State Immunity concerning Commercial Activities in Myanmar

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要　旨

経済のグローバル化の下、ミャンマーにおいても、外国企業と政府機関との間で主権免除の紛争が生じた場合に備えた法令の対応が必要になっている。そのため、本稿では、過去の判例を調べた上で、民間と国有企業の間の商取引、紛争処理手続き、外国の判決のミャンマーにおける執行の条件について、国際法及び現行国内法令と体制の面から評価した。その結果、ミャンマーにおいては、現行法が絶対免除主義を採用しているように見えながら、実際上は、商取引に関しては制限免除主義の対応をしていると考えられた。そのため、国家と国家財産の免除に関する国連条約の締結に向けた準備も行い得ると思われる。これは、外国からの投資及び国内の民間からの投資の堅固な基礎として、また、国際法の国内における具体化のために望ましいことでもある。但し、現状では、個々の契約において主権免除を明記することが、紛争回避の上では妥当であろう。

Keywords: Commercial activities in Myanmar, State immunity law, State-owned economic enterprise

Table of Contents

1. Introduction

The Union of Myanmar has been endeavoring to improve efficiency in trade and to increase its trade volume following the liberalization of its economy and adoption of a market oriented economic system since late 1988. In late 1988 the Union of Myanmar changed its centrally-planned economic system which had been practiced for more than 25 years to a market oriented system. Consequently, existing laws which were no longer applicable under the new economic system were amended and other laws were promulgated in accordance with the changing economic system. In addition, the Union of Myanmar Foreign Investment Law was promulgated in 1988 allowing, for the first time in decades, a variety of foreign investment activities to start up. State-owned Economic Enterprise Law was promulgated in 1989 providing some economic activities to be carried out together with government enterprises. Therefore, any person (whether citizen or foreigner, a natural or a legal entity) wishing to invest in Myanmar became entitled to do business or to make investments in accordance with the Foreign Investment Law. As a result, the country's economy has grown steadily since the enactment of these laws and faster than previously under the former economic system. State-owned Economic Enterprise Law defines economic enterprises which are equally recognized as government departments that exist as separate legal entities that may both sue and be sued. Therefore, this law indicates the necessity of a government status in order to facilitate commercial transactions. However, this law does not distinguish clearly between governmental act and commercial act in such commercial activities. State immunity is a problematic issue because the courts have found difficulties of distinction between governmental act and commercial act to be determined for granting immunity. Accordingly, it is clear that Myanmar should have a national law regarding state immunity to deal with the forthcoming difficulties concerning the distinguishing between governmental and commercial act in the courts. In Myanmar, there have been 3 cases regarding state immunity since Myanmar became independent in 1948. Myanmar has not had any disputes again between foreign sovereigns regarding state immunity problems since 1960.

As government entities are greatly involved in commercial transactions from time to time state immunity has been debated by states with the goal of establishing the unified law. Thus, the United Nation Convention on Jurisdictional Immunity of States and their Properties was held on December 2 2004 as a multilateral convention which was opened for signature by all states from January 17 2005 until January 17 2007 at United Nations Headquarters in New York. Up for discussion, at that time, amongst the various government

bodies had been the question about the signing and ratification of this U.N. convention. Plainly, international trade is not only carried out by private investors but involves state-owned enterprises as well. In view of the facing the globalization of economy, Myanmar should also prepare itself in legal arrangements to the potential conflicts over commercial activities between foreign investors and government entities. Thus, Myanmar should also seriously consider the importance of state immunity as Myanmar is not only a member of the UN, but is also engaging in investment with several foreign countries by encouraging a market oriented economic system. Furthermore, regarding commercial activities in Myanmar, state immunity issues are not unheard of.

This paper will discuss whether national laws in Myanmar regarding foreign investment would effectively serve foreign investor or not, as in cases where the questions of state immunity has arisen between a private investor and a government entity in commercial activities, and whether the execution of foreign judgment is successfully carried out in national courts or not. Next, this paper will focus on the concept of Myanmar having a national law regarding state immunity, and how this law will significantly contribute to commercial activities in Myanmar or not. In the concluding part of this paper, a practical solution to the problem of state immunity regarding Myanmar will be suggested. In this regard, Myanmar may have some of the general conditions to become a party to the United Nations Convention on Jurisdictional Immunities of States and their Property.　It should also be understood, that development of the national law on State immunity is a solid and reliable basis for foreign investors as well as for private investors.　In the meantime, it is best for foreign investors as well as for private investors to include a clause of express waiver of immunity in their commercial contracts with a government enterprise.

2. Myanmar's Cases Regarding State Immunity

In Myanmar, there had been 3 cases concerning state immunity since Myanmar became independent from British rule in 1948. Prior to this period, Myanmar adhered to the absolute theory of state immunity according to the Civil Procedure Code Section 9 and 86 [1].

In the case of ***U Kyaw Din V. The British Government***, [2] the plaintiff brought an action against the Government of the United Kingdom for the recovery of money being covering to the value of goods

belonging to him said to have been destroyed by the British forces on the eve of the evacuation of Rangoon in 1942. When the matter came up before the court, the complaint was heard by the judge subject to objections of the defendant on the ground that Myanmar court had no action against the British Government.

The judgment shows the Judge of the High Court was convinced that this case has been placed before the court for argument of whether this Court has jurisdiction to entertain the suit against the defendant or not. The plaintiff argued that in view of the provisions of Section 9 and 86 of the Civil Procedure Code, the present suit lay against the defendant. However, Section 9 of the Code merely mentions the nature of suit that may be instituted, and Section 86 provides that in certain circumstances, and subject to the consent of the authority concerned, suits, may be instituted against a Sovereign Prince or Ruling Chief, or against an Ambassador or Envoy of a Foreign State, but makes no mention of a foreign State as being amenable to the jurisdiction of the Myanmar courts. It is significant that under Section 84 of the Civil Procedure Code, a foreign state may sue in any court in the Union of Myanmar.

But the Judge pointed out all member states of the family of nations is equal before international law and consequently, no state can claim jurisdiction and there by, his views were in accordance with both the authors of Code of Civil Procedure and the famous scholar Oppenheim. Finally, the suit against the defendant was dismissed taking into account a previously relevant case [3]which stressed that an independent state could waive his right to immunity, and could treat himself as subject to the jurisdiction of the courts. If a sovereign state were to have been sued in a court residing in Myanmar, such state was outside the jurisdiction of the court because the foreign sovereign state did not need to come forward and assert its right. The court itself would be bound to take notice of the fact that it had no jurisdiction.

And then, in the case of ***U Zeya V. The British Secretary of State for War***, [4] the plaintiff-appellant, U Zeya, brought an action in the City Civil Court of Rangoon (Yangon) against the Secretary of State for War of the United Kingdom for the recovery of a sum of money as compensation for the use and occupation of a house at Yangon after the British-reoccupation of Myanmar, during the period from June 1, 1945, to the end of November 1946. A petition and a subsequent written statement were submitted by the Assistant Director of the Claims and Hirings Department, Myanmar, of the British Army, contending that the Court had no jurisdiction to hear this action. The Court held that the action was not maintainable against the defendant in

view of the provisions of section 86 of the Code of Civil Procedure (concerning immunity) and in view of the fact that Myanmar became an independence country as of January 4, 1948.

The Plaintiff appealed to the high Court and notice of appeal was sent to the British Ambassador in Yangon. The Court questioned whether there were any provisions in the law of Myanmar which allowed a foreign sovereign or state or ambassador who represented a sovereign or state to be sued in Myanmar. It was clear that an ambassador could not ordinarily be served with a notice of an action. The general meaning of Section 86 of the Code of Civil Procedure is apparently to give consideration to certain principles of international law. The plaintiff argued that the City Civil Court had jurisdiction to try the action which he instituted against the British's Secretary of State for War on the grounds that the defendant-respondent had submitted to the jurisdiction. The Court held that the action in the present case was in reality a suit against a foreign state or sovereign, and they did not find anything on the record to indicate that defendant-respondent was at any time capable of representing British Government in the action in question. Then, the Court observed that when the defendant-respondent appeared in the court and that, he was willing to have the case argued on the behalf of the Secretary of State for war, to show the Court had no jurisdiction to entertain the suit against the British Government. The defendant-respondent had no authority to represent the Secretary of the State for War. It must accordingly be held in the circumstances of this case that there had in fact been no acquiescence by the defendant-respondent in the jurisdiction of the Civil Court in the present case.

Myanmar's last case regarding state immunity, the case of ***Kovtunenko V. U Lone Yone***[5], there was a criminal proceeding. Unlike the previous two cases which involved civil suits, this was decided in favor of supported a restrictive approach to the interpretation of the state immunity and the decision have impacted the previous legalistic trends that had initially been used in reference to principle of international law in Myanmar.

The problem arose between the Tass News agency in Yangon and the Nation, an English language newspaper and, two other named newspapers. In this case, the respondent (editor in chief of Nation newspaper) lodged a compliant in the Court of the District Magistrate, Yangon, in criminal proceeding against Kovtuneko who was a representative of the Tass News Agency because of the effect of the a Tass News Agency's article on the Nation. The Soviet Embassy provided bail for the applicant of this case, and then asked the Foreign Office to intervene and to issue a certificate that declared that the Tass News Agency was as a department of the Soviet

Government. The Foreign Office declined intervention and the proceeding came up before the District Magistrate, who denied Kovtunenko's motion that the proceeding be quashed on the alleged ground that the Court lacked jurisdiction. Later, Kovtunenko appealed to the Supreme Court to have the proceeding quashed by way of writ, claiming that the prosecution against him was in effect a prosecution against the Soviet Government, in whose service and in the performance of his duties he had published the Tass's article of which the complaint arose. Kovtunenko admitted that he did not enjoy a full diplomatic status and its immunities, but he did argued that his actions, were done within the scope of his duties as dictated and authorized by the Soviet Government, a sovereign State, and thusly that he should enjoy the protection of immunity.

The Supreme Court held that the position in regard to immunity from criminal process was unclear. Judicial pronouncements also did not exist. However, there is section13 (3) of the Burma Laws Act specified that, in the absence of a specific enactment, the Courts must decide the case based upon "according to justice, equity, and good conscience". The courts considered such conception to decide the case when the absence of a specific enactment related to the case. According to accepted principles of international law, an Ambassador is immune from judicial proceeding. But, in Myanmar, he may be sued in the criminal proceeding. However, the president's consent to institute a suit against an Ambassador is necessary in accordance with 86 of the Civil Procedure Code.

The Chief Justice pointed out that "in criminal proceedings the Penal Code specifically confer jurisdiction on the courts over every person. As far as we can see, the purpose of the existence of the Tass Agency in Yangon is to gather information in Burma, on behalf of the Soviet Government. If the applicant is concerned at all in the publication of the article, his act might be an official act authorized by his government and within the scope of his official duties. But, by itself, that could not be used as a legal defense in Myanmar. However, it is to be taken into consideration if executive intervention is sought. The contention made by the Assistant Attorney General that in the absence of formal or official accreditation, Tass should be regarded as operating as a private News Agency, had no relevance. A sovereign can make known his legal identity at any time, where upon he assumes the privileges due to him, as did the Sultan of Johore when the suit against him was launched. Embassies and legations accredited to Burma would expect the statements in this memorandum to be observed; the more so because they are generally recognize principles of international law. To incorporate

these principles into municipal law is the duty of the government under Section 211 of the Constitution and we think this can be achieved as far as the civil process is concerned by making suitable amendments to Sections 85 and 86 of the Civil Procedure Code and by restoring Section 87 which had been deleted by the Adaptation Order, 1948. In regard to criminal process, a provision requiring the President's sanction may perhaps be incorporated in the Criminal Procedure Code. We cannot anticipate what the government's action will be and the case may have to proceed ultimately. In the circumstances prevailing in this case, we consider that it is one which should be tried in the High Court."[6] Finally, in this case, the application for a writ to quash the criminal proceedings in the Distinct Court was dismissed by the Supreme Court. The case was ordered to be transferred from the District Magistrate to the High Court to continue the case.

With respect to above mentioned three cases in Myanmar, the first two cases, ***U Kyaw Din V. The British Government*** and ***U Zeya V. The British Secretary of State for War*** pointed out that at the time Myanmar recognized the concept of absolute immunity as a principle of international law. The High Court rested on the cases that all member states of the family of nations are equal before international law and consequently no state can claim jurisdiction, as also indicated with reference views by authors of the Code of Civil Procedure and Scholar Oppenheim.[7]Accordingly, Section 9 and 86 of the Civil Procedure Code of Myanmar follow the general law-absolute approach of state immunity apparently giving effect to certain principles of international law so that a foreign state and its property are not subject to the process of another state without due consent.[8]But a foreign state could sue in any court in Myanmar under Section 84 of the Civil Procedure Code even if there is no provision in the Code which permits the institution of an action against a foreign state. Although Myanmar fully had accepted and embraced general rule of international law as indicated in the civil process applied since 1948, in the ***Kovtunenko V. U Lone Yone*** case, the Supreme Court had to consider not only national laws but also international practices on state immunity and quoted the opinions of eminent authorities on international law. The fact remained that in a criminal proceeding deal with state immunity that no person, not even the President of Myanmar, merely by virtue of his status, can claim immunity as provided in the Penal Code of Myanmar.[9]The Court, therefore, rejected the claim of immunity in this case. The Supreme Court normally upholds in deciding on national law though it generally recognizes the principle of international law.

These cases illustrated Myanmar's judicial practices regarding state immunity at that time. The Court follows

a particular principle of international law with conditions requiring that first such laws must be recognized as customary laws amongst nations and then, such laws not in conflict with municipal laws in Myanmar.[10]And then, regarding the application of international law and municipal law, these cases illustrate the need to fill gaps in the "law" and constantly help its growth. Although legislation is very important for the development of law, it is not inadequate only by itself and it needs broader interpretations by the courts. Therefore, the judiciary needs to takes a bold hand in developing laws not only through broad and liberal interpretation, but also through recognizing the living customs and changing circumstances of society. The British conception of "Justice, equity and good conscience" must be understood for the peoples as a basis of the Myanmar legal system.[11] In the absence of any particular enabling statutory provision, the courts would consider such conceptions to follow the principle of international law. In fact, the position in regard to immunity for the criminal process remains unclear and no provision in the Penal Code regarding immunity for the government, or the Supreme Court considered on the point of criminal proceeding in Myanmar that no person including foreigner shall be liable to punishment under the Penal Code of Myanmar. It is clear that the court merely anticipated any cases within the framework of municipal law when the law which incorporates in international principle, was absent. In 1962, Myanmar became a socialist country and then that of a parliamentary democratic system. It was under a socialist government from 1962 to 1988. Since 1988, Myanmar has not had any disputes regarding state immunity in national courts.

3. The Economic Situation in Myanmar

The Government of Myanmar has transformed the centralized socialist economic policies through liberalization of the country's economic system by loosing economic control over domestic trade since 1988. Accordingly, the private sector engages in most economic activities as established with an open door economic policy. Moreover, economic stabilization and reformed measures had been undertaken to be in line with global trends to create a market economy system. Subsequently, the Foreign Investment Law (hereinafter F.I.L.)[12] was enacted in November 1988 to allow encouragement of foreign direct investment with the prime objectives of among others export promotion, expansion and acquisition of high technology. Promotion of country's opportunities has been undertaken not only for domestic trade but also for border trade activities with China, Thailand, India and Bangladesh. As a result, the country's economy has been growing time to time through new and more liberal economic policies which promote and boost the development of the

national economy.

(1) What is Myanmar Investment Commission (M.I.C.)?

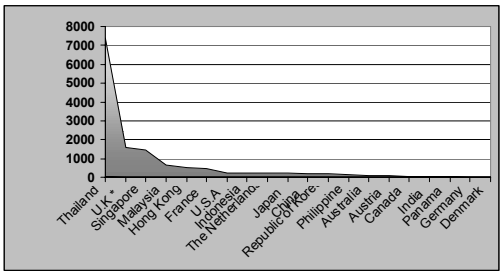
The Myanmar Investment Commission (hereinafter M.I.C.) is the governing authority that scrutinizes and issues permits to investors on a proposal being accepted under the F.I.L. The M.I.C. was formed by comprising government ministers, with a minister acting as the chairman of the M.I.C. under the procedures relating to the F.I.L. Section 3. An investor must submit a proposal in a prescribed form to the M.I.C. for consideration of issuing a permit under the procedures relating to the F.I.L. Section 6. Under the F.I.L., the M.I.C. performs the key role of scrutinizing and checking a proposal and whether it complies with the rules and regulations as set out in the F.I.L. and whether such is economically justifiable for Myanmar or not. Moreover, the M.I.C. has significant duties and powers for issuing a permit to an investor and the M.I.C. may allow any relaxing or amending of terms and conditions of permits or agreements. Thereafter, the M.I.C. takes whatever steps are necessary and prompts action in respect to issues regarding foreign investment. Furthermore, it may instruct the bank to provide transactions for financial matters authorized under the F.I.L.[13]

(2) Recent Permitted Foreign Investment Enterprises and Sectors in Myanmar

Recently, Myanmar has been engaging several foreign countries in foreign investment and trade. As of August 31, 2006, the M.I.C. has permitted 325 enterprises from 25 countries as seen in below Table-1. Most of the trading partners are apparently from South East Asia countries such as Thailand, Singapore and Malaysia and are top trading partners with Myanmar.[14]The Myanmar government wishes to promote and to strengthen border trade relations with her five neighboring countries, the People's Republic of China, India, Thailand, the Laos People's Democratic Republic, and the People's Republic of Bangladesh, and there by engage in bilateral treaties with them.[15] Border trade with China and India has been growing and is expected to continue growing in the future. Since Myanmar set up a market economy in late 1988, the accumulated pledged amount of foreign direct investment reached about 13.8 billion dollars (US$) as of August 31, 2006.

Among the total amount of foreign direct investment, investment from Japan amounts to about 215.2 million dollars (US$) and represents only 1.5% of the total foreign direct investment in Myanmar. A total of 23 projects from Japan have been permitted to invest in Myanmar.[16]It would seem that some Japanese investors

have contributed to economic development in Myanmar. However, there still a need for more Japanese investment of which would be mutually beneficial. Making up 50% of the foreign direct investment in Myanmar is the power and oil sector as seen below in Table.2. As of August 31, 2006, 325 foreign enterprises have been permitted to invest in various sectors of the Myanmar economy including power, oil, and gas, manufacturing, hotels and tourism, mining, fisheries etc.[17]



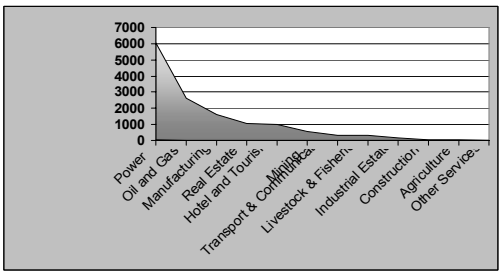


Table -1: Foreign Investment of Permitted countries

Table - 2: Foreign Investment of Permitted Enterprises by sectors

(Sources from http://www.dica.gov.mm/index.htm**,** as of August 31, 2006)

(3) Permitted Economic Activities in Myanmar

The M.I.C. published a notification which mentioned the types of economic activities that are allowed for foreign investment to furnish investors with more specific guidance in their investments.[18] Any investor has the right to carry out any economic enterprise or activity except those enterprises which are carried out solely by the government through S.E.E. law[19]However, if a foreign investor is interested in an activity not specified in the notification or an activity defined in the S.E.E. law, he can apply to the M.I.C. stating his interest and reasons as to why it will be mutually beneficial to the State and to himself for the activity to be undertaken.[20] If the M.I.C. is satisfied that the proposed activity will indeed be in the interest of the State, it may approve the application.

(4) Form of Business Organizations in Myanmar

In order to divide up and define the specific forms of business organizations, the F.I.L. section 5 and section 6 provides specific categories of business types. Accordingly, foreign investors who are interested in doing

business in Myanmar must do so through one of the following business organizations.

(1) 100% foreign-owned enterprises

The F.I.L Section 6(a) (i) states that foreign investors may establish their enterprises as a wholly foreign-owned enterprise by brining in 100% of the foreign capital required as sole proprietors, through partnerships, or limited liability companies.

(2) Joint venture made between a foreign and a citizen

Under the F.I.L. section 6(a) (ii), a foreign investor can enter into a partnership with his local counterpart or set up a limited liability company with shares held by a local partner. He can also join with any individual, firm, company, cooperative or State-owned enterprise in Myanmar to establish a joint venture either as a partnership firm or a limited company. In all such cases, the foreign capital to be brought in must be a minimum of 35 % of the total capital.

This necessary brief introduction of Myanmar's economic situation focuses on the current Myanmar foreign investment position and the levels of foreign direct investment in Myanmar. Notably, Myanmar is continuing to take necessary action to liberalize her investment areas for promoting her foreign direct investments even as Myanmar is moving towards becoming an open market economy system because foreign investment is crucial for development of the country. The state economy co-exists with her national business laws which should be stable, substantial, and reliable for foreign investors and local entrepreneurs as well. In doing so, Myanmar’s economy must become a more attractive investment area in the region to be sure of having transparency in its rules and regulations for foreign investment. Though the government has already offered a number of trade opportunities to domestic and foreign entrepreneurs, commercial transactions should be liberalized with the aim of improving economic development due to the necessity of enhancing the country’s gross domestic product (G.D.P.).

4. Economic related laws concerning State-owned Economic Enterprise in Myanmar

After Myanmar gained independence in 1948 from British rule, Myanmar started to stand as a sovereign state practicing parliamentary democracy and approaching the principles of a market economy. But in 1962, after

the assumption of power by the Revolutionary government, a centrally planned economy was adopted under a policy called the "Burmese Way to Socialism". [21] However, after assumption of power by the State Law and Order Restoration Council (now referred to as the State Peace and Development Council), the socialist economic system was officially abandoned and Myanmar was redirected towards a market-oriented economy, allowing the private sector to develop alongside the state sector. [22]Therefore, the government has been actively encouraging foreign investment and local investment in Myanmar since late 1988. Since then, the government had repealed old laws and had promulgated numerous new laws to sustain the country's economic growth. Among the new laws, especially for foreign investors, the F.I.L. and the S.E.E. law are the most significance laws as to inducing foreign investment. Moreover, before 1988, governing laws for commercial transactions such as the Myanmar Companies Act (1914), Myanmar Companies Rules (1940), the Special Company Act (1950) and the Myanmar Partnership Act (1932) had been revived again with enough experiences as to become legally incorporated. [23]

After emergence of the market economy, other legislative actions, especially those involving economic related laws, were promulgated to facilitate doing business in Myanmar. [24]A company that wants to invest in Myanmar, firstly, would observe not only Myanmar's level of the foreign direct investment, trade, investment opportunities and other incentives, etc., but would also be made aware of the transparency of its rules and regulations of trade and investment, especially whether economically related laws will be substantial and solid or not so for foreign investors and local investors. Foreign investors may seem reluctant to engage in trading with state-owned economic enterprise if economic related laws do not distinctly prescribe legal status of such enterprises. Meanwhile, for government enterprises, a new law was promulgated which is called the State-owned Economic Enterprises Law (1989) which gives a distinguished legal status of such enterprises the right to sue and to be sued. In this chapter, economic related laws of Myanmar and how they serve the demands of the market economy within the involvement of government enterprises will be examined.

(1) Commercial Transaction between Private Investors and State-owned Economic Enterprises

Regarding investments, the Foreign Investment Law is the most important law impacting foreign investors, as aforementioned, and it gives some attractive provisions to foreign investors in providing significant tax incentive and other incentives of investment. [25]Moreover, all investments, including all joint ventures with

state-owned economic enterprises are subject to and must apply to obtain an investment permit under this law. However, this law has not included any provision concerning commercial activities involving any part of a government entity. Foreign investors presuppose the question of whether a state-owned economic enterprise can invoke state immunity or not, and they can hesitate before investing in Myanmar if they realize that they are left without judicial remedies for potential disputes. Accordingly, the S.E.E. law focused precisely on this question that these enterprises are formed as a corporate body that has complete legal personality or is recognized as a legal person so that they have the right to sue and be sued as a company.[26]This provision serves as a crucial provision to determine the legal personality of government enterprises. The S.E.E. law provides 12 activities will be carried out solely by the government as state-owned economic enterprises.[27]However, these activities can be given to joint ventures between the government and any person or any other economic organization or to any person or economic organizations subject to conditions which are made through notification by the government under section 3 and section 4 of the S.E.E. law. The government may permit foreign investment for the interests of the State. A foreign investor wishing to invest in one of these activities (whether in a joint venture with a state-owned economic enterprise or a local private entity) must apply to the state-owned economic enterprise under which jurisdiction of that activity falls. This enterprise, in turn, forwards the application to its Ministry for a "certificate" to undertake such economic activity, and will be formed under the provisions of the Special Company Act (1950). [28]When the special company's Memorandum and Articles of Association have been approved by the Myanmar Investment Commission, a notification will be issued by the Ministry of Commerce allowing the company to be incorporated as a special company. [29]Moreover, such commercial activities which are carried out between private investors and government enterprises as joint ventures, have been organized in accordance with the S.E.E. law even though there was already a specific law of the Ministry concerning investors who are conducting investments under this Ministry. Therefore, state-owned economic enterprise must be specifically conducted and comply with procedures as dictated by S.E.E. law.

Regarding contracts of employment, the government provides several laws regarding employment. However, there is no specific law concerning contracts of employment. But, contracts of employment are generally subject to the Contract Act in Myanmar[30]. In practice, the terms of employment (such as job description, place of work, salary, contract period, and probationary period, and termination provisions) are usually written by an employer. Moreover, there is also no specially governing law relating to a contract of

employment between the state and an individual for work performed or to be performed, in whole or in part, in the territory of Myanmar. With respect to such contracts of employment, terms are generally agreed upon between an employer and an employee in accordance with the Contract Act. It should be considered that an individual must be bear in mind their rights and liabilities issues before he makes an employment contact with a state entity.

Regarding property interests, there are two significant laws providing the country's transfer of any interest in property. The Transfer of Property Act (1882) is the main land law of Myanmar. This Act provides the definition of transfer such as the sale, mortgage, lease, exchange, and gifts of land or any interest in immoveable property in Myanmar. Under this law, any person can transfer their own property to another by contract. There is a need to register their contract at the registration office under the Registration Act [31]as it is enforced. Another law, the Transfer of Immoveable Property Restriction Law [32]Section 3, gives prohibitions to transference of any interests in immoveable property to a foreigner. Therefore, foreigners can not hold any property in Myanmar that is under the Transfer of Immoveable Property Restriction Law. However, the government provides a foreign company with a long-term "right to use" specifying state-owned land as B.O.T (Build-Operate-Transfer) projects or joint ventures with state-owned economic enterprise. The terms of right to use are between 30 and 50 years and are approved by the M.I.C. [33]There is, in addition, one noted point that the Transfer of Immoveable Property Restriction Law does not apply to companies or organizations which form as joint ventures for the common interest of the state under Section 14 and 15 of the Transfer of Immoveable Property Restriction Law. In fact, foreign companies who are in a joint venture with a state-owned economic enterprise may be entitled to the right to use state property as approved by the M.I.C. as within the interests of the country.

Regarding state-owned or operated vessels in Myanmar, such are absolutely controlled by the Ministry of Transport. The government is directly involved in the provision of shipping services through its 100% owned Myanmar Five Star Line (hereinafter M.F.S.L.). The M.F.S.L. operates in international shipping (both conventional and containers) and coastal shipping. The M.F.S.L. is formed under the Myanmar Five Star Shipping Corporation Law[34]as an enterprise which has the right to sue and to be sued. Accordingly the MFSL has acquired extensive experience in shipping services in Myanmar as an operator in the field of sea transport for the country's exports and imports since it emerged.

Regarding the question of state immunity on such State-owned economic enterprises, it is conceivable that if private investors observe how these enterprises are formed in Myanmar they can distinguish whether their act is governmental or commercial. As previously mentioned the state-owned economic enterprise is one formed as a corporate body with a separate legal personality in the Myanmar legal system.[35]The Myanmar government insists that such enterprises are not capable of invoking the claims of sovereign immunity so that they do not entitle immunity before the jurisdiction of the courts. As such, these enterprises have the rights and powers conferred by the Ministry concerned and have the rights to enter into contracts and to sue and be sued in their corporate names.[36]And thusly, they can be formed in two ways in Myanmar under the governing law of enterprises. Firstly, they can be formed under the acts or laws of the state. The next method of formation is through notification that has been issued by the respected Ministry. Accordingly, it can be understood that their form of enterprise is either defined and restricted under the acts or notifications, as an example Myanmar Airways which is an enterprise under the Myanmar Airways Act (Act No.39 of 1952) and thusly, there must be a legal person under this law that has a right to sued or be sued.[37]Another example is seen in the formation of the enterprise under notification that Myanmar Hotels and Tourisms services were formed under the notification issued by the Ministry of Hotel and Tourism. Whether they formed through either the Acts, the Laws or the Notification, they must be legal persons under their governing laws.

There is a noticeable thing that such enterprises shall not be performed in commercial transactions beyond the powers which are expressly given by the Ministry concerned. Such enterprises must strictly follow the guidance and orders made by the Ministry. Furthermore, procedures relating to the S.E.E. law section 14 and 15, allows the government to dissolve the state enterprise at any time. In fact, foreign investors are likely to consider that state enterprises are not clearly completely independent entities and state enterprises are an extension of state departments. Therefore, even though the S.E.E. law provides a legal personality for the state enterprise, it is still vague to understand their legal status under such conditions. In practice, investors who wish to enter a joint venture with state enterprises must examine the laws of the Ministry concerned. Thereafter, such a state enterprise would be a legal person of under the respected Ministry as defined by the respected Ministry and whose contract would be defined as valid and enforceable, or not.[38]

Since there is no specifically enacted legislation concerning state immunity, the S.E.E. law in Myanmar provides merely that a state can not be entitled immunity as a corporate body as a state-owned economic

enterprise. Generally, a state enterprise's separate legal existence will be considered for liability purposes. However, the aforementioned confusion of section 14 and 15 of the procedure relating to state enterprises indicates that the government can dissolve state enterprise at any time. Thus, this law seems to disagree with state enterprises' legal existence in commercial activities and in that such enterprise seem completely on the government. In those cases, such state enterprise can not be assumed to be a completely independent corporate body, and are supposed merely branches of a state department. Moreover, the F.I.L. section 22 provides no nationalization of enterprise during the term of contract, but the government has rights to intervene in the contract when it may be necessary under section 32 of this Law, although all commercial contracts and agreements are subject to the Contract Act. Consequently, if foreign investors worry of risks associated with potential disputes in such circumstance, they are likely to be reluctant to invest with state enterprise in Myanmar. Such a circumstance is possible where a separate entity has not been set up as a reliable entity, but in order to shield the state from liability in such a situation the state corporation is dissolved by the state in order to defeat any legitimate claims against it.[39] Whether a state enterprise should be held responsible or not due to government interference is still unsettle. It is, therefore, clear that Myanmar needs a precise law on state immunity that shows a distinctly legal personality of a state entity regarding their specific matters concerning commercial activities.

(2) The Settlement of Disputes in Commercial Cases

When foreign investors do invest in Myanmar, they have rights and liabilities under the law. They do have options when there is a breach by another party and they can accept liabilities for any damages caused by their breaches of agreements and contracts regarding business. However, a foreign investor may hesitate to take legal action due to anxieties and uncertainties if one must commence with or defend proceedings in a foreign jurisdiction and so, the issue of dispute and their resolution is of great interest to foreign investors.[40]Generally, foreign investors rarely seek to commerce go to court over a dispute and instead use arbitration which is a preferential settlement dispute mechanism often used by foreign investors. Like other countries, in Myanmar, the settlement of disputes in commercial cases is a system that is based on proper *Locus Standi* - governing law regarding particular cases-as it is done in many common law countries.[41] All commercial contracts and agreements have a settlement of dispute clause as *modus vivendi* which is a mode of settlement of dispute[42]. When there is a dispute between contracting parties, at first, they will settle in accord with inclusions of a settlement of dispute in their contract or agreement. If such can not be settled in

an amicable way through of both contracting parties, they have to seek arbitration or go to court in accordance with their contract, to settle their dispute.

According to the arbitration system in Myanmar, the current arbitration law applicable in Myanmar is the Arbitration Act of 1944, [43]which is similar to the English Arbitration Act of 1950 (which remains the basis of the current English arbitration law) and arbitration legislation in other former British colonies introduced around that time. The Arbitration Act provides for the appointment of arbitrators, court supervision and enforcement of and appeal from the arbitration awards in terms which are recognizable to business people who have engaged in business in England, Australia, or other former British colonies in the region.[44]

According to proceeding before the court, when a dispute fails to reach agreements within contracting parties, they have to go to court. The jurisdiction of courts is the authority to decide matters that are litigated before it. In general, Myanmar courts have jurisdiction to try all civil suits against all persons (whether local or foreign) within Myanmar, other than a foreign sovereign. The appropriate court in which commencement proceedings occurs in Myanmar depends on the type and the value of the claims and, perhaps, the location of the parties or the place of business, or the act in question which is carried on.[45]A commercial action is typically commenced by the institution of a suit, commenced by the plaintiff filing a plaint setting out the claim against the defendants with the relevant court. When a plaint has been filed, a summons is to be served upon the defendant requesting him/her to appear and to answer the questions under section 26 and 27 of the Civil Procedure Code. A plaint should be rejected by the court and not accepted for filing where it does not disclose a cause of action, the relief claims is undervalued, the plaint is incorrectly stamped or the plaint is barred by law according to Order VII, Rule 11 of the Civil Procedure Code. After hearing both parties and their witnesses, the court makes a judgment on the ground of decree or order.

Therefore, the settlement of commercial litigations in Myanmar can be seen only by arbitration trial and civil proceeding in the court. However, among foreign investors, the question of state immunity is not difficult in the settlement of commercial litigations because their commercial agreements and contracts are subject to the Contact Act of Myanmar. But, there may be difficulties in cases of enforcement on foreign judgments and arbitral awards. Enforcement of judgments and arbitral awards are an important judicial process for foreign investors because they are greatly concerned with their business and do take into consideration that

government enterprises do not entitled immunity in this stage. Generally, enforcement of a domestic judgment or arbitral awards are quite simple but the enforcement of a foreign judgment and an arbitral award are very complicated in Myanmar because of outdated rules and regulations.

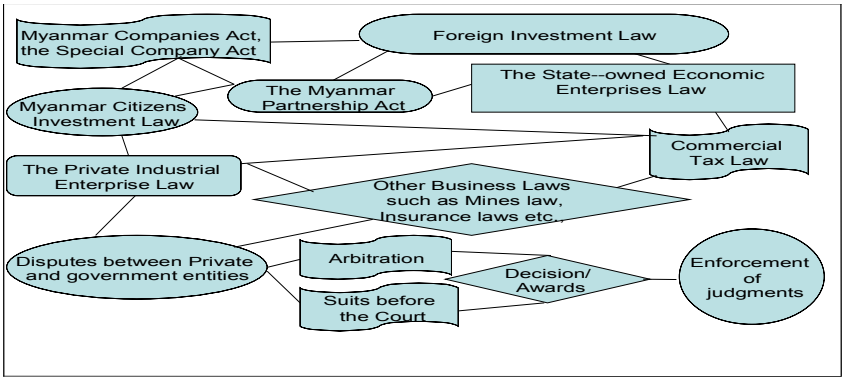


Table-3. Brief Sketch of Economic related Laws in Myanmar

5. Enforcement of Foreign Judgments in Myanmar

Enforcement of a foreign judgment is an important judicial process for business activities involving those such as multinational corporations or foreign private investors. Such occurs when a judgment has been decided by a foreign state that must be enforced in the court of another state where there is an obligation to protect a defendant's asserts. First, foreign judgments must be filed and submitted to a court. However, in practice, questions regarding enforcement of their judgment, sometimes becomes apparent when considerations are applied regarding a court’s competency to enforce a foreign judgment and whether the assets of a state-owned enterprise can be executed or not, when the foreign investor seeks investment with a state entity. In this chapter, laws and procedures related to execution of judgment will be provided and whether such enforcement is achievable in Myanmar, will be discussed.

With reference to an International Convention, Myanmar adopted the Geneva Protocol of 1923 on Arbitration clauses and the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards. The Arbitration (Protocol and Convention) Act of 1937 provides the execution of foreign arbitral awards. The Act provides for recognition and enforcement in Myanmar of foreign arbitral awards made in signatory countries and

grants reciprocal rights for enforcement of Myanmar arbitral awards in those countries. Besides, after the emergence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, most of the states which have already applied the Geneva Protocol and Convention, ratified and acceded the New York Convention of 1958. Accordingly, the Geneva Protocol on Arbitration clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 ceased to have effect between contracting states on their becoming bound and to the extent that they have been become bound by the New York Convention. However, the New York Convention legally superseded and replaced the Protocol that it gives legal effect only on contracting parties to be able to enforce their awards in respective countries as a reciprocity basis. In Myanmar, it has been difficult to enforce arbitral awards of foreign countries which are not a signatory to the Geneva Protocol because Myanmar has not acceded to the New York Convention.

However, in practice, concerning the dispute settlement process, foreign investors prefer and request to apply international rules of arbitration instead of Myanmar's existing arbitration Act when they make a commercial contract as their choice of law. UNCITRAL rules[46] are not the only the arbitral rules which were chosen by ASEAN (Association of Southeast Asian Nations) countries due to "The ASEAN Agreement for the Promotion and Protection of Investment"[47]but also are favored by foreign investors concerned with dispute settlements. Accordingly, foreign investors who engage in investment with state-owned economic enterprises also have made a contract including the dispute resolution processes that is mostly in reference to foreign arbitration under international rules such as arbitration in Singapore under the UNCITRAL rules.[48]In applying UNCITRAL rules, commercial contracts have included a clause mentioned to be settled by arbitration in accordance with the UNCITRAL rules. Consequently, foreign investors think that they would settle conveniently by this rule when disputes arise concerning any issue concerning a commercial contract. Thus, the parties may choose a foreign arbitral forum in their commercial contract as a secure and convenient forum for arbitration event though there is still a question of enforcement of foreign awards in Myanmar.

With reference to national laws in Myanmar concerning enforcement of foreign judgment, the Civil Procedure Code of Myanmar (hereinafter C.P.C.) section 13 provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties, or between parties under whom they or any of them claim, litigating under the same title. However, foreign judgment is not accepted as conclusive and final under certain circumstances that are as follows:

(1) when the judgment has not been pronounced by a court of competent jurisdiction,

(2) when it has not been given on the merit of the case or, when it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Myanmar in cases in which such law is applicable,

(3) when the proceedings in which the judgments was obtained are opposed to natural justice,

(4) when it has been obtained by fraud and when it sustains a claim founded on a breach of any law in force in Myanmar.

Myanmar has no agreement with other countries regarding enforcement or recognition of foreign judgment. There is also no case related to enforcement of foreign judgments in the courts of Myanmar. However, enforcement of foreign judgment and arbitral awards in Myanmar should conform to the minimum international standard as the country is promoting a market economy system. In the time of endeavoring to enhance the country's economy, as the issue of dispute resolution is always of concern to foreign investors, the problems arising from commercial activities should be solved by harmonizing laws and standardizing resolutions. Although Myanmar has no agreement and is not a party to the multilateral convention on enforcement of judgment, Myanmar will accept competent jurisdiction to hear cases in accordance with Section 13 and 14 of C.P.C. for enforcement of foreign judgments made by the court of another state when the defendant or relevant assets are actually located within her jurisdiction. Nevertheless, the country should be aware of foreign investors' concerns regarding dispute settlement and enforcement of those judgments and awards between private investors and state-owned economic enterprises. It would be favorable for foreign investors to secure and find convenient settlements as an incentive to foreign investment in Myanmar.

6. Future Perspective of Myanmar’s Position concerning State Immunity

From the previous chapters, a focus on the current Myanmar position of state immunity has indicated that since the *Kovtunenko V. U Lone Yone* case decided by the Supreme Court of Myanmar, the court had applied restrictive doctrine on the criminal proceeding in according with state immunity based on the Penal Code. Myanmar's position may be moving towards a restrictive doctrine that states an inability to invoke immunity in commercial activities through the S.E.E. law. Nevertheless, this law does not explicitly give the rights and obligations of the state involved in commercial activities, for particular sources such as a contract of

employment, property interests, etc. This chapter seeks to explore the future perspective of Myanmar's position on state immunity if Myanmar were to have its own national law.

Under the C.P.C. section 9 and 86, property of a foreign state which is located in Myanmar, would not be attached without consent of to a foreign state but there is no mention of a foreign state as being amenable to the jurisdiction of the courts of Myanmar.[49]Thus, Section 84 of the C.P.C. provides that a foreign state may sue in any court in Myanmar. Nevertheless, there is no provision in the code which permits the institution of an action against a foreign state.[50]Therefore, it would seem Myanmar's adheres to the general international law of application of absolute immunity on foreign state property. Even foreign state entities engaging in commercial activities are not entitled to immunity in Myanmar, and their property is afforded immunity under the Civil Procedure Code. There are no existing laws providing distinctions between nature acts and proposed acts of government on commercial activities. Moreover, the courts practice also does not provide any legal principles on public acts and private acts of state immunity in commercial activities. Therefore, it is unable to classify dealing with mixed activities of the state act such as selling and buying military goods whether such should be commercial or not. Furthermore, cases that concern the purchase, building and leasing of property for diplomatic or consular premises are very complicated to decide especially as the state is concerned. However, such conditions have already been settled in a number of states' courts practices that defines the acquisition of military equipment by foreign state's armed forces to be commercial and any kinds of contract such as building and leasing of property were found to be commercial activities.[51]

The Myanmar Official Secrets Act 1932 deals with government officials and provides protection for the secrets of government. Under section 3 of this Act, officers in the service of the government can be prosecuted if they wrongfully communicate classified materials or information. There is also no provision on state immunity though an officer of the government may be sued under this Act.[52] The Attorney General Law, 2001, adopts its duties and brings notice to the Ministries and Government Departments and organizations if their acts are not in conformity with law.[53]It is apparent that existing laws in Myanmar mean government officers can be sued if their acts are not in accordance with the law and though these laws are no distinction on state immunity.

In Myanmar, there is a recognizable principle of international law that a foreign Sovereign and his property

are not subject to the process of a court of another country. The purport of Section 86 of the C.P.C. is apparently to give effect to certain principles of international law.[54]Furthermore, the government has sought a national law that harmonizes and conforms to that of international law. Thus, some existing laws in Myanmar had been promulgated in accordance with international treaties and multilateral conventions. Myanmar has signed and ratified several multilateral or bilateral treaties since 1948. National laws were promulgated or amended to be in accordance with international ones once Myanmar had ratified such international conventions. Though all of the agreements and contracts are subject to the act and bilateral treaties in which state enterprises are barred from invoking their immunity from a foreign legal proceeding related to commercial activities, the issue of state immunity has not been explicitly drawn in existing laws in Myanmar.

Although Myanmar apparently applies absolute doctrine of immunity due to section 9 and 86 of the Code of Civil Procedure, there is practically no way to exercise the restrictive doctrine of immunity in commercial transaction as an inclusion clause which has a waiver capable of invoking immunity in a commercial treaties or contracts. Accordingly, Myanmar should greatly consider signing the UN convention on Jurisdictional Immunities on States and Government and their properties. It is apparent the government would have had the requirement of serious discussion and paid close attention to this great issue if Myanmar would have signed and ratified the UN convention. Then again, maybe not, because it would affect some laws requiring compliance with the UN Convention after signing and ratifying it. It should be obvious that the country needs to update her legal practice in order to fall in line with current international trends in commercial activities. In truth, state immunity is a controversial issue in the current trends of global trade and investment and it has been practiced by a different approach-absolute doctrine or restrictive doctrine in states as a denial of distinction of private act and public act by court practice differing from country to country or from legal system to legal system.[55]Thus, Myanmar should emphasize the states' practices which have already enacted national legislations as well as the UN convention on Jurisdictional Immunities of States and Their Property.

Obviously, as state immunity in commercial activities has been given attention by states at the present time, Myanmar should accede to the UN convention in the long run. Consequently, Myanmar should promulgate her own law on state immunity with specific matters regarding this issue. State immunity law in Myanmar would provide, like other states' national laws concerning state immunity, exceptions of specific matters of this issue which involve state enterprises engaging in commercial transactions. In commercial transactions,

State immunity law may be defined distinctly as the legal personality of a state enterprise by applying criteria of the nature act or the purpose act on commercial transaction. Regardless of commercial exception, in practice, it is best that foreign investors, as well as private investors insert or include and negotiate an express waiver immunity clause when government enterprises are in their commercial contracts.

With respect to employment contracts, that States should not be allowed to invoke immunity from jurisdiction in proceedings relating to employment contracts, unless the employee had been recruited to perform functions in the exercise of a governmental authority with particular reference to diplomatic or consular staff.[56]In fact, Myanmar nationals who work for foreign state entities' work where a contract was signed in Myanmar, may sue and ask for awards of foreign states entities that can not claim immunity in proceeding before Myanmar courts. This law may clearly define the status of the state which was involved in the employment matter for commercial purposes.

State immunity is an important issue in commercial litigation and sometimes difficulties may arise regarding the enforcement of judgments and the execution of state property in national courts. With respect to commercial litigation of a foreign state, a new exception to the law in relation to arbitration and proceeding in the courts shows that the state enjoys no immunity[57]but it could be problematic in actions to enforce foreign judgments and foreign arbitral awards due as Myanmar is not a member of the New York Convention, and only grants reciprocal rights of enforcement awards made in signatory countries of the arbitration (Protocol and Convention) Act 1939, there is no bilateral treaty or multilateral international convention in force between Myanmar and any other country on reciprocal recognition and enforcement of judgments. However, in practice, state enterprises and foreign companies have made contracts which include arbitration clauses that allow international rules for both parties. Nevertheless, the government is taking serious consideration concerning commercial litigation between foreign investors and state enterprises that includes application of international rules such as UNCITRAL rules. Furthermore, the national courts should support the arbitral procedure but refrain from undue interference to undertake enforcement of awards which are subjectable to foreign state property. Such would better serve Myanmar and thus is the best solution for enforcement of foreign awards and judgments in Myanmar as well as in many areas of foreign jurisdiction. In doing so, it will be beneficial for not only national investors, but also foreign investors in Myanmar in cases where the state enterprises engage in commercial activities.

Generally, the doctrine of State immunity is a principle of international law that gives the state and state officials'- absolute immunity from the adjudicating or enforces claims of national courts of other states and the court itself. The law of state immunity is a mix of international law and municipal law because such doctrine of international law is applied in accordance with municipal law in national courts. Further, its requirements are governed by international law but first and foremost, it is governed by the individual municipal law of the state before whose courts a claim against another state is made can determine the precise extent and manner of such application.[58]As modern international law is changing the doctrine of state immunity in that the states can not be entitled to in their immunity before the courts due to their involvement in commercial activities, states can only enjoy immunity restrictively when they are acting as a state and government function.[59]It is, therefore, important that Myanmar adhere to the principles of international law when Myanmar is presented with responsibilities and international liability as a country with dignity and equality among nations. As the S.E.E. law in Myanmar provides only that state enterprise can be sued or has the right to sue, there is still need to mention precisely to what extent and manner of a government may act in particular which matters are applicable or beyond their authority. Myanmar should have national legislation regarding state immunity to support the courts determining distinctly between private act and public act of state and government. Finally, it is also plausible that national law will be able to adopt a broader, more internationally minded approach in interpretation of the laws. In doing so, it will actively assist in fostering the country's economic development as a part of a solid legal framework laid out for commercial activities in Myanmar.

Conclusion

This paper has particularly focused on the issue of state immunity concerning commercial activities in Myanmar. It has been concluded that firstly, though the existing laws of Myanmar provide that the state, its officials, and its entities can be sued when they violate their liability, as aforesaid, these laws have not clarified the issue of immunity and also have not included situations where their acts have involved commercial activities. Furthermore, the state can not claim immunity from the jurisdiction of national courts in Myanmar when the state is involved in commercial activities as according to the S.E.E. law. Generally, this S.E.E. law merely defines the legal personality of state enterprises and does not distinguish between governmental acts and commercial acts. In fact, investors have asked to negotiate insertions of an express

waiver of immunity clause in their commercial contracts to secure their investments. Such is indicative that Myanmar needs to have its own state immunity law as a solid and reliable national law for foreign investors as well as for private investors.

Secondly, enforcement of foreign arbitral awards is of great concerned to foreign investors and only applicable for contracting parties of the Geneva protocol and Convention on the execution of foreign arbitral awards, however, such is not the case in Myanmar as it still has not agreed to ratification of the New York Convention. Regarding difficulties of enforcement of arbitral awards of a foreign sovereign, to some extent, enforcement would be doable if state immunity law were in which conformity with the UN convention, and were of equal value in Myanmar and it had its own law. Finally, it can be said that Myanmar should accede to the UN Convention firstly and then it should legislate a national law in line with this Convention. Such would reflect distinctly Myanmar's legal position concerning state immunity not only domestically but also internationally. With the emergence of state immunity law in Myanmar, such a change would contribute as to make Myanmar more accessible with considerations regarding judicial practices by states of which have well developed national legislations. These would contribute toward the future development of better state immunity law in Myanmar.

End Notes

1 Section 9 of the Civil Procedure Code mentions the nature of suit that may be instituted, and Section 86 provides that in certain circumstances, and subject to the consent of the authority concerned, suits may be instituted against a Sovereign Prince or Ruling Chief, or against an Ambassador or Envoy of a Foreign State but not without such consent.
2 The High Court of Rangoon, Burma Law Reports (1948), P.524, Materials on Jurisdictional Immunities of States and their Property, United Nation Legislative Series, 1982, P.214-215, see also International Law Reports(1956), p.214, reported originally in Burma law Reports(1948),p.524
3 Kay L.J. in Mighell V.Sulton of Johore(L.R.(1894) 1Q.B.149 at p.162
4 Decision by the High Court of Rangoon on 2 February1949, Materials on Jurisdictional Immunities of States and their Property, United Nation Legislative Series, 1982, P.215-217, see also International Law Reports(1956), p.212, reported originally in Burma law Reports(1949),p.402
5 Decision by the Supreme Court on 1 March 1960, Materials on Jurisdictional Immunities of States and their Property, United Nation Legislative Series, 1982, P.217-220, See also International Law Reports. Vol.31, p.259, Reported originally in Burma Law Reports (1960), p.51
6 Ibid
7 Materials on Jurisdictional Immunities of States and their Property, United Nation Legislative Series, 1982, P.215
8 "The filing of a suit against a foreign State, the collection of a claim against it and the attachment of the property located in the Myanmar may be permitted only with the consent of the competent organs of the State concerned."
9 Penal Code Section 2 provides every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, which he shall be guilty within the Union of Burma.
10 Supra 5, p.220
11 Law and Custom in Burma and the Burmese Family, Maung Maung, Dr, Matinus Nijhoff, the Hague, Netherlands, 1963, pp.43-44
12 Foreign Investment Law (No.10/88), Section10 gives that the commission shall issue a permit to a promoter, on a proposal being accepted.

13 F.I.L Section 8 to 16 provide that duties and powers of the M.I.C

14 Sources from http://www.dica.gov.mm/index.htm, official website of Directorate of Investment and Company Administration under Ministry of National Planning and Economic Development, last accessed on January 31 2007

15 Bilateral treaties with China in August 1988, with India in January 1994, with Bangladesh in January 1994, with Thailand in March 1996, with Laos exchanging draft agreement, official website of Ministry of commerce of the Union of Myanmar, last accessed on May23,2006**,**
http://mission.itu.ch/MISSIONS/Myanmar/e-com/Commerce/moc_web/doingbusiness/fsdoing.htm

16 Supra at 14

17 Ibid

18 Procedure relating to F.I.L, Section 5 provides forms of organization of foreign investment

19 S.E.E. Law section 3 gives the government has the sole right to carry out the 12 economic enterprises as state-owned enterprises, this law section 6 mentions that the right to carry out any economic enterprise other than those prescribed under section3

20 S.E.E Law Section 7 provides economic enterprises under section 3 of this law, can be carried out in the interest of the Union of Myanmar

21 Foreign Direct Investment in Myanmar, Alec Christie &Suzanne Smith, SWEET & MAXWELL Asia, 1997, p.2

22 Ibid

23 Myanmar Companies Act and Myanmar Partnership Act had been promulgated since British colonial time

24 Transfer of Immovable Property Restriction Law (1987) The Co-operative Society Law (1992) Law Relating to Fishing Rights of Foreign Vessels (1989) Law Relating to Aquaculture (1989) Commercial Tax Law (1990) The Central Bank of Myanmar Law (1990) The Financial Institutions of Myanmar law (1990) Myanmar Marine Fisheries Law (1990), Fresh Water Fisheries Law (1991) The Private Industrial Enterprise Law (1990) Myanmar Hotels and Tourism Law (1993) The Myanmar Insurance Law (1993) The Myanmar Mines Law (1994)Myanmar Citizens Investment Law (1994) Myanmar Pearl Law (1995) Myanmar Gems Law (1995) The Insurance Business Law (1996)

25 3 years tax exemption and other tax relief under section 21 of F.I.L

26 S.E.E Law, Section 8 (b) provides the respective organizations constituted under sub-section (a) shall be a body corporate having perpetual succession and common seal, and shall have the right to sue and be sued in its corporate name

27 The Economic Enterprises that are to be carried out solely by the Government (as stated in Section 3 of the State-Owned Economic Enterprises Law) are as follows: (a) extraction of teak and sale of the same in the country and abroad; (b) cultivation and conservation of forest plantation with the exception of village-owned fire-wood plantation cultivated by the villagers for their personal use; (c) exploration, extraction and sale of petroleum and natural gas and production of products of the same;(d) exploration and extraction of pearls, jade and precious stones and export of the same;(e) breeding and production of fish and prawns in fisheries which have been reserved for research by the Government;(f) Postal and Telecommunications Service;(g) Air Transport Service and Railway Transport Service;(h) Banking Service and Insurance Service;(i) Broadcasting Service and Television Service; (j) Exploration and extraction of metals and export of the same;(k) Electricity Generating Services other than those permitted by law to private and co-operative electricity generating services; (l) Manufacture of products relating to security and defense which the Government has, from time to time, prescribed by notification.

28 Supra at 21, p.38

29 Ibid, at p.5

30 Contract Act ,India Act 9/1872, Burma Code Vol. IX

31 India Act XVI of 1908

32 Pyithu Hluttaw Law No.1, 1987

33 Supra at 21, p.82-83

34 Revolutionary Council Law No.2 1964

35 S.E.E law section.8 (b) provides that economic enterprises formed under Section3 and 7 of this law, shall be a body corporate having perpetual succession and a common seal, and shall have the right to sue and be sued in its corporate name.

36 Supra at 21, p. 127

37 Ibid, see also Legal Frame Work of the Union of Myanmar, a paper delivered at the Fourth Meeting of Europe/East Asia Economic, Tun Shin, Dr, Legal adviser of Ministry of National Planning and Economic Development (now Deputy Attorney General of the Union of Myanmar), Singapore20-22 September, 1995

38 Supra at 21, p.126-127

39 Schreur, Christoph H., State Immunity: Some recent developments, Grotius publications limited, Cambridge, 1988, pp.120-121

40 Ibid, p.259

41 The Legal Framework of the Practical Settlement Disputes in the Union of Myanmar, Tun Shin, Dr, Myanmar Perspectives, 1996, p.23-24, the common law, and under many statutes, standing or *locus standi* is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged

42 Legal Frame Work of the Union of Myanmar, a paper delivered at the Fourth Meeting of Europe/East Asia Economic, Tun Shin, Dr, Legal adviser of Ministry of National Planning and Economic Development (now Deputy Attorney General of the Union of Myanmar), Singapore20-22 September, 1995
43 The Arbitration Act 1944, Myanmar Act IV, 1944 was promulgated on 1st March 1946
44 Supra at 21, p.248
45 Ibid, p.261
46 UNCITRAL (United Nations Commission on International Trade law) Arbitration Rules which adopted by UNCITRAL on 28 April 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitration and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award. (Sources: last accessed on April 16, 2007, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html)
47 It was signed in 1987 between the six ASEAN countries. It was amended in 1996 when Vietnam became a member of ASEAN and acceded to the agreement
48 In MOGE and oil and gas company' production sharing contract, there is a clause shows that if the arbitrators fail to agree on the appointment of an Umpire then MOGE and CONTRACTOR shall request the President of International Court of Justice, The Hague, to designate the umpire. See also chapter15 of supra at 20
49 Civil Procedure Code, Sections 9 and 86, Vol. 12, Myanmar Code provides that "the filing of a suit against a foreign State, the collection of a claim against it and the attachment of the property located in the Myanmar may be permitted only with the consent of the competent organs of the State concerned." See also U Kyaw Din case, The High Court of Rangoon, Burma Law Reports (1948), P.524
50 Code of Civil Procedure section 84, India Act 5/08, See also U Kyaw Din case, The High Court of Rangoon, Burma Law Reports (1948), P.524
51 Supra at 38, pp.17-20, In Mc Donnell Douglas Corp. v Islamic Rep. of Iran case, 758 F2d 341 at 349 (8th Cir.1985) held by US court that " the intent of the purchasing sovereign to use the goods for military purposes does not take the transaction outside of the commercial exception to sovereign immunity".
52 India Act 19/23, Burma Code, Vol. II, 1941, p. 135, Section 3 (2) further states "it shall be no defense for a person charged with an offence under the Act to prove that his section was not complied with."
53 Section 3(h) of the Attorney General Law, the State Law and Order Restoration Council Law No. 3/88
54 See, U Zeya vs. The British Secretary of State for War case, Decision by the High Court of Rangoon on February2, 1949
55 Supra at 38,pp4-9, See also Fox, Hazel, The Law of State Immunity, the three different phases of state immunity, p.2
56 UN Convention on Jurisdictional Immunities of States and Their Property, article (11)
57 UN Convention on Jurisdictional Immunities of States and Their Property, article(17, 18)
58 Fox, Hazel, The Law of State Immunity, oxford University Press, 2002, p.1
59 UN Convention on Jurisdictional Immunities of States and their Property(New York) adopted December2, 2004, its current status is 28 signatories countries and 4 parties, sourced from multilateral treaties deposited with the Secretary-General, http://untreaty.un.org, last accessed on March17 2007

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