

# International Investment Law and Myanmar Investment Law: Right to Water and Protection of Investment in Myanmar

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## 要 旨

本稿では、ミャンマーの国内法であるミャンマー投資法の歴史的経緯とその内容について分析する。ミャンマー投資法は2016年の改正により様々な点で発展が見られるが、二国間投資協定(BIT)との比較では国際的に求められている水準に満たない点も見られ、この点で今後の改正が望まれる。本稿では特に水道関連の投資に関して、国際的には国民の人権(水に対する権利)との関連で海外の投資家との間に紛争が生じつつあることを念頭に、投資家の保護と国民の人権の確保との間にどのようなバランスを取るべきかを検討した。

**Keywords: Myanmar Investment Law, Human Rights, Rights to Water.**

## 1. Introduction

Water is an essential resource for all aspects of life. Distribution of adequate water has been one of the States' obligations. States protect water and prevent an abuse of water by adopting legal frameworks. Since developing states do not have sufficient water resources and ways of providing and extracting water, they may ask for foreign investors in privatization of water services. In this way, investments for water services appear as a kind of business. Therefore, the host states have two burdens to observe, one for to protect the investor, and the other is to protect the right to water. In this respect, it is necessary for the host states to have the substantive protective provisions both for the investor protection and for the public interest protection. Myanmar is a developing country, and there are abundant water resources. However, in some parts, people are still facing the scarcity of water. According to the latest census of the Union of Myanmar in April 2014, the total population of Myanmar was over 51 million.<sup>1</sup> 60 percent of the total population lives in the region such as Yangon, Mandalay, Sagaing, Aayarwaddy and Shan State.<sup>2</sup> Average growth rate of population rate is 1 percent per year.<sup>3</sup> As the growth of the population has increased, the urban development and the infrastructure are also needed for living conditions of the people.

Myanmar government announced its economic policy on 19 July 2016.<sup>4</sup> The announcement

contained its policy to strengthen public financial management, extension of extractive industries, privatization of state-owned enterprises, preparation of infrastructure policy and the promotion of the agriculture and livestock sectors. For the water consumption, most of the population are relying on rivers, and the people living in the big cities such as Yangon and Mandalay use water from pipelines. Though Myanmar has abundant water sources, in the summertime, people suffer the scarcity of water.<sup>5</sup> Therefore, Myanmar is planning to accept water services business both from foreign investors and local investors in future. Myanmar has conducted a series of legislative reforms since 2010. In order to attract and accept foreign investment, Myanmar has enacted the Myanmar Investment Law in 2016. When Myanmar government privatizes the water services, the business will be conducted under the Myanmar Investment Law. Water business can be subject to conflicts, due to, for example, water tax, poor management, and other unpredictable issues. Before international investment tribunals, these issues appear as rights-based disputes, emphasizing a right to water of peoples affected throughout the operation. In order to avoid an adverse effect in the operation of water services, it is important for states to attract the business by taking a balance between investors' protection and protection of people's right to water. Myanmar investment regime is on a starting point to receive water service business. In this respect, it is important for Myanmar to avoid the conflicts as much as possible. Therefore, Myanmar needs to have a sufficient protection for both sides. The purpose of the present article is to make a suggestion to Myanmar to provide the necessary protections in protecting investor's rights and the right to water. As a developing state, Myanmar's legal frameworks might be weak even though legislative reforms.

The present article will make an analysis on how Myanmar legal regulations can take a balance between the investor's rights and people's right to water. For this objective, it will explore a progress of Myanmar Investment Law, taking up some important provisions for investor protection. Besides, water regulations in Myanmar will also be explored to examine whether these regulations can protect the right to water. Finally, in the conclusion, the article will make some comments upon current regulations regarding effectiveness in practice. A suggestion will be made about desirable rules in the future.

In this article, chapter 2 will analyze if Myanmar has provisions for the investor protection under Myanmar Investment Law. Chapter 3 will examine whether Myanmar has effective the legal frameworks for water sector. If it does, the analysis will continue if the regulations are consistent with international regulations. In chapter 4, international investment disputes will be discussed. In the conclusion, this article will try to suggest what kind of regulations should be enacted for taking a balance between investor rights and the right to water.

## 2. Myanmar Investment Law

### 2.1. A brief history of Myanmar Investment Law

In Myanmar legal history, foreign investment was promulgated three times. The first one was in 1988, the Union of Myanmar Foreign Investment Law (hereinafter UMFIL)<sup>6</sup>. UMFIL stated these facts as privileges; the right to enjoy the appropriate business interests, the right to take back all the assets of the investors after the business contract is expired. These privileges were not expressed as the provisions. They are expressed as the introductory statement prior to the legal provisions in the first part of the law. As the provisions, the law provided the exemptions and reliefs in Chapter 10, the guarantees for non-nationalization in Chapter XI and the right to transfer foreign capital in Chapter XIII. Apart from the tax exemptions and reliefs relating to tax and the guarantee of nationalization, there were not many incentives for the foreign investors in UMFIL. Due to political problems, closed door policy and international sanctions, foreign investment sectors were not much developed at that time. When Myanmar government started to focus on economic growth after seeing the neighboring states' economic development such as Taiwan, Singapore and Malaysia, it tried to extend its economic area by joining corporation or organization in Asian region, such as GMS (Greater Mekong Sub-region of economic corporation) in 1992.<sup>7</sup> After that, in 1997, Myanmar became a member of ASEAN and Ayeyarwady-Chai Phraya Mekong Economic Cooperation Strategy (ACMECS) in 2003.<sup>8</sup> These organizations had objectives of regional development. After general election in 2010, new government, President U Thein Sein made many political and economic reforms, including investment sector.

In 2012, Myanmar government enacted the new law on investment, the Foreign Investment Law (hereinafter FIL).<sup>9</sup> FIL provided with the objectives of the production of the minerals, the creation of jobs for the citizens and the development of high-technology and infrastructure, and energy works. Until the FIL, the applicable law for the local investors was governed by different regulations, such as Myanmar Citizen Investment Law.<sup>10</sup> In the FIL, duties and rights of the investors are provided in Chapter 8; together with the appointment of employers and workers (Chapter 11), the permission of land use (Chapter 14), and the dispute settlement (Chapter 19). For example, under the duties and the rights, the investors, shall apply a permit to the Myanmar Investment Commission,<sup>11</sup> and shall form a company to start an investment.<sup>12</sup> In the appointment of employees, the investment must appoint at least 25 percent of Myanmar citizens for the first 2 years after starting the investment, and the salary of the Myanmar citizens' shall not be less than foreigner employees.<sup>13</sup> In the land use, the investor can be permitted land lease up to 50 year period. Besides, this law also permitted foreign investor to do business with local investors in joint venture for the business that were formally allowed

only to local investors, such as agriculture and livestock sectors. When a dispute occurred during operating investment, the parties could settle by arbitration. This provision was very short without precise procedures. These provisions for the settlement of dispute was the first attempt to be consistent with the international standard. However, the FIL did not have provisions related to the protection of investors consistent with international standards. This point was newly provided in the new legislation, Myanmar Investment Law 2016 (hereinafter MIL 2016),<sup>14</sup> together with other additional provisions. After enacting the MIL 2016, Myanmar Citizen Investment Law and FIL 2012 were abolished.<sup>15</sup> These are gradual change of investment legislations in Myanmar.

The MIL 2016 contains 26 chapters and 103 Sections. The title and the definition, the objection and the scope of the law are provided in chapters 1 to 3. Formation, resignation, the dismissal, the duties and the powers of the Investment Commission to govern the investment are provided in chapters 4 to 9. Chapters 9, 11, 14, 15, 17 and 18 deal with investor interest and incentives for the investors, treatment of the investors, rights to land, investment guarantee, transfer of funds, the exemptions and reliefs. Besides, the MIL 2016 provides for responsibilities of investors, and administrative penalties for investors if the investors violate or fail to comply with the provisions of the MIL.

The significant parts of the MIL are the provisions relating to the public interest protections, the investor protection, the right to regulate of the host state in some circumstances such as for environment and the penalties for violations of regulations. Under the Myanmar Investment Law, Myanmar Investment Commission (hereinafter MIC) is the main organ to manage the investment projects. It was formed under section 4, chapter 4. It is composed of a chairman, a vice chairman, a secretary and other members from the Union ministries, government departments, government organizations and experts from the private sectors and professionals. Concerning with the investment, the MIC is obliged to carry out investment promotion activities, providing investment facilitation to investors and their investment. In accepting investment, there are two ways to start under the MIL, these are

- submission of a proposal to obtain the MIC permit under section 36; and
- application of an endorsement application under sections 75, 77 and 78.

All the business falling within the categories of section 36 of the MIL shall be started by submitting a proposal and acquire the MIC permit. These kinds of investment are the investments that

- are essential to the Union strategy;
- are large capital investment projects;

- can be a large impact on the environment and the local community; and
- is intended to use the states-owned land and building.

For these types of investments, the Myanmar Investment Rules<sup>16</sup> define types of business in chapter 2, section 3. For the investments exceeding USD 20 million running for the infrastructure and urban development, the investment exceeding USD 20 million by having a long-term land lease from the government, the investment doing along the borderline between the Union and other country and investment hiring more than 1000 acres of land in agricultural sector will be confined as the investment activity that is essential to the National strategy. If the investing amount is exceeding USD 100 million, it is confined as the large capital-intensive investment. When the types of the investment are operating by locating within the designated or protected area, forest reserved area or by supporting the ecosystem services under the provisions of the environmental laws, these kinds of investment are defined as the investments that can be a large impact on the environmental and local community. According to this provision, it seems it is lacked to describe in detail about it is whose part to decide whether or not that an investment making is falling under this section 36.

For all the investments that need to acquire the endorsement, the type of the operating business shall be falling within the types of business provided in section 50 and Section 75, 77 and 78. Section 50 of MIL provides about the right to use lands for investors. The provision granted the initial period of 50 years and another consecutive periods of 10 years. However, for another consecutive period of 10 years, it is needed to obtain the approval of the parliament (Pyidaungsu Hluttaw).

Another provision for applying for an endorsement, investors need to desire to enjoy the tax exemption and reliefs granted under section 77, 77 and 78. When the investor decides to enjoy the exemption and relief granted under this act, the investor can start his business by submitting the stipulated form of endorsement application. Section 75 provides for the tax exemption for the designated zones, section 77 provides for a grant relief from the custom duties, and section 78 provides for an exemption or relief for the income tax. The MIC designated 3 zones by notification, under the right conferring by the section 100 of MIL, for the implementation of the regional development<sup>17</sup>. These Zones are:

- Zone (1), of which the area is less development, the income tax can be exempted for the period of consecutively 7 years,
- Zone (2), of which the area is the moderated development, the income tax is exempted for the period of consecutively 5 years, and
- Zone (3), of which the area is the adequate developed, the income tax is granted for the 3 consecutive

years.

As the implementation of the urban development is one of the Myanmar government's reform plan, water services investment can enter into the Myanmar investment regime in the form of the business relating to the private public partnership (hereinafter PPP). Myanmar government has recently paid attention to the business relating to the PPP and the privatization of the water services to the private investor. Over 30 local and foreign investors are searching for the investment in the city's water distribution project. Besides, the Yangon City Development Committee is considering and showing the interest in permitting the project for the city water sector under the PPP for dealing with the weak of distribution of the adequate water to the local residents.<sup>18</sup>

## **2.2. Investor Protection Provisions**

The key incentives for the investors are the national treatment, fair and equitable treatment and the guarantee relating to the expropriation or nationalization. Therefore, it could be said that the legal framework has somewhat made a progress in comparison with previous two laws. The treatment of fair and equitable treatment, and the guarantee for non-expropriation are the typical provisions that used to contain in bilateral investment treaties (hereinafter BIT). Myanmar concluded BITs with Asian countries; such as China-Myanmar BIT,<sup>19</sup> India-Myanmar BIT,<sup>20</sup> Japan-Myanmar BIT,<sup>21</sup> Philippines-Myanmar BIT<sup>22</sup> and Myanmar-Thailand BIT.<sup>23</sup> Under section 47 of the MIL 2016, foreign investor can enjoy the treatment no less favourable than the local investors relating to the establishment, acquisition, expansion, management, operation and the sale of the other disposition of direct investment,<sup>24</sup> including the right to obtain the relevant information or governmental measures that can impact upon the investment<sup>25</sup>. For the expropriation, under the section 52, the government has guaranteed not to expropriate, directly or indirectly, and has guaranteed the compensation if the expropriation has taken place for the interest of the state. In this matter, it is not clear what kind of situation that the expropriation will be taking place with the non-discriminatory manner under the exceptional clause under section 52 (c).<sup>26</sup> Besides, in calculating the amount of fair and adequate compensation in the event of the expropriation, the law provided the ways how to calculate the compensation. The calculation will be based on the fair consideration of public and the interest of the private investor. However, there might be the dissatisfaction felt by the investor upon the calculated amount. For this matter, the provision relating to how to settle for the possible disputes if there is the dissatisfaction has not provided.

Moreover, though the necessary treatments and the guarantees for the investor are provided, the MIL has lacked to provide the provision relating to the full protection and security of the investor in the territory

of host state. This is the physical protection that might be harmed upon the body and the assets of the investor resulted by the individual disturbance such as rioting groups or governmental regulatory actions. In this protection, it also includes the police power to take the necessary actions for arresting the criminal or performing for restitution. This protection is one of the provisions that used to insert in the international treaties. For example, Article 5 of US Model BIT<sup>27</sup> and Article 2(2) of the Argentina-US BIT,<sup>28</sup> this protection was inserted along with the fair and equitable treatment. Relating to Myanmar, this protection provision is seen in the Japan-Myanmar<sup>29</sup>. This kind of treatment will be needed due to the civil crisis, civil war, public rioted or demonstration occurs around the investor's business or by the individual attack as well. Among international investment disputes, there were cases claimed for the violations of this treatment. For example, in the case of *Asian Agricultural Products (AAPL) case*,<sup>30</sup> the dispute had occurred because the claimant's shrimp farm business -insurgency of the Sri Lanka security forces against the rebellions. The tribunal held that, the respondent state, Sri Lanka was responsible for the destruction of the claimant's physical assets and decided to pay US dollars 460,000 with the interest by the state. Therefore, it should be understood that fair and equitable treatment and full protection and security treatment are the same obligations to be accorded by a host state. In the incentives that Myanmar government has currently revealed relation to operation of the business in the investment law, the business that are operated in the borderline areas near the neighbouring nations, will have tax-exemption. When the investor chooses the border line area to run his investment in where the legal stability is weak or the rule of law is not properly prevailed, the investor or his investment will not be able to enjoy the full protection of security under the MIL. If this lack of state obligation relating to the security of the investors is inserted in the law, it will be a more welcomed for its progressive.

As for another comment to the MIL 2016 is about the compensation for the expropriation. In relating with the calculation of the compensation for the nationalization, it is provided that the compensation will be calculated by taking into consideration the public interest, investor interest, the purpose of the nationalization, market value of the investment and so on. In this matter, the provision has not mentioned for the settlement if there is disagreement over the calculated amount of the compensation between the investor and the government or the respective organ of the government. The guarantee for the non-expropriation and the procedure for designing the amount of the compensation should be provided more precisely so that to reduce the concerns of arising the investment disputes to have a well-established regulation.

### **3. Regulations for Water Sector in Myanmar**

As Myanmar is a developing state, the legal frameworks for some sector like water sector are not much developed. Myanmar has never had experiences with the acceptance of the water services before. Recently, Myanmar is having plan to privatize the distribution of water services to the investors. Though states authorities privatize the water services to the hands of the investors for daily use of residents, water services business tend to have the adverse effect to a certain society. Therefore, the host state should have the effective legal frameworks for protection of water. In providing regulation and the implementations for water sector should be consistent with the international regulation as much as possible. This chapter intends to analyze Myanmar legal framework in performing the state obligations relating to water services. And then it will analyze that are those legal frameworks consistent with the international regulations. If they are not, what kind of principles are needed to lay down will be discussed.

#### **3.1. Various Regulations for Water Sector in Myanmar**

Under the Urban Development Plans for the target cities, plans for public water supply and sanitation constitute a part of urban development plans. We can see various legislations concerning water supply and sanitation system in Myanmar. They provide for protection of water resources. These legislations include:

1. Essential Supplies and Services Act, 1947,
2. Yangon Water-Works Act, 1885,
3. City of Yangon Municipal Act, 1922,
4. Underground Water Act, 1930,
5. City Yangon Development Law, 1996,
6. Mandalay City Development Law, 1992 and
7. Development Committee Law, 1993.

These legislations address urban development, especially in Yangon and Mandalay. Other water regulations provide obligations for maintenance and protection of water sources.

Under Yangon Water-Works Act, 1885, it is Yangon City that bears a principal responsibility for setting up water pipelines, constructing waterworks, and supply of pure and sufficient water.<sup>31</sup> Besides the committee's obligations, the Act provides the offences for the acts of unlawfully obstruction of water, of using for other purpose than the domestic use, the acts of bathing in water works or washes or throw at any rubbish or animal. These offences are punishable with fine without the imprisonments. Development Committee Law, 1930



contains punishments for destructions or obstructions of streams, water flows, and misuse of water.<sup>32</sup> Underground Water Act, 1930, which was provided for the development for the cities excepts Yangon and Mandalay, provides only for the tubes' extensions without providing the regulations for the maintenance of waterworks or the offences for causing destruction of water. The other regulations provide functions and the plans of the respective development committee for the development of the cities and townships in Myanmar. Under City Yangon Development Law (1996) and Mandalay City Development Law (1992), the water-related regulations are the functions for the waterworks are contained as a part of plan for the urban development. Most of the water regulations mentioned above are the provisions for cities such as Yangon and Mandalay. As a nationwide regulation, protection of water resources is provided under Essential Supplies and Services Act, 1947. This legislation is the law for the maintenance of the essential services to the life of the community in all the matters of trade or business or in any public services. Under this Act, the government can order any matters that needs for the maintenance supplies and the services essential for the safety of the interest of the community.<sup>33</sup> In the meaning of 'matters of essential services', this contains trade or business or any public services such as, for instance, the matter of carrying the restricted goods, the use of or disposal of animal, the matter of controlling the prices or rates of goods or at any vessel, any rate of rents for accommodation, and water supply and environmental sanitation in rural areas. Therefore, under this Act, the government may make any rules or adopt measures to restrict or prohibit the inappropriate water services or supply that can harm to the public safety. Other water related regulations are the regulations for the environment.

It was in 2012 that Myanmar started to focus on the environmental protection, and started to lay down rules for the protection of environment. Environmental Conservative Law was enacted in 2012, and Environmental Conservative Rules was promulgated in 2014.

Under this legislation, water sector is contained for the sustainable development for the environment. The law was enacted with the objectives for systematic integration of the environmental conservation in sustainable development by combining with the international organization, non-governmental organizations and regional and the bilateral corporation. For example, the cooperation with the Asia Development Bank for the promotion of the sustainable development in rural areas and environmental, and the cooperation with the Norwegian Environment Agency for the sustainable of natural resources, energy and environment.<sup>34</sup> In the definition setting of this law, water was listed as an element that is necessary for the environment.<sup>35</sup> Therefore, it will be assumed that the protection of the water is the same with the protection of the environment.

In the context of criminal offence concerning water, it is provided in the section 277 of the Penal

Code. The section provides that any person who voluntarily destroyed or intentionally make less the value of the water of any public spring or reservoir will be punishable with the imprisonment for 3 months or with fine.<sup>36</sup> The Penal Code was drafted in 1861, and it has been subject to modifications. However, the provision concerning water remains as it was drafted. The context and the penalties provided in this provision are totally outdated, and thus needed to be updated like other amended offences.

As for the local people living in the big cities, water for domestic used is relying on the pipeline distributed by City Development Committee. As for the people living in the rural area, people have to rely on the rainfall, river water, stream water for drinking water, cooking and water for other domestic use. In the dry zone areas located in the middle parts, the availability of fresh water is more difficult to consume for local people. Water regulations stated above displayed various regulations. But these regulations cannot directly protect for the water resources and cannot fulfil the individual need of people for clean drinking water and sanitation and other purpose of domestic used. As Myanmar is having plan to privatize the water utility services to the foreign investors, the scarcity of water for local people will be solved. On the other hand, due to the water services investment in which engaged with the foreign investor, the central government should foresee the potential conflicts such abusive behaviour, poor management of the business that affect the consumers. To fulfil these necessities, the legal framework of the central government for water policy, the strong institution for the management of water sector is needed to be implemented. In Myanmar, as the legal frameworks are outdated and not improved to support the full protection upon the right to water, the water policy to be created should be adopted according to, as much as possible, the international regulations that are provided for the right to water.

### **3.2. Necessary Legal Frameworks for Water Sector in Myanmar**

There is no uniform regulation for water resources that is applicable in Myanmar, except for the Penal Code. Since Myanmar has a future plan to privatize the water services to the foreign investors, Myanmar needs to have an effective legal framework. As water problems have been a worldwide issue, international organizations, such as the United Nations, the World Trade Organization (WTO), Council of Europe, and Association of South East Asian Nations (ASEAN), have produced resolutions or directives for the protection of the water resources. For Myanmar, in reforming a new legal framework for water sector, the regulations adopted by the United Nations should be the model example. The right to water is not directly recognized as a right under international norms. This right has derived from the recognition for a fundamental right of a person. This right was provided in the resolution adopted for the right to development adopted by United Nations

General Assembly.<sup>37</sup> In that resolution, clean water was contained as one of the ingredients to organize the fundamental right of a person.<sup>38</sup> Thus, along with fundamental right of a person, water, as an essential element, has become a right of a person to enjoy full standard of living condition. In the UN resolution adopted in 2010, water was entirely recognized as a right as a human right.<sup>39</sup> Therefore, in creating the legal framework for water in Myanmar, by citing these documents, firstly, water should be recognized as a right for each and every one of the citizen. To emphasize this right, General comment 15 by the Committee of Economic, Social and Cultural Rights states State Parties' obligations related to right to water for states has provided in the document of.<sup>40</sup> According to the General Comment, it is the primary obligations for states to be ensure and to observe for the fulfilment of safe and clean drinking water and sanitation,<sup>41</sup> by adopting the necessary rules and regulations, laws and policies.<sup>42</sup> Therefore, for states, taking care of attainment and full enjoyment of safe and clean water is primary and necessary task. In observing these tasks, states shall take all the necessary steps to protect water.<sup>43</sup> General comment has provided the way to perform for states to fulfil the obligations; to respect, to protect and to fulfil.<sup>44</sup> For respecting this right, the state should not interference the right to water of a person and protect the interference by others coming from various ways, such as the disturbance from engaging war, or unlawful treatment by third parties or from poor governance.<sup>45</sup> In protecting the right to water, states should protect from third parties' disturbance such as corporations or individuals. States shall adopt necessary measures and accurate regulations<sup>46</sup> in order not to obstruct the accessibility of water for the people. In fulfilling the obligations for the right to water, state shall perform this task by promoting the water sector, provide the necessary facilities and encourage the educational works for offering knowledge in using water. In encouraging the right to water, the applicability of water are mainly kinds; availability, quality and the accessibility.<sup>47</sup> The respective institutions shall make sure to have the adequate water for every person for their daily use.<sup>48</sup> And water to enjoy should be clean, safe and free from the dangerous elements that cause harm to the people's health.<sup>49</sup> Enjoying the right to clean and safe water should be available without discrimination to all persons with an affordable price. By citing these standards, Myanmar should prepare its legal frameworks in adopting new legal frameworks for water sector.

In the existing laws for water, there is no recognizing manner for water as a right. The provisions in water laws are provided for offences and punishments for making destruction to water resources. All these laws should be updated in accordance with the current age to be consistent with the above international water regulations. Without the effective regulations, the right to water of the citizens cannot be protected properly. The first regulation to adopt in Myanmar is to recognize a person's right to enjoy the right to water. And, as the

next step, it is needed to make rules that protect the essential elements support the highest sustainable development of people and their highest living standards. Thirdly, the government needs to enact in which the offence and punishments shall be contained for making destruction upon water. In implementing this task, the provisions of the law should be applicable to individuals and corporations who obstruct or prevent with the enjoyment of the right to water. The enforcement must be accurate in the matter of violations of rules and regulations concerned. In fulfilling this obligation, the rules for keeping water fresh and clean, for ensuring to available of water to all parts of the respective regions, should also be provided. And then, the central government needs to take other necessary measures in giving knowledge relating to use of clean water, relating to protection of water resources. By creating legal frameworks under these standards, Myanmar can adopt the water regulations that are, at least, consistent with the international regulations. In the next chapter, the typical cause that can arise the investment disputes before international tribunals during operating water services. This kind of regulation will be effective when Myanmar government permits the delivery of water services to the foreign investors.

#### **4. Water-related Disputes and Lesson Learned**

In order to operate the water business for the citizens of the host state the residents without damaging investors in Myanmar in the future, without arising the disputes with the foreign investors, it is necessary to have a look at the international investment disputes regarding water supply. In this case, the government of Bolivia cancelled the concession contract due to the civil crisis that had arisen for the expensive water tax. From this case, we can learn the lesson that the water supply business could not achieve due to the poor management of the government.

This dispute had occurred in Bolivia between the Bolivia government and the *San Francisco Company Aguas del Tunari*.<sup>50</sup> Bolivian government signed a forty-year-long contract with the San Francisco Company Aguas del Tunari in September 1999, for the distribution of water supply in the third largest city Cochabamba in 1999. In 2000, the widespread of public riots happened due to an increased water tax (more than 50 % than before). Bolivian government had to declare the state emergency and had to cancel the above-mentioned contract. Besides, the company was forced to leave from Bolivia. The investor brought a claim in 2001 against Bolivian government pursuant to the ICSID Convention. The claimant alleged that Bolivian government breached the *Netherlands v Bolivia BIT* obligations and claimed for compensation.<sup>51</sup> In 2006, with the request of the respondent State, the proceeding was discontinued, and the dispute was settled between the

parties. Public riots had mainly occurred for the water tax that had increased with the advance notice. Since the day the government and the company signed the concession, the news article was published for the government was not transparency concerns with the water price.<sup>52</sup> Before the concession was entered into force, the citizens were worried about the water tax. Knowingly about the concerns of the public, Bolivian government failed to give information for water price and did not take into consideration for fixing a fair price. Within a couple of months, the public criticism was greater after releasing the new rate of water tax.<sup>53</sup> In April 2000, the government had to cancel due to the massive public riots and the investors had to leave from Bolivia.<sup>54</sup> In this case, the operation of the water supply business did not succeed due to the poor management of the Bolivian government. By virtue of the several articles that were reported in the newspapers for not having transparency relating to the actual water price, Bolivian government could foresee the dissatisfaction of the citizens and the potential of public riots. But the government did not try to adjust the price with the investment company that could be an appropriate amount for the investors and the citizens. Civil riots arose because water tax was not the affordable price for the citizens. Besides, due to the civil riots, the investors had to leave from Bolivia. This had to be happened because Bolivia government could not give the protection both for the physical harm and the assets of the investors. With a failure to make a balance for both sides of the government, the conflict had ended up by being claimed in the international tribunal.

We can see another dispute related to water: the case of *Azurix v. Argentina*<sup>55</sup> in which the tribunal's reasoning can be learned about the connections of the fair and equitable treatment and full protection and security. Besides, the government's failure to oblige its duty for the availability of clean drinking water. In 1999, the US company Azurix Buenos Aires S.A. concluded an agreement with Argentine Government. The agreement concerned distribution of the water services and the treatment and the disposal of sewage in Buenos Aires. During the operation of the business, the Province government denied for permitting the expenses (about \$11 million) that Azurix had cost for the water infrastructure during the previous government.<sup>56</sup> Though the claimant tried to get a loan from the Overseas Private Investment Corporation, the chance for a loan was rejected that led to expense by the claimant's company itself.<sup>57</sup> Moreover, the Province government did not fulfil its obligation to permit a full recovery of Canon payment 438,555,554 in Argentina Peso to the claimant company.<sup>58</sup> Besides, the claimant was prevented from increasing bill with the concern of the public crisis for the presidential race.<sup>59</sup> These omissions caused the claimant's company to be the deprivation of the business interests and to file for bankruptcy.<sup>60</sup> Besides, during the algae outbreak in water that resulted water cloudy and hazy and even could cause the infectious disease, the Province not only failed to perform the Algae Removal

Works<sup>61</sup>, but also persuaded the local people not to pay water tax and ordered the company to discount water tax. After having so many difficulties for two years, the Azurix company requested for the termination of the Concession Agreement and the government of the Province rejected the termination of the Concession<sup>62</sup>. When the Azurix filed for the bankruptcy, the government terminated the Concession by alleging for the non-fulfillment of the business. And then the Azurix company brought a claim against the Argentina government for compensation in ICSID tribunal with the allegation for the violations of fair and equitable treatment, full protection and security and expropriation provided in the United States-Argentina BIT.

The allegations were made based on the actions and omissions that needed to perform by the Argentina government, relating to non-application of the tariff agreed in the Concession, non-completion of the certain works of the authorities of the Province and the failure to support for the financial recovery obligations<sup>63</sup>. In the allegations that the actions that performed by the Province government relation to adding the non-existence provisions in the Concession, the denial to provide the information and delay to assist verified information constituted the violations of fair and equitable treatment and full protection and security.<sup>64</sup> The claimant further stated that the obligations to preserve fair and equitable treatment is the maintenance of the stability of the investment<sup>65</sup>. In the case, the respondent state defended that it had never breached the contractual provision<sup>66</sup>. Argentina contended that the state was not responsible for violation of fair and equitable treatment because all the actions and measures done by Province government was not against the applicable legislation, rules and regulations.<sup>67</sup> In the tribunal's reasoning, the government authorities had refused the notice of the termination of concession notice sent by the claimant<sup>68</sup> and made the repetitive callings upon the claimant for non-payment of water bill<sup>69</sup>, and the respondent state failed to provide full secure investment environment to the investor.<sup>70</sup> Then the tribunal held that the respondent state violated the state obligations of fair and equitable treatment and the full protection and security.<sup>71</sup> For the allegations of the expropriation, claimant alleged that the refusal of the right to recover fully Canon payment, the interference of the claimant's enjoyment of the expected economic interest were amount to creeping expropriation.<sup>72</sup> The respondent State denied that the Province's measures were not amount to expropriation and a single effect of each measure cannot constitute the expropriation<sup>73</sup> and all the actions of the Province government was done under the provision of the Concession contract.<sup>74</sup> The tribunal held that the actions of the state did not amount to expropriation<sup>75</sup>. Because, it reasoned that, although the management of the business was affected due to the measures taken by the Province, the claimant did not lose his ownership in the business.<sup>76,77</sup> In this case, it can be seen in the tribunal's reasoning for the connection between the fair and equitable treatment and full protection and security.

After reasoning upon the several facts, tribunal expressed its belief upon the interrelation of the two standards by saying that “it was persuaded of the interrelationship of fair and equitable treatment and responsible to preserve full protection and security”, and failing to observe fair and equitable treatment is amount to the violations of full protection and security.<sup>78</sup> For the obligations relating to the task of safe drinking water, the Province government totally neglected for taking steps to have kept water safe and clean. In this regard, government itself was the one who violates the right to water for the citizens. The tribunal made a comment in the award that the actions of total disregard of the Province government caused the water civil crisis than the resolution of the Algae outbreak instead.

Another water related dispute was the case of *Biwater v Tanzania*.<sup>79</sup> This case shows that the Tanzania government’s performance to take steps to protect the right to water from the threat falling upon the citizens due to the poor management of the investor’s water service business. Due to a joint venture of the United Kingdom company, Biwater International Limited and the Germany corporation, HP Gauff Ingenieure GmbH, had signed a ten-year contract with the Tanzanian government in Feb 2003,<sup>80</sup> to operate water distribution, maintenance of sewage system and to collect the tax, under having a conditions that the claimant has to give the monthly payment to the government.<sup>81</sup> Due to poor management on billing systems and the other serious financial problems, the claimant company collected far less water tariff than the expected income that unable to pay the exact amount to the government.<sup>82</sup> This was continued till 2004. The claimant’s failure to fulfil the contract obligations to distribute the clean water caused the significant risks to human health of the citizens.<sup>83</sup> In May 2005, the government announced that the Lease Contract was terminated. Para 207, and the government ordered the staffs to transfer to the new department that was meant to take all the management of the claimant business.<sup>84</sup> The claimant’s right for the entitlement of VAT relief was also cancelled.<sup>85</sup> In the end, the claimant owed 3.4 billion in Tanzanian currency for all the unpaid tax and rental fees.<sup>86</sup> For all these happenings, the claimant company brought a claim by alleging for the violations of fair and equitable treatment and expropriation under UK-Tanzania BIT.<sup>87</sup> The respondent state defended that due to the claimant’s failure to give the rental fee and tax, to operate the contractual obligations, the government had to exercise its regulatory power according to the contract provisions.<sup>88</sup> The state further stated that its action was done for the necessity of the continuation of services,<sup>89</sup> and as there were no deprivation of the valuable right.<sup>90</sup> The respondent further stated that the claimant’s non-performance upon the water supply services has been threatening to gain the budget amount that is necessary to do the repaired works for water and sanitation services.<sup>91</sup> Because the claimant did not pay for the essential goods and services that is necessary to treat the

raw water clean from the river, the government needed to remove the claimant's management upon the water service business.<sup>92</sup> Therefore, the state's actions and measures did not establish the expropriation.<sup>93</sup> The tribunal held that the actions relating to damaging the claimant's interest, disturbance of the contractual process were amounted to the expropriation.<sup>94</sup> In defending full protection and security, the respondent state contended that full protection and security is a duty to act by due diligence and the government's actions intended to protect the basic needs of the citizens, that did not constitute the violations of full protection and security.<sup>95</sup> For the fair and equitable treatment, the respondent state, the claimant's business was at risks since the beginning and all his management were leading to a failure.<sup>96</sup> Therefore, the claimant's extent to enjoy this treatment under the lease Contract was in critical.<sup>97</sup> As in overall decision, the tribunal decided that the actions of the Tanzanian government in conducting the rejection of VAT certificate, the seizure of the claimant's office and the public announcement for the termination of claimant's water supply business constituted the violations of fair and equitable treatment, full protection and security and established the expropriation.<sup>98</sup> In this case, the investor of the water supply service could not manage to make a progress to for upgrading the water and sanitation business. And the investor failed to cooperate with the government by paying for essential goods and services to the Tanzanian government that is needed to treat the water from the rivers before distribution.

These disputes show that the disputes can arise from various forms in the water services business. In the first Bolivia dispute, the main problem is the water price. The civilians are so interested about the water tax before releasing the official announcement. Knowingly that, Bolivian government ignored and the information about the increase price is not transparency. After announcing the water tax amount, the price is not the affordable for the citizens. As a government which is planning to privatize water services, making policy for water tax in advance should be the priority. The fixing water price should be fixed by taking into consideration the individual income of the citizens. When water price causes the frustration to the consumers, the unsuccessful water supply business would be end by arising the public riots.

In *Azurix* case, the current authorities themselves violated the right to water of the citizens by neglecting the Algae out brake in water. Knowingly, letting the distribution of unsafe water is violation of the right to water. Besides, the authorities made the public confusion by inviting not to pay the water tax to the investor. This action is the interference of the availability of the right to water of the citizens and is also amount to abusive. In the last case, *Biwater*, poor management of the investor had been a total threat to the health of the local people. the Tanzanian government had taken all the necessary steps to save the bad situation by watching the investors' business and the accuracy of the management. When the consequences are worse, the



Tanzanian government invaded and took all the control of the business. Tanzania government had done this action for the protection of the right was in accordance with the international regulations adopted for the protection of the right to water.

## 5. Conclusion

As stating in the above chapters, Myanmar investment law and water law still have not been completed to be consistent with the international standards. For investor protection, the provisions of full protection and security treatment is needed to add in MIL. And the precise regulations in calculation of compensation is needed to provide. As for the water services, legal frameworks are needed to make some regulations. First of all, there must be a regulation that recognizes human right to life. Second, there should be the regulations that protect the essential element such as water that is supporting a people's right to life. Thirdly, the implementation of the regulations should be accurate in monitoring and taking actions when any right is violated. Finally, a particular regulation relating to the services business should be promulgated. In that regulations, the provisions to negotiate between the investor and the government for the matters that have to directly deal with the consumers. Besides a plan of the public announcement in advance for the increasing tax in operating the services business. In fixing the increased tax amount, the individual average income should be taken into consideration as the economic level of the state. As for the final suggestion, there should be a Plan B for the host government in case the permitted services investment has caused the threat of danger to the society.

## Endnotes

<sup>1</sup> The Republic of the Union of Myanmar, The 2014 Myanmar Population and Housing Census, The Union Report, Census Report Volume 2, Department of Population, Ministry of Immigration and Population, May 2015, P. 12-14.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> The Union of Myanmar, The 2014 Myanmar Population and Housing Census, The Union Report, Census Report Volume 2, Department of Population, Ministry of Immigration and Population, May 2015, P. 12-14.

<sup>5</sup> Myanmar, Urban Development and Water Sector Assessment, Strategy, and Road Map, Asia Development Bank, 2013, p. 2.

<sup>6</sup> THE UNION OF MYANMAR FOREIGN INVESTMENT LAW, THE STATE LAW AND ORDER RESTORATION COUNCIL LAW NO. 10/88, 30 November 1988.

<sup>7</sup> Yusuke Takagi, Veerayooth Kanchoochat and Tetsushi Sonobe (Eds), *The Developmental State Building, The Politics of Emerging Economics*, The Springer, 2019, p. 139.

<sup>8</sup> *Ibid.*, p. 140.

<sup>9</sup> Foreign Investment Law, Pyidaungsu Hluttaw Law No. 21/2012, 2 November 2012.

<sup>10</sup> Myanmar Citizen Investment Law, pyidaungsu Hluttaw Law No. 18/2013.29 July 2013.

<sup>11</sup> Section 19 of FIL 2012.

<sup>12</sup> Section 17(b).

<sup>13</sup> Section 24 (a) and (f).

<sup>14</sup> Myanmar Investment Law, Pyidaungsu Hluttaw Law No. 40/2016, 18 October 2016.

<sup>15</sup> Section 101 of MIL.

<sup>16</sup> Myanmar Investment Rules was enacted by the Ministries of Planning and Finance by the Notification No. 35/2017 on the date of 30 March 2017 under the power conferred by the Section 100 of the Myanmar Investment Law.

<sup>17</sup> Myanmar Investment Commission Notification No. 10/2017, (22 February 2017).

<sup>18</sup> *Ibid.*

<sup>19</sup> Article 3 and 4 of the People's Republic of China and the Union of Myanmar.

<sup>20</sup> Article 4 and 5 of the Republic of the India and the Republic of Union of Myanmar.

<sup>21</sup> Article 2, 3 and 4 of Japan and the Republic of the Union of Myanmar BIT.

<sup>22</sup> Article 2, 3 and 4 of the Republic of the India and the Republic of Union of Myanmar.

<sup>23</sup> Article 2, 3 and 4 of the Kingdom of Thailand and the Republic of Union of Myanmar.

<sup>24</sup> Section 47 of MIL.

<sup>25</sup> Section of 48 of MIL.

<sup>26</sup> Section 5 (2) (c) of MIL.

<sup>27</sup> Article 5(1) of the United States Model BIT (2012) provides that "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

<sup>28</sup> Article II (2) (a) of United States of America and the Argentina Republic BIT provides that "Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."

<sup>29</sup> Article 14 of Japan and the Republic of the Union of Myanmar BIT provides that "Each Contracting Party shall accord to investors of the other Contracting Party that have suffered loss or damage relating to their investments in the Area of the former Contracting Party due to armed conflict or a state of emergency such as revolution, insurrection, civil disturbance or any other similar event in the Area of that former Contracting Party, treatment, as regards restitution, indemnification, compensation or any other settlement, that is no less favourable than that which it accords to its own investors or to investors of a non-Contracting Party, whichever is most favourable to the investors of the other Contracting Party."

<sup>30</sup> *Asian Agricultural Product Ltd (AAPL) v. Sri Lanka*, Award, ICSID Case No. ARB/87/3, 21 June 1990.

<sup>31</sup> Section 4 of Rangoon (Yangon) Water-Works Act.

<sup>32</sup> *Ibid.*, Section 35-37.

<sup>33</sup> Section 4 of the Essential Supplies and Services Act, 1947.

<sup>34</sup> Memorandum of Understanding between the Government of the Kingdom of Norway and the Republic of the Union of Myanmar concerning Development Cooperation, (1 December 2014).

<sup>35</sup> In the section 2(a) of Environment Conservative Law, it provides that, "Environmental means the physical factors in the human environment, including land, water, atmosphere, climate, sound, odour, taste, the biological factors of various animals and plants and historical, cultural, social and aesthetic factors."

<sup>36</sup> Section 277 of Penal Code provides that "Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to fifty thousand kyats, or with both."

<sup>37</sup> UNGA, *The right to development*, A/RES/54/175, 15 February 2000.

<sup>38</sup> *Ibid.*, para 12.

<sup>39</sup> United Nations General Assembly, *The human right to water sanitation*, A/RES/64/292, 3 August 2010, p.2. It stated that "The General Assembly recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights."

<sup>40</sup> Office of the High Commissioner for Human Rights, *General Comment 15: The Right to Water*, Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, Document E/C.12/2002/11, 20 January 2003.

<sup>41</sup> Article 6 of General comment 15.

<sup>42</sup> *Ibid.*, Article 17.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, Article 20.

<sup>45</sup> *Ibid.*, Article 20-21.

<sup>46</sup> *Ibid.*, Article 23, 24.

<sup>47</sup> *Ibid.*, Article. 12.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Aguas Del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3.

<sup>51</sup> *Ibid.*, Decision on Respondent's Objections to Jurisdiction, p. 456.

<sup>52</sup> *Ibid.*, para 63.

<sup>53</sup> *Ibid.*, para 66.

<sup>54</sup> <https://democracyctr.org/article/bolivia-15-years-on-from-the-water-war/> (Last access on 18. 11. 2019)

<sup>55</sup> *Azurix Corp v. The Argentine Republic*, Award, ICSID Case No. ARB/01/12, (14 July 2006).

- <sup>56</sup> *Ibid.*, para 162.  
<sup>57</sup> *Ibid.*, para 163.  
<sup>58</sup> *Ibid.*, para 41.  
<sup>59</sup> *Ibid.*, para 83.  
<sup>60</sup> *Ibid.*, para 43.  
<sup>61</sup> *Ibid.*, para. 124.  
<sup>62</sup> *Ibid.*, Para. 244.  
<sup>63</sup> *Ibid.*, para. 43.  
<sup>64</sup> *Ibid.*, para. 330.  
<sup>65</sup> *Ibid.*, para 324.  
<sup>66</sup> *Ibid.*, para. 303.  
<sup>67</sup> *Ibid.*, para. 337.  
<sup>68</sup> *Ibid.*, para. 374.  
<sup>69</sup> *Ibid.*, para. 375.  
<sup>70</sup> *Ibid.*, paras. 406 to 408.  
<sup>71</sup> *Ibid.*, Paras. 377, 408.  
<sup>72</sup> *Ibid.*, para 277.  
<sup>73</sup> *Ibid.*, para 295.  
<sup>74</sup> *Ibid.*, para 278.  
<sup>75</sup> *Ibid.*, paras. 321-322.  
<sup>76</sup> *Ibid.*  
<sup>77</sup> *Ibid.*, paras. 321-322.  
<sup>78</sup> *Ibid.*, para. 408.  
<sup>79</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, Award, (24 July 2008).  
<sup>80</sup> *Ibid.*, para 6.  
<sup>81</sup> *Ibid.*, para 8.  
<sup>82</sup> *Ibid.*, paras. 16, 163.  
<sup>83</sup> *Ibid.*, paras 377, 387, 429.  
<sup>84</sup> *Ibid.*, para 212.  
<sup>85</sup> *Ibid.*, para 218.  
<sup>86</sup> *Ibid.*, para 227.  
<sup>87</sup> *Ibid.*, Para 354.  
<sup>88</sup> *Ibid.*, Para 422, 424.  
<sup>89</sup> *Ibid.*, para 428.  
<sup>90</sup> *Ibid.*, para 422.  
<sup>91</sup> *Ibid.*, Para 434.  
<sup>92</sup> *Ibid.*, paras. 434-435.  
<sup>93</sup> *Ibid.*  
<sup>94</sup> *Ibid.*, para 500.  
<sup>95</sup> *Ibid.*, para 723.  
<sup>96</sup> *Ibid.*, Para 568.  
<sup>97</sup> *Ibid.*, Para. 569.  
<sup>98</sup> *Ibid.*, Para 814.

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