefore suggest that further time is taken to prepare the law and accompanying regulations before submitting it to a parliament with a fresh mandate in 2016.

Such a timetable would be more likely to result in a law in which investors had confidence, and whose implications had been fully considered in a transparent process. Furthermore it would allow for this Law to be considered in the light of the amendment of the Companies Act.

We have a number of comments on specific sections of the draft, which are addressed in order of the draft. MCRB's main focus in making these comments is on ensuring that the Investment Law underpins responsible investment, transparency and the protection of human rights, in line with the Myanmar government's 'duty to protect', as contained in the 2011 UN Guiding Principles on Business and Human Rights. Our comments reflect our observations on Myanmar's regulatory processes to date, and feedback we have received from businesses, human rights advocates and civil society organisations.

We would like to highlight the **most pressing concerns** from MCRB's perspective are the following:

- **Section 7 lack of clarity about the mandate, powers, discretions and processes of the MIC**
- **Section 11** on guaranteeing **compliance with existing contracts**
- **Section 13** on **land**
- **Section 17** on **prior permissions**
- **Section 22** on **exceptions**

We have also taken this opportunity to highlight some wider general points about not excessively curtailing Myanmar's right to regulate investment and protect its interests, particularly at a time of transition, which we are sharing to raise awareness of the risks of some of the approaches proposed. We have also identified some legal drafting issues. We have benefitted from the legal expertise of Margaret Wachenfeld of the Institute of Human Rights and Business.

We are grateful for the opportunity to make an input into the draft Investment Law, look forward to the next consultation draft. We stand ready to provide further clarification and support as required.

Yours faithfully,

Vicky Bowman

**Director,
Myanmar Centre for Responsible Business**

MCRB Comments on the draft Myanmar Investment Law

Section: Preamble

As mentioned in the consultation at UMFCCL, while MCRB welcomes the references in the preamble to transparency, good governance and accountability, Myanmar laws do not traditionally have a preamble. The introduction of this unfamiliar legal approach could complicate the adoption of the law, including in Parliament.

Furthermore, the current text of the preamble is misleading since it appears to suggest that a consolidated/merged Investment Law is consistent with best practice in the region and a sign of commitment to the ASEAN Economic Community (AEC). At the consultation at UMFCCL, it was suggested that one justification for the merger of the existing Foreign Investment Law (FIL) and the Myanmar Citizens Investment Law (MCIL) was that all ASEAN countries other than Myanmar regulate foreign investment and domestic investment through a single law. This is incorrect. Both the Philippines (Foreign Investments Act of 1991) and Thailand (Foreign Investment Act of 1986) have investment laws that are specific to foreign investment. Other ASEAN countries, notably Singapore, do not have any investment laws as such and, instead, regulate foreign investment through sector-specific legislation.

While we support the objective of merging the Foreign Investment Law and the Myanmar Citizens Investment Law, rather than the retention of two laws, it is important not to imply that such a merger is a requirement as a result of Myanmar's AEC membership.

- **Proposal: Delete Preamble**

Part 1: Preliminary Provisions

Section 2: Definitions

One of the changes between the first and the second draft was to limit the application of the Law to direct investments. The objective of limiting the application of the Law to direct investments is stated in the Explanatory Note and is reflected in the definition of the term 'Direct Investment', 'Domestic Investment' and 'Foreign Investment' in section 2 and in section 4(1) on the application of the law. Consistently with the accepted definition of FDI, the definition of 'Direct Investment' contained in the Law refers to an 'interest in ... [an] enterprise'.

However, section 2 also retains the asset-based definition of the term 'Investment' that was included in the previous draft. This definition of 'Investment' refers to a broad range of tangible and intangible property rights – for example, cash, equipment, various intellectual property rights, various contractual rights including claims to money or to contractual performance, etc. – many of which are not interests in an enterprise and which would, therefore, be incapable of qualifying as 'Direct Investments' in themselves. This discrepancy creates confusion, as many of the subsequent provisions of the Law are still drafted so as to apply to 'investments'.

- **Proposal: Address inconsistent use of the terms 'Direct Investment' and 'Investment'.** This could be done by bringing the definition of the term 'Investment' into line with the definitions of the terms 'Domestic Investment' and 'Foreign Investment' contained in section 2 of the current draft, as follows:

“Investment” shall be any Direct Investment made within the Union

- **Add** an additional Definition of ‘**Prior Permission**’ (reasoning explained in Section 17 below):
Prior Permission means permission issued in accordance with the article 24 of the Environmental Conservation Law.
- **Add a definition of Enterprise Registration** with a **cross-reference to the Companies Law** to provide better coordination between the two laws.
- **Use** the term **MIC Approval** in the body of the Law in the appropriate place. At the moment, it is a defined term but then does not appear anywhere in the text.

Section 3

We support the description of the Objectives of the law.

Section 4(2)

We believe that the **Law should not apply to any measures adopted prior to the entry into force of the Law** which fall within the scope of Section 22 General Exceptions.

- **Proposal: add** the following sentence to Section 4(2):
This Law does not apply to any measures that fall within the scope of Section 22, regardless of when such measures were originally adopted.

Part II: Myanmar Investment Commission

Section 5: Establishment

Section 5(2) states that the MIC is an “autonomous organ of the Union Government”. Section 5(4) grants a range of corporate powers to the MIC. The commentary to Section 5(4) suggests that these powers could be used by the MIC to generate its own income:

As an autonomous body, the Commission has its own legal entity. It is empowered to enter into contracts and to acquire properties under its own name. In the long run, the Commission may utilize these flexibilities to generate its own income and become less reliant on the Union Government budget for its expenses and development.

Conferring general powers on the MIC to generate its own income creates the risk of conflicts of interest between income generating activities and the exercise of statutory functions. Because of this risk of conflicts of interest, it is highly irregular for statutory authorities to be given an open mandate to generate their own income. Where powers to generate income are granted to statutory authorities, those powers are normally limited to the earning of income through the performance of the functions conferred by law.

- **Proposal: Clarify** in Section 5(4) that the **corporate powers of the MIC can only be used to the extent necessary for the performance of functions conferred by law**. The commentary should also be amended to reflect this clarification.

Section 6: Composition and Membership

The future relationship between MIC and DICA is unclear. Section 6(7), including the commentary, appears to provide that the Secretary to the MIC (an individual) will take over the support and

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administrative functions of the MIC that are currently carried out by DICA. If so, this would involve a radical change in the way that the MIC currently operates. It is difficult to see how the MIC could continue to operate without the administrative support of DICA, even taking into account the reduced role that the draft Law envisages for the MIC.

- **Proposal: Clarify and explain the relationship.** If the intention is for the MIC to operate without the support of DICA, further thought should be given to **how appropriate administrative support will be provided to the MIC.**

Section 6.3 provides that the President may at any time revoke the appointment of any Member without assigning any reason. Even if it is important to vest the power of revocation with the President, the reasons for revoking an appointment should be limited to a defined list of reasons. Such reasons could include: failure to carry out the duties of a member of the MIC as prescribed by this Law; failure to attend three consecutive meetings of the MIC without good reason; incapacity. We would also suggest consideration of the necessity to give some public explanation of the reasons for the revocation.

- **Proposal: Limit** the power of revocation to a set of prescribed reasons set out in the Law, such as those mentioned above.

Section 7: Mandate Function and Powers of the MIC

We welcome the inclusion of Section 7(1)(c)(iii) giving MIC a mandate to advise the President and/or the Union Government on investment policies including ‘any requirements for, of expectations of, responsible business conduct by investors’. We believe that administrative documents such as DICA’s Investment Guide offer the opportunity to set out such requirements and expectations in more detail. MCRB would be pleased to work with DICA (and GIZ who assisted in the recent revision of the Guide) to develop appropriate guidelines.

We believe a further point could be added to MIC’s mandate, concerning their mandate to provide guidance to other Ministries, for example in bidding rounds and licence allocation in the natural resources sector, to ensure that requirements for sustainability and responsible business conduct were including in the bidding criteria as has already taken place in the 2013 telecoms licensing round.

- **Proposal** : add a point ii)-bis
‘any requirements to incorporate criteria relating to responsible business conduct into the processes for the award of government tender processes, licenses or permits.

The scope of the discretionary powers of the MIC

As a matter of general principle, when a law confers discretion on a statutory authority to confer a benefit (e.g. to issue a permit, or to approve an incentive) it should specify the limits of those discretionary powers and the factors to be considered when exercising that discretion. This is a basic principle of good governance that helps to provide certainty for those dealing with government (e.g. investors) and to reduce the scope for abuse on the part of the authority.

From the definition of “MIC approval” in Section 1, it appears that the draft Law envisages a system in which MIC approval continues to be required before an investor can invest in a restricted sector.

However, unlike the existing Foreign Investment Law and Myanmar Citizens Investment Law, this draft contains no substantive provisions dealing with the issue of MIC approval. **MCRB believes that the draft Law requires further development on this point.**

The present draft appears to envisage a system where the MIC would exercise unstructured discretion in relation to the issuing of investment permits. This is unsatisfactory, as it opens the MIC approvals process to the potential or perception of abuse.

- **Proposal:** To resolve these problems, the **Law itself should specify:**
 - factors that the MIC must **take into account when considering whether to grant a permit;**
 - the **types of conditions** that can be attached to the grant of a permit;
 - the **consequences** if an investor fails to comply with the terms of a permit;
 - the **legal rights conferred** by the permit (e.g. the right to proceed with the investment as described in the permit, subject to compliance with further regulatory requirements and licences as imposed by Myanmar law).

We have similar concerns about Sections 7(3) and 19(1), which address the grant of non-automatic incentives. The draft envisages that this process will be dealt with through Rules. (See also the comment on rule-making below.) We would prefer to see maximum available incentives limited by the Law itself, thereby ensuring a clear institutional separation between the arm of government that determines what incentives are available (parliament) and the arm of government exercising discretion to grant non-automatic incentives (the MIC). Whether non-automatic incentives are defined in the Law itself, or through Rules under the Law, the relevant instrument should clearly clarify how the discretion to award such incentives will be exercised – for example, by addressing the issues identified in the previous paragraph so far as they relate to the grant of incentives.

Insofar as a decision is taken to address the grant of incentives through Rules, we note that no such Rules are currently in force, because the existing incentive granting powers are contained in the FIL and MCIL, themselves, both of which would be repealed by the adoption of the new Investment Law.

- **Proposal:** ensure that either **new clauses in the Law dealing with incentives or new Rules on incentives** are ready for adoption at the time the new Investment Law is enacted (see also above).

The ability of the MIC to delegate its functions

Section 7(3)(e) provides that the MIC may delegate its function to various members of the MIC, subject to the caveat that rule-making powers cannot be delegated. (See also the comment on rule making below.)

We have seen media reports that the MIC intends to delegate its function to approve investments below certain monetary thresholds to State and regional governments¹. We note that the new Law, by

¹ Source: Myanmar Business Today (6th February) Union government to allow state and regional governments to give nods to small and medium foreign investments of up to \$10 million. Regional governments such as Mandalay's will be able to give the go ahead to small and medium foreign investors without the union government's approval from April 1. The principles of an agreement to allow more freedom to state and regional governments to approve foreign investments have been finalised at the first inclusive meeting between the regional planning and economic ministers and the Directorate of Investment and Myanmar Centre for Responsible Business, 15 Shan Yeiktha Street, Sanchaung, Yangon, Myanmar
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removing the requirement for MIC Approval for many projects, may render this intention to delegate to regional governments unnecessary.

- **Proposal:** If MIC has an intention to delegate, **such powers of delegation, including limits on those powers as well as the requirement to follow the same procedural safeguards**, will need to be addressed in the Investment Law.

Part III: Admission Of Investments

Section 8

The relationship between MIC permits and licenses/permits required by line Ministries

At the UMFCCI consultation, there were several questions about the relationship between MIC permits and additional requirements to obtain permits or licences from relevant line Ministries (section 8(2)). The panel was unable to clarify how these two processes are intended to interact.

As we understand it, the intention of the Draft is to allow line Ministries to continue to require investors to obtain a permit before investing/operating in certain sectors. However, unless the sector in question is included on the “negative list”, the line Ministry would be bound by the National Treatment provision of the Draft (Section 10) to consider and issue such licences in a non-discriminatory manner. If this is the intention of the Draft, it should be made clear in the text through appropriate cross-references.

- **Proposal:** In the event that the National Treatment provision is intended to bind line Ministries, **these Ministries will need to be alerted, in advance, to the effect of the new Investment Law** so as to avoid confusion and the risk of disputes being brought against the Government.

The relationship between the MIC and other regulatory agencies of government, including MOECAF

One of the basic structural changes of the Draft Law is to separate the procedures governing admission of investment from the laws and procedures regulating the operation of investments. Permission from MIC is now only required prior to investing in sectors contained on the “negative list”. Regardless of whether MIC permission is required, all investment remained governed by regulations of general application (Section 8(2)).

MIC also currently exercises a range of quasi-regulatory functions, including through the assessment of prospective projects on a costs-benefit basis and by including social and environmental operating requirements as conditions attached to MIC approval. MIC’s current practices in exercising quasi-regulatory functions under Notification 50/2014 were discussed at the consultation on the Investment Law with CSOs at the Chatrium Hotel.

In general, MCRB **supports the separation of the admission of investment** (through enterprise registration and the MIC process) **from the regulation governing the operation of** investments (through laws of general application, line Ministries and specialised agencies) as a long-term objective for Myanmar’s investment governance. In particular, we support the strengthening of MOECAF’s role (or that of a specialised successor body) as a regulator of environment and social impacts, including through

Company Administration (DICA). “When the investors come in, they won’t have to request approval from the union government. They would only need to submit their proposals to the Myanmar Investment Commission (MIC).

the EIA process. We also support the strengthening of other line ministries relevant to regulating and monitoring responsible business conduct, such as the Ministry of Labour. We have concerns about the capacity of Myanmar's regulatory agencies, particularly MOECA, to fully assume this regulatory function at this time. We are encouraging development partners to build relevant capability and technical knowledge.

However the separation of those roles does not preclude the linking of MIC Approval with the requirement to have permission from relevant ministries to reinforce the need to have both sets of approvals/permission.

- **Proposal:** Given the ongoing confusion about the respective roles of MIC, MOECA and other Ministries and the timing of various processes, **we encourage MIC/DICA to take the opportunity of the new Investment Law** to work with the Ministries to provide a single and consistent set of guidance for investors.
- To highlight the importance of Myanmar's environmental/social regulatory process in regulating investment, we propose below a specific mention of the requirement for **'Prior Permission'** (see Article 17 below).

Section 9

The "no back-tracking" provision

Section 9(5) prohibits the Government of Myanmar from "derogating" from a decision to liberalize a sector.

Once an Investment sector is liberalized, such liberalization may not be derogated.

This provision goes much further than preserving the legality of investments made while a sector was opened to unrestricted foreign investment (a protection that is important to provide certainty to investors and that we would support). Rather, Section 9(5) would prevent prospective changes to the negative list to re-introduce conditions/restrictions on new investment in sectors that were previously liberalised. As far we are aware, there is no precedent for this in the investment laws of any other ASEAN country.

As a question of policy, we do not agree that investment liberalisation should only proceed in one direction. There may be legitimate reasons why a country wishes to reimpose restrictions or conditions on foreign investment in a particular sector – for example, new evidence about the (lack of) economic benefits of such investment. A country may also wish to impose restrictions/conditions on new sectors that did not even exist at the time that the negative list was drafted. For example, the US Government previously had this problem after failing to list reservations for the cross-border supply of internet gambling services at a time when there was no industry for the cross-border supply of internet gambling. This dispute became the subject of the WTO case *US – Gambling*.

We are also concerned about the Government of Myanmar's technical capacity in 2015 to draft a "once and for all" negative list, from which future derogation is not permitted. Moreover, if the Investment Law were to enter into force before such a list was finalised, the Government of Myanmar would lose

the ability to restrict/condition entry of foreign investors in the future in any sectors that are not currently restricted.

- **Proposal:** **delete** the sentence ‘*Once an Investment sector is liberalized, such liberalization may not be derogated*’ from section 9(4). **Replace** it with the following new sentence:
 ‘Any revisions to the four above-mentioned Schedules shall operate solely on a prospective basis and shall not prejudice investments that were made validly under the Schedules that were in force at the time that such investments were made.’
- Section 9(4) contains a typo (reduce is included twice)

Part IV Treatment of Investors

The introductory commentary to Part IV states that the investment protection provisions contained in Part IV are based on internationally acceptable standards, including those adopted in ACIA. However this is incorrect.

Section 11

Fair and Equitable Treatment

Section 11(2) contains a definition of fair and equitable treatment that goes significantly beyond what is found in any of Myanmar’s existing investment treaties. For example, Article 11(2)(a) of ACIA defines fair and equitable treatment as follows:

For greater certainty ... fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process

The most significant point of contrast between this ACIA definition and that proposed in the draft Myanmar Investment Law is that Section 11(2)(c) of the Draft, which would define fair and equitable treatment to include the following additional obligation:

Due compliance of the Union government and Government Entities with contracts, if any, that it may have entered into with any Investor.

This is a far-reaching and dangerous provision that has no precedent in the investment laws of any other ASEAN country. It has wide-ranging implications that could jeopardise the consolidation of democratic rule in Myanmar.

Section 11(2)(c) would prevent the Government of Myanmar from varying the terms of any existing contract, regardless of the circumstances in which that contract was originally concluded and regardless of the strength of the environmental or social justifications for doing so.

Myanmar has recently emerged from a period of military rule and there are many investment contracts that were signed between Government Entities and associates of the Government on a non-arms’ length basis during that period. An important part of the transition to democracy currently underway will involve the renegotiation of these contracts to incorporate new environmental and social standards, and to put the financial/fiscal terms on something that resembles an arms’ length basis. The

renegotiation of the Letpadaung contract is one example of this process. Another example is the new Environmental Impact Assessment procedures currently being developed by MOECFAF, which will apply to existing investments in Myanmar and which confer powers on MOECFAF to suspend non-compliant investment projects. This process of working out the economic legacy of authoritarian rule is likely to take many years.

- **Proposal: Remove Section 11(2)(c).**

Section 13

Access to Land

The Foreign Investment Rules currently provide certain protections against abuses but related to leases by foreign investors under the MIC permit regime.² Leases must be submitted to the MIC and the person leasing the land can make a complaint to MIC if the investor fails to pay the promised lease payment or carry out any provision in the agreement. MIC can thereafter terminate the lease. MIC is also entitled to terminate the lease after necessary investigations if the investor violates a law on the land. Interestingly, a foreign investor shall not be permitted to lease land “in a place that the public is not desirous to transfer and vacate.”³ If there are occupants, the foreign investor must submit to MIC the statement of agreement and satisfaction of the relevant owner on the transfer and resettlement, including payment of the current price plus and damages.⁴ The draft Investment Law does not appear to contain any of these protections.

- Given the current lack of protection of legal or customary land owners in Myanmar, the new Investment Law or subsequent rules **should contain similar levels of protection.**

Section 14

Right to Employ

We note that existing provisions (Article 24) on ‘local content’ and employment of citizens in the Foreign Investment Law, including in unskilled jobs, appear to have been lost in the revision of this article into Article 14.1, covering only qualified personnel. We wonder whether this was an unintentional deletion.

Furthermore, there appear no longer to be any requirements for companies to invest in capacity building of citizens. While the inclusion of detail at the level of the previous CIL/FIL in the new MIL may be unnecessary, some requirement is necessary to ensure that companies take active steps in this area.

- **Proposal: Retain** existing requirements in the FIL (Article 24 (c)) concerning unskilled staff
- **Include** a requirement either in Section 14, or under Section 17, imposing an obligation on investors to undertake capacity-building programmes for citizens to enable them to fill senior management, technical, professional and advisory positions in the investor’s enterprise.

² [Notification 39/2011](#)” on the Right to Use of Land relating to the Republic of the Union of Myanmar Foreign Investment Law.

³ Foreign Investment Rules, above, Chapter 15.para 126.

⁴ Foreign Investment Rules, above, Chapter 15, para 126.

Section 15

Expropriation

The drafting of Section 15(2) and Section 15(3) appears to be influenced by Annex 2 to ACIA on Expropriation and Compensation. However, the drafting of Sections 15(2) and 15(3) does not follow the ACIA text exactly, and it is unclear whether these textual differences are intended to be legally significant. In the absence of a clear rationale for differing language, we suggest that section 15 follow the internationally accepted language that it included in most recent investment treaties, including ACIA.

- **Proposal: Replace Sections 15(2) and 15(3) with the following:**
 2. An action or a series of related actions by a Government Entity cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a direct investment.
 3. Article 15 (1) addresses two situations:
 - (a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
 - (b) the second situation is where an action or series of related actions by a Government Entity has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 4. The determination of whether an action or series of actions by a Government Entity, in a specific fact situation, constitutes an expropriation of the type referred to in Section 15 (3)(b), requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (a) the economic impact of the government action, although the fact that an action or series of actions by a Government Entity has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;
 - (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and
 - (c) the character of the government action , including, its objective and whether the action is disproportionate to the public purpose referred to in Section 15 (1).
 5. Non-discriminatory measures that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in Section 15 (3)(b).

Section 17

Obligations of Investors

Under the 2012 Environmental Conservation Law, MOECF can require that selected businesses must obtain **prior permission** from MOECF as a condition of operation. To reflect the important role that the 2012 Environmental Conservation Law (ECL) plays in regulating business activity (particularly once Environmental Impact Assessment processes are in place), we recommend that the Investment Law specifically refers to '**Prior Permission**'. The concept of prior permission is included in Chapter X the

ECL⁵ and underpins the permitting requirements. (We are not aware of whether other Myanmar laws use the concept of prior permission),

- **Proposal: amend** Section 17 (1) to read
 - (1) All Investors shall fully abide by the Laws of the Union, **including any requirement to obtain Prior Permission**, as well as with the terms and conditions of the special licenses, permits, and certificates issued to them, as the case maybe.

Section 17(4) provides that *“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”*).

- **Proposal: Include a clear time limit.** 12 months appears reasonable. Furthermore, account needs to be taken of the provisions in the draft EIA Procedures (Article 9) concerning existing projects, and any timeframes included in those. Alternatively, if the phase in period is to be retained at all it should be limited exclusively to the obligation under Section 17(3).

Part V: Investment Incentives

Sections 18 and 19

Incentive reform

At the consultation on the Investment Law with CSOs held at the Chatrium Hotel, one of the reasons cited for consolidating the Foreign Investment Law and the Myanmar Citizens Investment Law into a single law was to reform the system of investment incentives. The MCRB supports reform of the investment incentives granted by the MIC and efforts to increase transparency around the grant of incentives and a clearer justification for the award of incentives, and suggests that the current level of generous and across-the-board incentives should be reconsidered.

If the finalisation of the new Investment Law is delayed to allow time for further consultation, the MIC may wish to consider interim steps that could be taken to reform the incentives system within the

⁵ **Chapter X**

Prior Permission

21. The Ministry may, with the approval of the Union Government, stipulate the categories of business, work-site or factory, work-shop which may cause impact on the environmental quality that requires to obtain the prior permission.

22. The owner or occupier of the category of business, work- site or factory, workshop stipulated by the Ministry under section 21 shall apply for the prior permission to the Ministry in accord with the stipulations.

23. The Ministry may, after scrutinizing whether or not the application made under section 22 is in conformity with the stipulations, grant or refuse to issue the prior permission by stipulating terms and conditions.

24. The Ministry may, in issuing the prior permission, stipulate terms and conditions relating to environmental conservation. It may conduct inspection whether or not it is performed in conformity with such terms and conditions or inform the relevant Government departments, Government organizations to carry out inspections.

25. The Ministry may, if it is found that a holder of the prior permission fails to comply with any of the terms and conditions relating to environmental conservation contained in the prior permission, pass any of the following administrative penalties:

- (a) causing to comply with in accord with the terms and conditions after warning, causing to sign the bond;
- (b) causing to comply with in accord with the terms and conditions after paying a fine.

current legal framework. For example, as we understand it, only the income tax incentive provided by section 27(a) of the Foreign Investment Law and section 20(a) of the Myanmar Citizen Investment Law is an ‘automatic’ incentive. Under the current legal framework, the incentives identified in section 27(b)-(k) of the Foreign Investment Law and section 20(b)-(k) of Myanmar Citizens Investment Law are discretionary incentives. Thus, it would be open to the MIC to adopt a new policy on the award of discretionary incentives by way of a Notification made under the existing laws that would establish a new, non-discriminatory policy for the award of incentives and commit MIC to full transparency.

Part VI: Dispute Resolution and Prevention

Section 20

Investment grievance mechanism

Section 20 requires (in mandatory terms) the Union Government to establish a grievance mechanism for investors. This section does not explain which Ministry/agency of government should establish such a mechanism; how such a mechanism would operate; or whether such a mechanism could be established by regulations under powers conferred by the Draft Law without the need for further primary legislation.

While we welcome efforts to resolve grievances at an earlier stage and to smooth some of the administrative obstacles that impede investment in Myanmar, we have concerns about the lack of specification of how such a mechanism would operate. For example, we would have very serious concerns about a grievance mechanism that allowed the agency responsible for managing grievances to waive otherwise applicable regulatory requirements (e.g. those related to forced relocations or environmental performance) in order to avoid an impending dispute with an investor. It is difficult to address these concerns in the abstract; they depend on the way that the grievance mechanism is set up and the breadth of discretionary powers that are conferred upon it.

- **Proposal:** In the absence of any specification of how the mechanism will operate, omit section 20 from *this* Law and enact it with appropriate specificity through a future law. Alternatively, if the drafters have a particular model for a grievance mechanism in mind (at the UMFCCI consultation the example of Korea was mentioned), an adequately specified grievance mechanism could be included in the **next draft of the Investment Law**, which should then be the subject of further consultation.

Although not appropriate for inclusion in this section of the Investment Law, the imbalance between provision of a Grievance Mechanism for investors and the absence of mention of grievance mechanisms and remedy for those impacted by an investment should also be considered.

- **Proposal:** MIC should, under the powers envisaged in Section 7(1) direct investors to establish **operational grievance mechanisms** consist with the criteria outlined in the UN Guiding Principles on Business and Human Rights.

Section 21

Dispute Settlement Mechanism

Section 21(2) appears to provide advance consent to international arbitration to all foreign investors in relation to any future investment dispute. This provision goes beyond provisions of other investment laws – such as those in the investment laws of Cambodia, Indonesia and Vietnam – in which a host country agrees to respect arbitration clauses (if any) that are contained in contracts that it has entered into.⁶ Rather, Section 21(2) appears to provide advance consent to international arbitration with all foreign investors in Myanmar without the need for any specific agreement between the parties or any quid pro quo on the part of the investor (as would be the case in a contractual context).

No other ASEAN country provides advance consent to international arbitration in its investment law.

The drafters will be aware that there is currently a significant debate about the wisdom of including international investor-state arbitration provisions in investment treaties. A range of concerns have been raised in this debate, including:

- lack of transparency of arbitration proceedings, particularly in cases involving investor challenge to public policy measures;
- the high costs of such proceedings (over \$US 8 million per party on average);
- whether affected communities interests are appropriately represented.

In light of these concerns, some countries have decided not to sign new treaties that provide advance general consent to investor-state arbitration (e.g. Indonesia). Other countries have continued to include investor-state arbitration in their investment treaties, while providing for extensive reform of the process to address the concerns noted above (e.g. the EU). Without taking a position in this debate, it seems inappropriate for the government of Myanmar to be proposing to include such provisions in an investment law when:

- There is no precedent for this in other comparable investment laws;
- The inclusion of such provisions in treaties is controversial;
- Insofar as broadly analogous provisions are included in modern investment treaties, Section 21(2) of Draft Law lacks the sorts of procedural safeguards that would be included (see, e.g. the US Model BIT and the Canada-EU Trade Agreement.)

- Proposal: revise Section 21(2)** to make it clear that there is **no automatic consent to arbitration**;
- Undertake a thorough review** the legal, political and financial implications of Section 21(2), including by the Union Attorney-General's Office and the Finance Ministry.
- If a decision is made to retain Section 21(2) in its current form, **take steps to clarify** a range of further issues such as which government entity would be the proper respondent in such a claims, and ensuring that arrangements are in place to retain legal advice for the purpose of defending such claims. Given the **significant financial consequences** of giving advance consent to international arbitration through an investment law, internal arrangements should also be made to **identify the Ministry/agency of government that will be responsible for paying adverse arbitral awards.**

⁶ See Article 20 of the Cambodian Law on Investment of 1994 (as amended); Article 32(4) of the Indonesian Investment Law of 2007; Article 12(4) of the Vietnamese Law on Investment of 2001. These provisions are similar in effect to Section 43(b)(ii) of the Myanmar Foreign Investment Law of 2012.

We take the opportunity to encourage the Myanmar Government to accede to the new **United Nations Convention on Transparency in Treaty-based Investor-State Arbitration**.

Part VII: Final and Transitional Provisions

Section 22: General Exceptions

The function of a General Exceptions clause is to clarify that the Law does not prevent the Government of Myanmar from adopting legitimate regulatory measures that affect investors, so long as such measures are adopted in good faith and applied in a non-discriminatory manner. Including an exceptions clause in an Investment Law cannot substitute for flaws in the drafting of other provisions of the Law. However, a well-drafted exceptions clause can provide additional clarity that the rights granted to investors by the Law do not prevent the Government of Myanmar from exercising normal regulatory functions in relation to investment. This clarification is particularly important because the Law will apply to any measure adopted or maintained by any arm of the Government of Myanmar that affects any investor in Myanmar. As such, the Law will have a very broad range of application and risks interacting with many other government laws and policies in ways that are not anticipated at the time of drafting.

As noted in the commentary to section 22, General Exceptions clauses are provided for ACIA and in many other investment treaties. However, as currently drafted, section 22 of the Law is much more limited than Article 17 of ACIA. For example, section 22 does not include an exception to cover measures taken to protect public health (see, ACIA article 17(1)(b)) or measures taken to protect the environment (see, ACIA article 17(1)(f)). As a minimum, Section 22 should be brought into line with article 17(1) of ACIA. In addition, in particular in light of Myanmar's history and in light of repeated commitments made by the government about respecting the rule of law and human rights, we also propose that section 22 should also cover measures taken to protect human rights.

- **Proposal: Add three addition points to Section 22(1)**
 - (d) the protection of **human, animal or plant life or health**;
 - (e) the protection of the **environment**;
 - (f) the protection of **human rights**.

Section 23: International Agreements

All international agreements to prevail over any inconsistent Myanmar laws

The commentary to Section 23 suggests that its intention is to ensure that the provisions of any international agreement entered into by Myanmar over-ride any conflicting national laws and policies. However, the meaning of the provisions of the investment treaties referred to in section 23(1) is itself uncertain. This uncertainty is amplified by disagreement about the extent to which the content of such treaties is modified through MFN interactions as a matter of international law.

Importing uncertain treaty provisions by a general reference such as that contained in section 23(1) **would create uncertainty about the validity of existing Myanmar laws and regulations**. Direct incorporation would also raise a range of other practical questions about the validity of existing

contracts. For example, bearing in mind Article 6 of the Myanmar-Japan BIT, it is unclear what the effect of Section 23(1) would be for the enforceability of performance requirements contained in existing licences and contracts with foreign investors.

If Section 23 is retained, a range of further technical problems with the drafting will need to be addressed. On its face, Section 23(1) refers to all agreements entered into by the government – e.g. treaties on consular relations, trade, human rights, etc. Such a broad incorporation of international law by reference has vast potential for unintended consequences for national laws and policies that have nothing to do with investment. Presumably, the drafters did not intend the investment law to have such radical consequences for Myanmar’s legal system as a whole. Also, it appears that the term “international agreements” is intended to refer only to international treaties between governments, and not to international contractual agreements (e.g. an MoU relating to an SEZ project that is entered into by both governments and private parties).

- Proposal: If Section 23 is to be retained, **clarify** that Section 23 refers only to treaties, and that it only refers to those treaties relating to foreign investment, or that it refers only to “investment” treaties.

Section 24 - The power to make rules

Section 24(1) confers the power to make Rules and Regulations on “the Union Government”. The commentary explains that the Commission will have to go through “the government process in order to impose or amend rules”. It is unclear what this provision means, or which “government process” this refers to.

Under article 97 of the Myanmar Constitution, the power to make rules or regulations under primary legislation is normally invested in a Ministry or agency of the executive arm of government. In that case, the relevant Ministry or agency would be specified in the primary legislation. A good example of this is section 56 of the Foreign Investment Law, which specifies that the MNPED has the power to make rules and regulations under the FIL and that the MIC has the power to issue notifications. Under articles 137 and 157 of the Myanmar Constitution, such rules or regulations would, once made, be submitted to parliament for approval, which then has the power to annul rules or regulations that exceeded the scope of rule-making powers conferred under primary legislation.

- **Proposal: Specify** in Section 24 **which Ministry/agency of government** has the power to make rules and regulations. If the drafters envisage that this function can only be exercised by Parliament then this should be made explicit. In that case, the drafters should consider whether the schedules should be enacted through primary legislation (e.g. an Annex to the Investment Law), rather than through rule-making powers.