



Investment Laws of ASEAN Countries: A comparative review

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Executive Summary

This paper compares the investment laws of the 10 ASEAN countries, focusing on basic questions relating to the function of investment laws in each country.

The main findings of the paper are as follows:

1. Not every ASEAN country has an investment law. For example, Singapore, which is the most successful ASEAN country in attracting foreign investment, does not have an investment law.
2. Among ASEAN countries that do have investment laws, different countries' laws have different functions. For example, the Malaysian Promotion of Investment Act deals exclusively with investment incentives, while the Thai Foreign Business Act deals exclusively with restrictions and conditions on foreign investment. Some ASEAN countries have multiple investment laws, each with a different function.
3. Among ASEAN countries that do have investment laws, these laws form only a small part of the legal and regulatory regime governing investment. It is impossible to evaluate a country's investment law without considering how it fits into the wider legal and regulatory framework governing investment.

This paper also highlights fundamental differences between investment laws and investment treaties:

4. Among ASEAN countries, no country's investment law includes the combination of vague investor rights commonly found in investment treaties. For example, aside from the Myanmar Investment Law (2016), no ASEAN investment law guarantees investors "fair and equitable treatment" (FET). FET is among the most far-reaching, and widely criticized, investor rights that investment treaties grant to foreign investors. Moreover, the Myanmar Investment Law defines FET very differently from the way that investment treaty tribunals have understood that concept.
5. No ASEAN country grants general consent to investor–state arbitration in its investment law. However, many ASEAN countries do allow investor–state arbitration in cases where there is a specific agreement between an individual investor and the host government—in for example, an investor–state contract—to resolve a dispute through arbitration.



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Introduction

Several countries in the Association of Southeast Asian Nations (ASEAN) are currently revising their investment laws. As with any process of law reform, one important step in this process is reviewing the practice of other countries. A comparative review of this sort can draw attention to issues that might otherwise be overlooked, and highlight different ways of addressing common issues. Careful comparative analysis is particularly important in developing countries, where government officials may lack the time and resources to carry out a systematic review of various alternatives themselves.

This paper is primarily descriptive. It does not propose a model investment law or recommend provisions that should be included in investment laws.¹ On the contrary, one of the key findings of the paper is that a country's investment law cannot be evaluated in the abstract, without considering how it relates to other elements of the legal and regulatory framework governing investment in that country. Nevertheless, understanding how existing investment laws operate in different countries does help to clarify questions that should be considered when revising or adopting a new investment law.

Focus

The focus of this paper is on the *function* of investment laws in each of the 10 ASEAN countries. In other words, this paper examines what investment laws are *for*. One of the central conclusions of this paper is that investment laws have different functions in different countries. In some countries, the function of an investment law is to establish a process for the review and approval of new investment. In others, it is to establish a regime for the granting of investment incentives. The variety of possible functions of an investment law is reflected in the fact that some countries have multiple investment laws, while others have no investment laws as such. These basic questions of function are important. It is impossible for a law reform process to progress without first clarifying the function that the new investment law is intended to perform and considering how this relates to the operation of other laws that apply to investment.

The focus on the function of investment laws means that this paper does not delve deep into the detail of each country's law on specific issues. For example, while this paper examines whether ASEAN countries' investment laws offer tax incentives to investors, it does not compare the rate and duration of such tax incentives for investment in different sectors in each country. Nor does it provide a detailed comparison of the sectors that are closed, open subject to conditions or entirely open to foreign investment in each country. To be sure, such questions are an important component of any law reform exercise, but they only arise after basic questions relating to the function of a country's investment law have been resolved.

¹ This contrasts with the approach of the International Finance Corporation's (IFC's) *Investment Law Reform: A Handbook for Development Practitioners* (World Bank Group, 2010). The IFC Handbook includes a Law Assessment Tool, which promotes a range of "good practice" features for investment laws. Many of these "good practice" features are strong investor rights provisions that were traditionally found in investment treaties. To our knowledge, there is currently no published evidence that supports the IFC's recommendation to include these features in investment laws. Many of the recommendations made in the IFC *Handbook* are justified by reference to the IFC's own data and research (e.g., pp. 2, 9, 19 and 20). We encourage the IFC to make publicly available any in-house data or research relating to its "good practice" recommendations.



Research Methodology

At the beginning of the research, the author prepared a set of questions to guide the analysis of each country's investment law. These questions fell into nine categories, as follows:

1. Scope of application

Which investors does the investment law apply to? Domestic investors, foreign investors or both? How are they distinguished?

Which investments does the law apply to? Is there a distinction between investment projects and investment capital? Does the law cover portfolio investment and, if so, how?

2. Investment institution

Does the investment law create or refer to an investment institution? If so, what are the functions of that institution?

3. Entry and approval of new investment

Does the investment law deal with the admission and approval of new investment? If so, how? Does the law establish a negative or positive list of sectors closed or open to investment? Is approval required to invest in listed/unlisted sectors? If so, which agency is responsible for issuing investment approval and how do these approval processes relate to other permitting processes, such as environmental and construction permits?

4. Relationship to other laws

How does the investment law relate to other laws? Are interactions dealt with explicitly? If so, does the investment law defer to, or override, other laws such as those dealing with immigration, transparency, land acquisition and taxation? How does the investment law relate to laws governing investment in special economic zones?

5. Investment incentives

Does the investment law deal with investment incentives? If so, how does the process for the granting of investment incentives relate to processes of investment approval? Are incentives granted on an automatic or discretionary basis?

6. Investor rights

Does the investment law confer certain rights on investors—such as rights to compensation in the event of expropriation of their investment and rights to transfer capital and earnings from the investment out of the host country? If so, how do these rights compare to those commonly found in investment treaties?

7. Dispute settlement

Does the investment law establish special arrangements for the settlement of disputes relating to investments—for example, by establishing a special institution for the settlement of investment disputes, or by providing consent to international arbitration for disputes arising out of investments?

8. Status of investment treaties

Does the investment law address the status of a country's investment treaties—for example, by allowing foreign investors to invoke treaty rights as a matter of national law?

9. Other unusual features

Does the investment law contain any other features not found in other ASEAN countries' investment laws, such as provisions governing outbound foreign investment, or provisions regulating the trading of shares on the local stock exchange?



Originally, the intention was to present the findings on each country's law in a standard format, using these nine headings. As the research progressed, it became clear that there were vast differences between the basic structure and format of each country's investment law(s). In light of these differences, it made more sense to organize the discussion of each country's law on its own terms, rather than confining that discussion within predetermined categories. Nevertheless, these nine sets of questions continued to guide the analysis, and are reflected in the way the discussion of each country is organized.²

Key Findings

Four key findings emerge from the analysis that follows:

1. There is no single “good practice” approach to an investment law.

The research shows a wide variety of approaches to investment laws within ASEAN. Not every ASEAN country has an investment law. For example, Singapore, which is the most successful ASEAN country in attracting foreign investment, does not have an investment law. Singapore's approach is consistent with the fact that most developed countries do not have investment laws.³ In countries without investment laws, foreign investment is governed by laws of general application (e.g., company laws, contract laws, environmental protection laws, land-use laws, laws guaranteeing compensation for expropriation of property, etc.), along with sector-specific laws, which govern the admission of new investment in sectors in which entry is regulated (e.g., laws governing the issuing of banking licences).

The variety of approaches within ASEAN raises questions about what should be counted as an investment law. For example, many ASEAN countries have specific laws addressing investment in special economic zones (SEZs), such as Myanmar's Special Economic Zone Law (2014). The title of such laws does not include the word “investment” and, for this rather arbitrary reason, these laws are not examined in this paper. However, in some ASEAN countries investment in SEZs is covered by the investment law—notably, Laos' Law on Investment Promotion.

In the absence of clear evidence to the contrary, there is no reason to think that certain issues are best dealt with through a law that is called an “investment” law, rather than a law that is not called an “investment” law.

2. Investment laws have different functions in different ASEAN countries.

Malaysia's Promotion of Investment Act deals exclusively with investment incentives. Thailand has two investment laws, the Thai Foreign Business Act, which deals exclusively with restrictions and conditions on foreign investment, and the Thai Investment Promotion Act, which deals primarily with investment incentives. Vietnam's Law on Investment deals with restrictions and conditions on new investment, investment incentives and outbound investment. The differences between these three countries highlight the importance of clarifying the intended function of an investment law.

3. Investment laws do not operate in isolation

Even in countries that have investment laws, those laws are only a small part of the national legal and regulatory regime governing foreign investment. As such, a central question in drafting investment laws is how the law relates to other parts of the legal and regulatory regime governing investment. The interaction between approval processes for new investment established by investment laws and other processes of approval is one particularly important issue. Does approval under the processes established by an investment law remove the need for regulatory approvals that would otherwise be necessary—e.g., construction permits necessary for new buildings? The interaction between laws is also important in understanding the operation of “investor rights” provisions. For example, does a guarantee of free

² These nine categories are similar to the features of investment laws which UNCTAD uses as the basis for coding of its investment law database (UNCTAD, n.d.). UNCTAD's investment law database was made public in October 2017, after the research for this paper had been completed. It provides another important source of information for the comparative study of national investment laws.

³ For example, Australia, France, Germany, the United Kingdom and the United State of America do not have investment laws as such. For more detailed discussion, see Shan (2012).



transfer of funds override restrictions on the movement of funds imposed by banking or anti-money laundering legislation?

4. ASEAN countries' investment laws differ from investment treaties.

Investment treaties have historically been focused solely on the protection of foreign investment from adverse government action.⁴ In contrast, as previously noted, ASEAN countries' investment laws perform several different functions. Investment protection is sometimes among these functions. But investment protection is not the sole or dominant function of any ASEAN countries' investment law.

Insofar as ASEAN countries' investment laws have investment protection as one of their functions, they do not include the combination of vaguely drafted, and widely criticized (Bernasconi et al., 2011), investor rights commonly found in investment treaties. For example, no ASEAN country's investment law contains a vaguely drafted guarantee of fair and equitable treatment (FET) of the sort often found in investment treaties,⁵ and no ASEAN country's investment law contains an "umbrella clause" of the sort found in some investment treaties. Moreover, in contrast to investment treaties, no ASEAN country grants advance consent to investor–state arbitration in its investment law. (Many ASEAN countries do recognize the possibility of investor–state arbitration in cases in which an individual investor and the host government have specifically agreed to resolve disputes through arbitration—for example, when consent to arbitration is contained in an investment contract between the investor and the host government.)

That said, some ASEAN investment laws do contain a selection of the investor rights provisions commonly found in investment treaties. For example, many ASEAN countries' investment laws contain guarantees of compensation for expropriation and of the right to repatriate profits that are similar to standard investment treaty provisions. A minority of ASEAN countries also grant national treatment to foreign investors in their investment laws, but this is always subject to exceptions and qualifications.

This paper does not seek to explain why investment laws differ from investment treaties, but it does suggest two possible explanations. The first stems from the fact that many investment laws have the objective of promoting and facilitating investment. This might lead them to focus on practical issues that are directly relevant to investors that are considering making an investment, such as the process for issuing investment permits. A second possible explanation stems from the fact that investment laws are only one element of the national legal and regulatory regime governing investment. For this reason, other laws of general application may be able to address aspects of the relationship between private actors and government decision makers with much greater precision than possible in an investment law. For example, a government can codify standards of fair administrative treatment that apply to all individuals and companies in its territory through laws of general application—for example, Indonesia's Law on Government Administration (2014)—rather than make ill-defined promises of "fair and equitable treatment" in a law that applies only to investors.

The finding that investment laws have different functions to investment treaties has important implications for the way in which research about national investment laws is framed. There is surprisingly little published research on national investment laws. But, insofar as research has been conducted, it is based on the implicit premise that investment laws have the same function as investment treaties. For example, much of the published work on investment laws involves review of whether countries' investment laws include provisions commonly found in investment treaties.⁶ The findings of this paper suggest that this premise is unduly narrow, in that it fails to recognize that investment laws have many important functions aside from investment protection.

⁴ In other publications IISD has raised questions about whether investment treaties should continue to be focused solely on investment protection. See Bernasconi et al. (2011).

⁵ But note the discussion of the FET provision in the Myanmar Investment Law below.

⁶ e.g. Shan (2012). A partial exception to this tendency is UNCTAD's recent publication *Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment* (UNCTAD, 2016), which recognizes that investment laws do have functions other than investment protection.



Brunei

Absence of an Investment Law

Brunei does not have a law on foreign investment or an economy-wide investment law governing both domestic and foreign investment. In the absence of an investment law, foreign investment is governed by other laws, and by policies and administrative practices under those laws.

Investment Agency

The Brunei Economic Development Board (BEDB) was established by the Brunei Economic Development Board Act in 1975 (the EDB Act). The EDB Act sets out the functions and the powers of the BEDB. Notably, Section 8 of the EDB Act makes it clear that its function is to attract and facilitate both local and foreign investment.

Restrictions on Foreign Investment

The BEDB website states that:

100% foreign ownership of a company/business is allowed, except for activities that directly utilise Brunei Darussalam's natural resources such as oil & gas and fisheries.⁷

It is not clear what the legal basis of these restrictions is. The U.S. Government's 2015 Investment Climate Statement on Brunei states that BEDB has "confidential" processes to screen foreign investment.⁸ It was not possible to verify this claim or to determine whether these screening processes, insofar as they exist, apply only to foreign investment in natural resources.

Brunei also prevents foreign ownership of land. These restrictions do not appear to be codified in legislation. Rather, they appear to be implemented through a system that requires registration and approval of property transfers under Section 23 of the Land Code.

Incentives

Brunei offers a range of tax incentives to encourage investment through the Investment Incentives Order of 2001. For the most part, these incentives are available to all investors, not only foreign investors.

⁷ See <http://www.bedb.com.bn/index.php/invest-in-brunei/value-proposition/credible-co-investment-partnership>

⁸ US Department of State (2015a), p. 7.



Cambodia

The Cambodian Law on Investment (1994, amended in 2003) establishes a “negative list” approach to the admission and establishment of investment. It also establishes the framework for the granting of investment incentives through the award of Qualified Investment Project (QIP) status to investment projects. The Law on Investment is short. It does not define many of the key terms that are used in the law. Instead, these definitions are fleshed out through sub-decrees.⁹ More detail of the way the regime governing investment in Cambodia operates in practice is contained in statements of policy published on government websites.¹⁰

Scope of Application

The Law on Investment applies to both Cambodian and foreign investors and investments. The law defines a “Cambodian entity” as a company registered in Cambodia that is at least 51 per cent Cambodian owned.

Investment Agency

Article 3 of the Law on Investment designates the Council for the Development of Cambodia (CDC) as the “organization responsible for the rehabilitation, development and the oversight of investment activities.” Provincial-Municipal Investment Sub-Committees can exercise the responsibilities of the CDC for projects with capital values below USD 2 million.¹¹

Foreign Investment in Cambodia and the Negative List

The Law on Investment articulates the basic principle that Cambodian and foreign investment in any sector is permitted in any activities not contained in the “Negative List.”¹² The most recent version of the Negative List is contained in Annex 1 to Sub-Decree No 111 ANK/BK. In general, there is no requirement to seek approval from the CDC for investment in activities that are not contained in the negative list. However, our understanding is that, in many sectors, new investment requires line ministry approval.

Approval of Incentives Through the Granting of QIP Status

The main functions of the Law on Investment are to establish a framework for the grant of investment incentives through the award of QIP status, and to specify the benefits that QIPs are entitled to.¹³ To apply for QIP status, an investor must submit an investment proposal to the CDC.¹⁴ Assuming that the investment is not proscribed by the Negative List, the CDC then takes responsibility for assisting the investor in obtaining all the licences and permits required for the project.¹⁵ At the end of this process, the CDC grants a Final Registration Certificate, which confers QIP status on the investment project.

If an investment qualifies as a QIP, it is automatically entitled to investment incentives under the Law on Investment.¹⁶ Investment incentives include income tax holidays, waivers of import duties and access to visas for skilled foreign workers, subject to Cambodian Law.¹⁷

⁹ e.g. Sub-Decree No 111 ANK/BK on the Implementation of the Law of Investment

¹⁰ For example, the CDC’s website acknowledges that there is a tension between the provisions of the Law on Investment and the provisions of Sub-Decree No 111 insofar as they relate to application process for QIP status. The website clarifies that, in practice, the relevant provisions of Sub-Decree No 111 are applied, and outlines the application process in detail: <http://www.cambodiainvestment.gov.kh/investment-scheme/investment-application-procedures.html>.

¹¹ Sub-Decree No 111 ANK/BK on the Implementation of the Law of Investment, Article 4.

¹² Cambodian Law on Investment (1994, as amended), Article 7.

¹³ Cambodian Law on Investment (1994, as amended), Article 1.

¹⁴ Cambodian Law on Investment (1994, as amended), Article 6.

¹⁵ Cambodian Law on Investment (1994, as amended), Article 7.

¹⁶ Cambodian Law on Investment (1994, as amended), Article 14.

¹⁷ Cambodian Law on Investment (1994, as amended), Article 14.



Investor Rights

The Law on Investment contains a chapter titled “Investment Guarantees,” which deals with investor rights. Article 8 guarantees foreign investors non-discriminatory treatment, with the exception of matters relating to the ownership of land. Article 16 clarifies that, under the Land Law, only Cambodian citizens and Cambodian-incorporated companies that are also majority Cambodian-owned are entitled to own land in Cambodia. (However, foreign investors can acquire land-use rights by way of long-term leases of privately owned land or the grant of economic land concessions over state-owned land.) Article 9 guarantees that the Cambodian Government will not nationalize the property of investors and Article 11 allows investors to transfer funds abroad, subject to the provisions of other Cambodian laws and regulations.

When read in isolation, some of the guarantees in the Law on Investment do not appear to be conditional on registration with the CDC. For example, the guarantee of non-discriminatory treatment contained in Article 8 of the Law on Investment is drafted as applying to “foreign investor[s].” The term “foreign investor” is not defined in the Law on Investment but, on its face, would appear to be broad enough to cover foreign investors who have not sought to register their investments as QIPs. However, Article 5 of Sub-Decree No 111 ANK/BK clarifies that the guarantees contained in the Law on Investment are only available to registered foreign investors. An investor that does not wish to register a QIP, or whose investments are not eligible for QIP status, may still obtain the benefit of the guarantees contained in the Law on Investment by registering with the CDC.¹⁸

Relationship to Other Laws

Article 26 of the Law on Investment states that “any provisions contrary to this Law shall be abrogated.” This article was added by amendments to the Law on Investment in 2003. The term “provisions” is not defined in the Law on Investment, but it appears to be broad enough to cover the provisions of other laws, regulations and decrees. As such, our understanding is that the Law on Investment overrides inconsistent provisions of all other Cambodian laws.

Dispute Settlement

Chapter 8 of the Law on Investment deals with dispute settlement in relation to QIPs. It appears to cover both disputes between investors and other private parties and disputes between investors and the government of Cambodia. Article 20 requires investors to attempt to resolve disputes amicably through consultation. If consultations fail after two months, disputes may be resolved through conciliation proceedings before the CDC, court proceedings in Cambodia or arbitration, including international arbitration, if the disputing parties have agreed to arbitration.¹⁹

¹⁸ Sub-Decree No 111 ANK/BK on the Implementation of the Law of Investment, Article 5.7.

¹⁹ Cambodian Law on Investment (1994, as amended), Article 20.



Indonesia

Indonesia's Investment Law was enacted in 2007. The Investment Law deals with the establishment of new investment, investment incentives and investor rights, among other issues.

Scope of Application

The Investment Law applies to both Indonesian and foreign investment. Foreign investors are defined as including foreign citizens and foreign incorporated companies.²⁰ Foreign investment is defined as any “investment activity for running [a] business” that is partly owned or financed by a foreign investor.²¹ However, the “Elucidation” of the Investment Law—a formal supplement enacted alongside the Investment Law to clarify the meaning of ambiguous provisions—states that the Investment Law applies only to direct investment, excluding indirect and portfolio investment.²²

Form of Foreign Investment

The Investment Law requires that any foreign investment in Indonesia must be made through the form of a limited liability company incorporated in Indonesia.²³

Approval of New Investment Projects

The Investment Law establishes the basic principle that all business fields are open to both domestic and foreign investment, except for those specifically declared as closed and those declared as open to investment subject to conditions—for example, limits on the permissible share of foreign ownership.²⁴ Restrictions and conditions on investment derive their legal basis from a range of laws and regulations. But the Investment Law requires these restrictions to be consolidated in a single Presidential Regulation.²⁵ The latest version of this “Negative List” of restrictions and conditions on investment is Presidential Decree 39/2014.²⁶

Even if investment in a business field is not restricted or subject to conditions under the Negative List, a permit is still generally required.²⁷ The system of permits is administered by the Investment Coordinating Board (BKPM). BKPM's website explains the system of permits (which are called licences) in more detail, including questions of when, and in what form, approval is required for the expansion, transfer or change of a business's activities.²⁸

In addition to its role in screening new investment, BKPM also provides a “one-stop service” that aims to coordinate the issuing of other permits and approvals required from various ministries and agencies of government for a given investment. However, our understanding is that this “one-stop service” operates only with respect to investment approvals required at the national level. The Investment Law expressly allocates authority to regency governments to “organize” investment that takes place exclusively within their regency,²⁹ and expressly allocates to provincial governments authority to “organize” investment that crosses several regencies within a single province.³⁰ As such, on our understanding, investment may also require approval from the relevant regency/provincial government, along with the permits and approvals coordinated by the BKPM.

²⁰ Indonesian Investment Law (2007), Article 1(6).

²¹ Indonesian Investment Law (2007), Articles 1(3) and 1(8).

²² Elucidation of the Indonesian Investment Law (2007), Article 2.

²³ Indonesian Investment Law (2007), Article 5(2).

²⁴ Indonesian Investment Law (2007), Article 12(1).

²⁵ Indonesian Investment Law (2007), Article 12(4).

²⁶ In addition to the restrictions and conditions on new investment documented in the negative list, investment in various sectors is also subject to regulation by other institutions—for example, Central Bank regulations that apply to investment in financial services.

²⁷ Indonesian Investment Law (2007), Article 25(4).

²⁸ See <http://www.bkpm.go.id/en/investment-step-by-step/principal-license>.

²⁹ Indonesian Investment Law (2007), Article 30(6).

³⁰ Indonesian Investment Law (2007), Article 30(5).



Investor Rights and Obligations

The Investment Law grants a series of rights to both foreign and Indonesian investors. They include the right to “market price” compensation in the event of nationalization of the investment, the right to treatment that does not discriminate on the basis of nationality and the right to transfer funds out of Indonesia.³¹ However, several of these rights are explicitly subject to other Indonesia laws. For example, the guarantee of non-discriminatory treatment is clearly subordinated to other Indonesian laws,³² as is the right to transfer foreign currency out of Indonesia.³³

The Investment Law also mentions the obligations of investors, notably to report on their investment activity to BKPM and to comply with applicable rules of Indonesian law.³⁴

Relationship to Other Laws

The Investment Law does not contain a provision that deals with its relationship with its other Indonesia laws. However, as noted in the previous section, several provisions of the Investment Law specifically deal with the relationship between different laws in a detailed and sophisticated manner, usually by making the effect of the provision in question subject to other laws. For example, the general requirement for foreign investment to be conducted through a company incorporated in Indonesia is subject to any derogations contained in other laws.³⁵ Similarly, the basic allocation of investment approval functions between the national, provincial and regency levels of government is subject to other Indonesia laws allocating the approval function to the national government.³⁶ As previously noted, investors’ rights to non-discriminatory treatment and to free international transfers of funds are also subject to Indonesia law.

Incentives

The Investment Law establishes a range of incentives—called “investment facilities”—that are available subject to certain conditions.³⁷ They include income tax deductions, import duty holidays and accelerated depreciation. Article 19 of the Investment Law states that these fiscal incentives will be further specified and granted on the basis of “the national industrial policy issued by the Government.” Consistent with this mandate, Ministry of Finance Regulation No. 130/PMK.011/2011 governs the grant of tax holidays from corporate income tax in certain sectors. Eligibility for this incentive is determined by the Ministry of Finance.³⁸

The Investment Law also establishes various non-fiscal incentives, such as special visa arrangements and expedited import procedures.³⁹ It appears that BKPM is responsible for assisting investors in taking advantage of these incentives.⁴⁰

Investment Promotion

The Investment Law gives BKPM responsibility for coordinating and developing Indonesia’s investment policy, in consultation with various other government agencies.⁴¹

Dispute Settlement

The Investment Law recognizes that the Government of Indonesia and foreign investors may agree to resolve investment disputes through international arbitration, through a specific agreement between them.⁴²

³¹ Indonesian Investment Law (2007), Articles 6, 7 and 8.

³² Indonesian Investment Law (2007), Article 6(1).

³³ Indonesian Investment Law (2007), Articles 8(4) and 8(5).

³⁴ Indonesian Investment Law (2007), Article 15.

³⁵ Indonesian Investment Law (2007), Article 5(2).

³⁶ Indonesian Investment Law (2007), Article 30(7)(f).

³⁷ Indonesian Investment Law (2007), Articles 18 and 19.

³⁸ See <http://www.bkpm.go.id/en/investment-procedures/investment-incentives>.

³⁹ Indonesian Investment Law (2007), Articles 23 and 24.

⁴⁰ Indonesian Investment Law (2007), Articles 21 and 23(4).

⁴¹ Indonesian Investment Law (2007), Article 27.

⁴² Indonesian Investment Law (2007), Article 32(4).



Laos

The Lao Law on Investment Promotion was enacted in 2009. The law deals with the establishment of new investment, as well as investment incentives. Unusual for the region, it also deals with the establishment and operation of special economic zones (SEZs).

Scope of Application

The Law on Investment Promotion applies to both foreign and domestic investment. Article 8 distinguishes between wholly domestic-owned investments, wholly foreign-owned investments, and two different structures of jointly owned investments. However, for the most part the provisions of the Law on Investment Promotion apply equally to all investments, regardless of domestic or foreign ownership.

A more significant distinction is made in Article 13 between:

1. General business;
2. Concession business; and
3. Investment in SEZs.

The distinction between general businesses and concession business is based on whether the investment requires the grant of specific concession rights by the government—for example, mineral rights in the case of mining investment or spectrum allocation rights in the case of telecommunications investment.⁴³ Each of the three types of investments is subject to a different approval regime administered by a different agency. For each type of investment, the approval regime does not depend on the investor’s nationality.

Approval of New Investment Projects

Under the Law on Investment Promotion, investors wishing to invest in a new general business must obtain an enterprise registration certificate from a “one-stop service” of the Ministry of Industry and Commerce.⁴⁴ An investor will be issued with an enterprise registration certificate only after permits and approvals required by other laws and regulations have been obtained.⁴⁵ As such, the certificate sits at the apex of a complex system of permits and approvals required for investment. For example, line ministry approval is normally required for any investment.⁴⁶ The Law on Investment Promotion also refers to a “negative list” of controlled businesses in which investment is notionally restricted. Article 18 establishes different timeframes for investment in controlled businesses as compared to other investment in general businesses. However, the list of controlled businesses does not appear to be publicly available online.

The Law on Investment Promotion establishes a different framework for the granting of concession rights and for the approval of investments that require such rights.⁴⁷ The Decree on Implementation of the Investment Law establishes the Committee on Investment Promotion (CIP), which has powers to award concession rights.⁴⁸ An investor that has obtained a concession right then requires a further layer of investment approval in the form of concession registration certificate from a “one-stop service” of the Ministry of Planning and Investment. The “one-stop service” of the Ministry of the Planning and Investment serves as the CIP’s secretariat,⁴⁹ implying a degree of institutional coordination between the different processes required to make a concession investment.

The Law on Investment Promotion also creates a committee responsible for the establishment of special economic zones.⁵⁰ This committee has a range of powers in relation to SEZs, including the establishment of

⁴³ Lao Law on Investment Promotion (2009), Article 15.

⁴⁴ Lao Law on Investment Promotion (2009), Article 17.

⁴⁵ Lao Law on Investment Promotion (2009), Article 19. See also, Article 8 of the Lao Decree on the Implementation of the Investment Law (2011)

⁴⁶ US Department of State (2015b).

⁴⁷ Lao Law on Investment Promotion (2009), Articles 22 and 23.

⁴⁸ Lao Decree on Implementation of the Investment Law (2011), Article 22.

⁴⁹ Lao Decree on Implementation of the Investment Law (2011), Article 23.

⁵⁰ Lao Law on Investment Promotion (2009), Article 36.



new ones.⁵¹ Each SEZ has a management committee. Investment in SEZs requires approval by the “one-stop service” of the management of the committee of the relevant SEZ.⁵²

Incentives

The Law on Investment Promotion contains provisions dealing with fiscal incentives and other benefits for investors. The fiscal incentive regime comprises a three-tier system based on the sector in which the investment is made,⁵³ and an overlapping three-tier system based on the part of the country in which the investment is made.⁵⁴ Incentives include a profit tax exemption⁵⁵ and exemptions from import and export duties.⁵⁶ An investor’s entitlement to profit tax exemption is indicated in the business registration or concession certificate.⁵⁷ Exemptions from import and export duty require specific approval of the line ministry with responsibility for the sector in which the investment is made.⁵⁸

Relationship to Other Laws

The Law on Investment Promotion does not deal with its relationship to other laws in general terms. Some provisions of the Law on Investment Promotion are explicitly subject to those of other laws. For example, investors’ rights to hire labour are subject to the Labor Law,⁵⁹ and the protection of intellectual property is subject to the Law on Intellectual Property.⁶⁰ Other provisions of the Law on Investment Promotion implicitly override other laws—for example, those governing incentives.

Investor Rights

The Law on Investment establishes a limited set of investor rights. These include a right to market value compensation for expropriation,⁶¹ and the right of foreign investors to transfer capital and profits out of the country.⁶²

The Law on Investment Promotion does not grant foreign investors a right to national treatment *per se*. Article 60 does state that “investors” have “equal rights to invest”; however, Sections 1 and 2 of Article 64 clarify that this right is subject to other Lao laws and regulations. A handful of provisions of the Law on Investment Promotion impose different requirements for investment by foreign investors. For example, Article 17 imposes a minimum capital requirement for investment in “general businesses” by foreign investors.

Dispute Settlement

The Law on Investment Promotion establishes a hierarchy for the resolution of investment disputes, commencing with mediation, then administrative dispute resolution procedures, followed by litigation in Lao courts for disputes that remain unresolved.⁶³ The law does not refer to any form of arbitration as a method of resolving investment disputes. However, it does acknowledge that disputes arising under investment contracts between an investor and the government may be resolved through dispute settlement procedures specified in the contract.⁶⁴

⁵¹ Lao Law on Investment Promotion (2009), Article 37.

⁵² Lao Law on Investment Promotion (2009), Article 43.

⁵³ Lao Law on Investment Promotion (2009), Article 49.

⁵⁴ Lao Law on Investment Promotion (2009), Article 50.

⁵⁵ Lao Law on Investment Promotion (2009), Article 51.

⁵⁶ Lao Law on Investment Promotion (2009), Article 52.

⁵⁷ Lao Law on Investment Promotion (2009), Article 55.

⁵⁸ Lao Decree on Implementation of the Investment Law (2011), Article 37.

⁵⁹ Lao Law on Investment Promotion (2009), Article 66.

⁶⁰ Lao Law on Investment Promotion (2009), Article 62.

⁶¹ Lao Law on Investment Promotion (2009), Article 61.

⁶² Lao Law on Investment Promotion (2009), Article 68.

⁶³ Lao Law on Investment Promotion (2009), Article 78.

⁶⁴ Lao Law on Investment Promotion (2009), Article 82.



Malaysia

Investment in Malaysia is governed by several laws. They include laws governing investment in particular industries, such as the Industrial Coordination Act (1975) which governs investment in manufacturing, and laws of general application, such as the Environmental Quality Act (1974). The closest thing to an investment law in Malaysia is the Promotion of Investments Act (PIA) of 1986, which deals exclusively with the issue of investment incentives.

This section provides an overview of the framework governing the approval of new investment in Malaysia and then examines the role of the PIA.

Approval of New Investment in Malaysia

In general, new domestic and foreign investment in Malaysia requires government approval. For example, Section 3 of the Industrial Coordination Act requires any individual or company seeking to engage in “manufacturing activity” to obtain a licence. (Companies with fewer than 75 employees and less than RM 2.5 million—roughly USD 600,000—in paid up capital are exempt from this requirement.) Licences for the manufacturing sector are issued by Malaysia’s investment agency—the Malaysian Investment Development Authority (MIDA).

Investment in many services sectors also requires government approval. These requirements are generally imposed by sector-specific legislation. In some sectors, a prospective investor can apply to MIDA for the relevant licence; in others, applications for licences and permits are dealt with by the relevant line ministry or agency. For example, foreign investment in financial services is regulated by the Financial Services Act (2012) and subject to equity limits. Applications for licences to supply financial services are dealt with by the Malaysian Central Bank.

Promotion of Investments Act

Scope of Application

The PIA is a framework law. It grants the Minister of International Trade and Industry broad discretionary powers to determine which investors and investments are eligible for certain classes of investment incentives, and to define the magnitude of such incentives.⁶⁵

The PIA itself does not distinguish between foreign and domestic investors or investments. However, in the exercise of discretion granted by the PIA, the Minister may make rules defining eligibility for incentives that distinguish between Malaysian and foreign investors. For example, guidelines published on the MIDA for “general investment” show that eligibility for incentives in some sectors is conditional on the company in question having a minimum percentage of Malaysian shareholding.⁶⁶

Incentives

The PIA establishes several different types of incentives. The two most important are pioneer status and the investment tax allowance. Pioneer status entitles an investor to an income tax holiday for five years.⁶⁷ This tax holiday may be extended for a further five years.⁶⁸ The investment tax allowance allows investors to offset certain classes of capital expenditure relating to the investment against future income in any year during the five years following the year in which the expenditure was made.⁶⁹ These two incentives are mutually exclusive; an investor must choose which one to apply for.⁷⁰

⁶⁵ Malaysian Promotion of Investment Act (1986), Section 4.

⁶⁶ For example, investment in integrated logistics services requires that at least 60 per cent of the company’s equity must be held by Malaysians: see “Incentives for General Investment” at <http://www.mida.gov.my/env3/uploads/IncentivesCompilation/MIDA/2013/AppIAGeneral.pdf>.

⁶⁷ Malaysian Promotion of Investment Act (1986), Section 14.

⁶⁸ Malaysian Promotion of Investment Act (1986), Section 14C.

⁶⁹ Malaysian Promotion of Investment Act (1986), Section 29

⁷⁰ Malaysian Promotion of Investment Act (1986), Section 26.



As previously noted, the Minister of International Trade and Industry has broad powers under the PIA to determine which investments are entitled to which incentives.⁷¹ This includes the power to determine the magnitude of incentives in different sectors. For example, an investor that is granted pioneer status for investment in certain defined “high technology” projects is entitled to a 100 per cent income tax holiday.⁷² In contrast, in general manufacturing activities, investors with pioneer status are only entitled to a 70 per cent income tax holiday.⁷³ MIDA publishes detailed guidelines specifying the eligibility of investors in different sectors.

⁷¹ Malaysian Promotion of Investment Act (1986), Section 4 and 4A.

⁷² See “Incentives for High Technology Projects” at <http://www.mida.gov.my/env3/uploads/IncentivesCompilation/MIDA/2013/AppIBHighTech.pdf>

⁷³ See “Incentives for General Investment” at <http://www.mida.gov.my/env3/uploads/IncentivesCompilation/MIDA/2013/AppIAGeneral.pdf>.



Myanmar

Following the return to nominally civilian rule in 2011, Myanmar adopted a new Foreign Investment Law (FIL) in 2012. In 2013, Myanmar adopted the Myanmar Citizen's Investment Law (MCIL), which was near-identical in its terms to the FIL. The two basic functions of the FIL and the MCIL were to establish a regime to govern the admission and approval of investments through permits issued by the Myanmar Investment Commission (MIC) and establish a regime for the granting of investment incentives to MIC-approved investments.

In 2014, the Myanmar Government began drafting a new investment law intended to replace both the FIL and the MCIL. The new law—the Myanmar Investment Law (MIL)—was enacted in October 2016.

The Myanmar Investment Law (2016)

Scope of Application

The MIL applies to both foreign and Myanmar citizen investors. The term “Myanmar citizen investor” is defined to include Myanmar companies as defined within the Myanmar Companies Act.⁷⁴ The Myanmar Companies Act defines a Myanmar company as a company that is 100 per cent owned by Myanmar citizens.⁷⁵ However, this threshold of 100 per cent ownership may be reduced through amendments to the Companies Act that are currently in draft form.

Investment Agency

The MIL also reconstitutes Myanmar's investment agency, the Myanmar Investment Commission. It defines the MIC's powers and duties, which include those related to the regime for the approval of investments and the granting of investment incentives. The MIL also gives the MIC a wider range of duties, including investment promotion and monitoring investors' compliance with laws and conditions governing the investment in question.⁷⁶

The MIL also requires the MIC to establish and manage a grievance mechanism to resolve disputes.⁷⁷ The Myanmar Investment Rules (2017) specify that this function will be formed by an Investor Assistance Committee.⁷⁸ Investors are required to bring any dispute with the Government of Myanmar to this committee before initiating court proceedings or arbitration.⁷⁹ Although the Myanmar Investment Rules are not entirely clear on this point, it seems possible that affected communities may also be able to bring concerns related to particular investments to this committee as well.⁸⁰

Approval of New Investment

The MIL significantly alters the system of investment approval that existed under the FIL and MCIL. Investment in specified sectors continues to require a permit issued by the MIC.⁸¹ The details of this investment approval regime are contained in a series of notifications and policy documents explaining the MIC's practices, available on the MIC's website. The most important of these is Notification 15/2017, which lists sectors in which foreign investment is prohibited and sectors in which foreign investment is only permitted by way of a joint venture with a Myanmar investor or with line ministry approval.

Investment outside these listed sectors no longer requires a permit from the MIC. However, investors outside these sectors seeking to avail themselves of the benefits of the MIL still need to submit an “endorsement” application to qualify for these benefits. The purpose of this procedure appears to be ensuring that investors are

⁷⁴ Myanmar Investment Law (2016), Section 2(n).

⁷⁵ The Burma Companies Act [INDIA ACT VII, 1913] (1 April, 1914), Section 2(2A).

⁷⁶ Myanmar Investment Law (2016), Section 24(a), 24(k).

⁷⁷ Myanmar Investment Law (2016), Section 82.

⁷⁸ Myanmar Investment Rules (2017) http://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/mir_english_0.pdf, chapters XVII and XVIII

⁷⁹ Myanmar Investment Rules (2017), Rule 173

⁸⁰ Myanmar Investment Rules (2017), Rule 165(d)

⁸¹ Myanmar Investment Law (2016), Section 36.



eligible for the benefits in question. The benefits available under the MIL for investors that hold an MIC permit or endorsement include various tax incentives and, in the case, of foreign investors, the right to lease land for a period of 50 years.⁸²

Under the FIL and MCIL, the MIC played an important role in coordinating various other approvals and permits required for investment projects across government—for example, requirements for line ministry approval of foreign investment in some sectors and the requirements for “prior permission” under the Environmental Impact Assessment (EIA) Procedure. This role continues through the “One-Stop Service” for investors that is established by the new Myanmar Investment Rules and housed in the premises of the Myanmar Investment Commission.⁸³

Incentives

Chapter 18 of the MIL governs incentives. Section 75 establishes a tiered system of income tax holidays, based on the location in which the investment is made. Investments made in regions designated as “least-developed” are eligible for the longest income tax holiday. Regardless of location, only investments in specified sectors are eligible for these income tax holidays.⁸⁴ At the time of writing, the MIC does not appear to have made any notification to specify sectors that are eligible for these incentives.

The MIL also confers a large degree of discretion on the MIC to grant exemptions from customs duties and other internal taxes, and to authorize various tax deductions.⁸⁵ Under the FIL and MCIL, the MIC’s practice was to grant these incentives in accordance with policies that specify the eligibility of investors in various sectors for certain combinations of incentives. Under the MIL this practice has been formalized through Notification 13/2017, which lists promoted sectors that are entitled to incentives.

The MIL clarifies that investments in special economic zones are not eligible for incentives under the MIL.⁸⁶ This is because they are subject to a separate incentive regime under the Special Economic Zone Law.

Relationship to Other Laws

Section 94 of the MIL appears to override provisions of any other law that are not consistent with the MIL. One effect of Section 94 is that the rights and privileges granted to an investor under the MIL override Myanmar laws of general application. For example, a long-term lease of land approved by the MIC under Section 50 of the MIL is exempt from the strict terms limits on foreign leases imposed by the Transfer of Immovable Property Restriction Law (1987).

Section 91 stipulates that the provisions of any international treaty or “agreement” to which Myanmar is a party “shall be abided by,” notwithstanding any contradictory provisions of the MIL. This provision appears intended to clarify that the Government of Myanmar must observe any rights granted to foreign investors under investment treaties that are more generous than those granted by the MIL.

Investor Rights and Obligations

The MIL grants investors a range of different rights, which are enumerated in Chapters 11 to 15. Many of these are modelled on the investor rights commonly contained in investment treaties, but subject to further clarification and qualification. For example, Section 48 guarantees foreign investors fair and equitable treatment (FET). FET is one of the most powerful investor rights granted by investment treaties. But in the MIL, FET is defined exclusively as:

- A right to obtain information about measures affecting an investment; and
- A right to due process in any challenge brought by an investor to a measure affecting an investment.

⁸² Myanmar Investment Law (2016), Chapter 18 and Chapter 12.

⁸³ Myanmar Investment Rules (2017)

⁸⁴ Myanmar Investment Law (2016), Section 75(c).

⁸⁵ Myanmar Investment Law (2016), Sections 77 and 78.

⁸⁶ Myanmar Investment Law (2016), Section 81.



This definition of fair and equitable treatment is much narrower than the way FET provisions in investment treaties have been interpreted and applied by arbitral tribunals.⁸⁷ It appears to address issues of process, without making the state liable for regulatory changes that adversely affect investors.

A similar trend is evident in other investor rights provisions. Section 52 guarantees that investments will not be nationalized, and guarantees compensation in the event of indirect expropriation. Section 54, which appears to be modelled on paragraph 4 of Annex 2 of the ASEAN Comprehensive Investment Agreement (ACIA), clarifies that non-discriminatory regulatory measures of general application do not amount to indirect expropriation. Section 53 clarifies that compensation for the indirect expropriation would normally be equal to an investment's fair market value, but that other factors should also be taken into account. Section 56 contains a carefully qualified guarantee of free transfer of funds. Section 47 guarantees foreign investors national treatment, subject to situations where discrimination is authorized under national law.

Unusually, the MIL contains two “exceptions” sections dealing, respectively, with general exceptions and security exceptions to the MIL. These sections are modelled on Article 17 and 18 of ACIA. Their primary purpose appears to be to establish exceptions to the investor rights provisions of the MIL.

Chapter 16 also enumerates the responsibilities of investors. Investors' responsibilities are primarily to comply with national law as it applies to different aspects of an investor's activities. However, Section 65(g) also states that investors have a responsibility to abide by international best practice environmental standards. The Myanmar Investment Rules clarify that MIC's Investment Monitoring Commission may make a recommendation to the MIC that an “administrative penalty” be imposed upon on an investor for failure to comply with Section 65 of the MIL.⁸⁸ Chapter 20 of the MIL gives the MIC the power to impose “administrative penalties,” including suspension of incentives or even revocation of an MIC permit or endorsement.⁸⁹

Dispute Settlement

Section 83 of the MIL states that disputes related to investments should be settled amicably where possible, including by reference to the Investment Assistance Committee.⁹⁰ If amicable settlement is not possible, the MIL requires disputes to be settled according to the dispute settlement mechanism specified “in the relevant agreement” or, if no dispute settlement process is specified, according to the normal procedures under Myanmar law.⁹¹ Although Section 84 does not specifically refer to international arbitration, international arbitration is possible where the parties have specifically consented to arbitration in an agreement between them. This interpretation of Section 84 is also consistent with the new Myanmar Arbitration Law (2016).

⁸⁷ See Bernasconi (2011).

⁸⁸ Myanmar Investment Rules (2017), Rules 175-179.

⁸⁹ Myanmar Investment Law (2016), Section 85(a).

⁹⁰ Myanmar Investment Rules (2017), Rule 173

⁹¹ Myanmar Investment Law (2016), Section 84.



The Philippines

The Philippines has two different laws on investment. The first is the Foreign Investments Act (FIA) of 1991. As the name suggests, the FIA applies specifically to foreign investment in the Philippines. Its primary function is to regulate the entry of new foreign investment into Philippines by means of a series of “negative lists” of sectors in which foreign investment is restricted or prohibited.

The second law on investment is the Omnibus Investments Code (OIC) of 1987, as amended. The OIC applies to both domestic and foreign investment. It provides the legal basis for the activities of the Philippines Board of Investment (Chapter II) and deals primarily with the issues of investment promotion and investment incentives. In addition, the Special Economic Zone Act of 1995 deals with investment promotion and investment incentives for businesses operating within one of the Philippines’ many special economic zones. The Special Economic Zone Act is not examined in this paper.

The Foreign Investments Act

Scope of Application

The FIA governs investment in the Philippines by “non-Philippine nationals.” Philippine nationals are defined to include Philippine citizens and companies incorporated in the Philippines in which Philippine citizens own at least 60% of the capital and voting of the company.⁹² Entities that fall outside this definition are non-Philippine nationals.

The FIA draws a distinction between the concept of “investment”, which is defined as equity participation in an enterprise incorporated in the Philippines,⁹³ and “doing business”, which is defined broadly to include more or less any business related activity in the Philippines.⁹⁴ However, the FIA applies to both “investment” and “doing business” by non-Philippine nationals.⁹⁵ Our understanding is that the effect of the distinction between “investment” and “doing business” is to clarify that the FIA applies regardless of whether a non-Philippine national incorporates a company in the Philippines for the purpose of carrying out business in the Philippines.

One important limitation on the scope of the FIA is that it does not apply to banking and financial institutions,⁹⁶ which are governed by the General Banking Act.

Foreign Investment in the Philippines and the Negative Lists

The basic principle established by the FIA is that a non-Philippine national can invest or do business in the Philippines in any sector without need for prior approval, with the exception of sectors in which foreign investment is restricted or prohibited under the “Negative List.” For those sectors falling outside the Negative List, the only requirement is that non-Philippines nationals must register before investing or doing business.⁹⁷ The Negative List itself is divided into three parts. Here, a distinction between “export enterprises” and “domestic market enterprises” is relevant. The term “export enterprises” refers to enterprises that export at least 60 per cent of their output.⁹⁸ Other enterprises are domestic market enterprise. The first two parts of the Negative List apply to both export enterprises and domestic market enterprises. However, the third part of the list applies only to domestic market enterprises.⁹⁹ One effect of the Negative List’s three-part structure is to open a wider range of sectors to foreign investment where that investment is geared primarily to production for export.¹⁰⁰

⁹² Philippine Foreign Investment Act (1991), Section 3(a).

⁹³ Philippine Foreign Investment Act (1991), Section 3(b).

⁹⁴ Philippine Foreign Investment Act (1991), Section 3(d).

⁹⁵ Philippine Foreign Investment Act (1991), Section 5.

⁹⁶ Philippine Foreign Investment Act (1991), Section 4.

⁹⁷ Philippine Foreign Investment Act (1991), Section 5.

⁹⁸ Philippine Foreign Investment Act (1991), Section 3(e).

⁹⁹ Philippine Foreign Investment Act (1991), Section 7.

¹⁰⁰ Philippine Foreign Investment Act (1991), Section 8(c).



Relationship to Other Laws

Section 12 states that “no agency, instrumentality or political subdivision of Government” shall take actions which conflict with the FIA or nullify its effect. The purpose of this article seems to be ensuring that the actions of other arms of government do not interfere with non-Philippine nationals’ ability to invest in sectors that are not contained in the FIA’s Negative List. Section 11 of the FIA explicitly states that all “industrial enterprises” (a term that is not defined in the FIA) must comply with other environmental laws and standards. Presumably, the principle that investment must comply with applicable Philippine laws and regulations applies more generally, even in sectors open to investment by non-Philippine nationals.

The Omnibus Investments Code of 1987

Scope of Application

The OIC applies to both Filipino and foreign investors,¹⁰¹ although the law does not apply equally to Filipino and foreign investors. For example, different criteria for eligibility for incentives to Filipino and foreign investments.¹⁰²

Establishment of Board of Investments

The OIC establishes the Philippines Board of Investment (BOI). The OIC describes the responsibilities of the BOI as “the regulation and promotion of investments in the Philippines.”¹⁰³ However, from the powers conferred on the BOI by the OIC and from the BOI’s website, it seems that its responsibilities in practice are more focused on the promotion of investment than the regulation of investment.¹⁰⁴ The BOI’s functions include the development of the annual Investment Priorities Plan,¹⁰⁵ and determining investors’ eligibility for incentives under the Investment Priorities Plan.¹⁰⁶

Incentives

Investors’ eligibility for incentives is determined through the process of registration of enterprises with the BOI under the Investment Priorities Plan.¹⁰⁷ Enterprises that successfully register are entitled to the incentives that are available for the sector and region in which they operate.¹⁰⁸ Incentives available under the OIC include income tax holidays, various tax credits and simplified customs procedures (Article 39). Some of these incentives are conditional on satisfying various performance requirements—for example, prescribed capital–labour ratios.¹⁰⁹

Investor Rights

The OIC also grants a range of “basic rights and guarantees” to investors. These rights are available to all investors, not only those registered with the BOI under the Investment Priorities Plan.¹¹⁰ They include the right to just compensation in the event of expropriation and the right to remit capital and profits derived from foreign investments. However, rights to remit capital and profits are explicitly made subject to the Central Bank Act, as amended.¹¹¹

Relationship to Other Laws

In addition to the references to the Central Bank Act in Article 38, the OIC refers to conditions or restrictions derived from other laws in several other places. For example, one of the incentives available to investors registered with the BOI is the ability to employ foreign nationals. However, this is subject to the Immigration Act.¹¹²

¹⁰¹ Philippine Omnibus Investments Code (Executive Order No. 226), Article 2(1).

¹⁰² Philippine Omnibus Investments Code (Executive Order No. 226), Article 32(1).

¹⁰³ Philippine Omnibus Investments Code (Executive Order No. 226), Article 7.

¹⁰⁴ See <http://www.boi.gov.ph>.

¹⁰⁵ Philippine Omnibus Investments Code (Executive Order No. 226), Articles 7(1) and 26.

¹⁰⁶ Philippine Omnibus Investments Code (Executive Order No. 226), Article 32.

¹⁰⁷ Philippine Omnibus Investments Code (Executive Order No. 226), Article 32.

¹⁰⁸ Philippine Omnibus Investments Code (Executive Order No. 226), Article 39.

¹⁰⁹ Philippine Omnibus Investments Code (Executive Order No. 226), Article 39(a)(1).

¹¹⁰ Philippine Omnibus Investments Code (Executive Order No. 226), Article 38.

¹¹¹ Philippine Omnibus Investments Code (Executive Order No. 226), Article 28(a)–(e).

¹¹² Philippine Omnibus Investments Code (Executive Order No. 226), Article 39(g), as amended.



Singapore

Absence of an Investment Law

Singapore does not have a law on foreign investment or an economy-wide investment law governing both domestic and foreign investment. Instead, investment is governed by laws of general application—for example, the common law of contract and the Singapore Companies Act—and sector-specific legislation. In general, there is no difference between the treatment of foreign investment and domestic investment,¹¹³ except insofar as differences in treatment are authorized by a specific law.

Investment Agency

Singapore's Economic Development Board (EDB) was established by statute in 1961. The Economic Development Board Act sets out the functions and the powers of the EDB. Notably, Section 6 of the EDB Act makes it clear that its function is to attract and facilitate both local and foreign investment. On its website, the EDB currently describes itself as a:

the lead government agency for planning and executing strategies to enhance Singapore's position as a global business centre. . . . We are a one-stop agency which facilitates and supports local and foreign investors in both the manufacturing and services sectors.¹¹⁴

Restrictions on Foreign Investment

Singapore restricts foreign investment in several sectors, including telecommunications, media, banking and land ownership. Restrictions on foreign investment are found in relevant sectoral legislation—for example, the Newspaper and Printing Presses Act in the case of restrictions on foreign control of newspaper companies. In practice, these limitations on foreign investment are implemented by the relevant regulatory authority. For example, the Monetary Authority of Singapore regulates foreign investment in the banking sector through the system of licensing established by Section 7 of the Banking Act.

Incentives

Singapore offers a range of tax incentives to encourage investment. For the most part, these incentives are available to all investors, not only foreign investors. For example, Part X of the Economic Expansion Incentives Act creates a tax deduction for capital expenditure in an “approved project.” This incentive, including the designation of investments as “approved projects,” is administered by the EDB and is available to both domestic and foreign firms.

¹¹³ Jean Ho, “Singapore” in Shan (2012).

¹¹⁴ See <https://www.edb.gov.sg/content/edb/en/about-edb/our-strategy/what-we-do.html>.



Thailand

Thailand has two different laws on investment. The first is the Foreign Business Act (FBA) of 1999. As the name suggests, the FBA applies specifically to foreign investment in Thailand. Its primary function is to regulate the entry of new foreign investment into Thailand by means of a series of “negative lists” of sectors in which foreign investment is restricted or prohibited. However, it is important to note that these “negative lists” are not the only restrictions on foreign investment under Thai law. Additional limits and conditions on foreign investment are contained in other sector-specific legislation, such as the Financial Institutions Business Act (2008).

The second law on investment is the Investment Promotion Act (IPA) of 1977. The IPA applies to both domestic and foreign investment. It provides the legal basis for the activities of the Thai Board of Investment and deals primarily with the issue of investment incentives.

The Foreign Business Act

Scope of Application

The FBA applies to foreign businesses seeking to operate in Thailand. Section 3 of the FBA defines a “foreign” business as including:

- natural persons who do not have Thai nationality;
- legal persons (e.g., companies) that are not registered in Thailand; and
- legal persons registered in Thailand in which at least half the capital or at least half the shares are held by foreign persons.

Investment Approval and the Negative Lists

The central function of the FBA is to regulate foreign investment in certain prohibited and restricted sectors. The law establishes three different lists of sectors in which foreign investment is prohibited or restricted:

- List One, sectors in which foreign businesses are prohibited;
- List Two, sectors in which foreign businesses are prohibited unless permission is obtained from the Minister; and
- List Three, sectors in which foreign businesses are prohibited unless permission is obtained from the Director-General of the Department of Business Development.

Sections 15 through 18 of the FBA also establish the procedures for applying for and obtaining permission to operate a business in sectors specified in Lists Two and Three.

In principle, foreign investment is allowed in sectors that are not specified in any of the lists, although this is subject to further restrictions and limitations found in other, sector-specific laws.

Interaction With Other Laws, Including the Investment Promotion Act

One important feature of the FBA is that it does not purport to override other laws. Rather, Section 13 provides that, in the event of inconsistency between laws, other laws prevail over the FBA. In practice, this means that restrictions on foreign investment contained in other laws continue to apply, including restrictions that relate to sectors that are not listed in the “negative lists” under the FBA. For example, under Section 16 of the Financial Institutions Business Act, at least 75 per cent of the shares in a financial institution must be held by Thai persons.¹¹⁵

¹¹⁵ For a brief summary, see Norton Rose Fullbright (2008).



The principle that the FBA yields to other laws in the event of inconsistency is also reflected in Section 12, which deals with the inter-operation of the FBA and the IPA. Section 12 states that if an investment in a sector listed in List Two or List Three is granted “promoted” status by the Board of Investment under the IPA then it must also be permitted under the FBA. As such, being granted promoted status under the IPA is one way of satisfying the requirements for foreign investment in restricted sectors under the FBA.

Section 10 provides that foreigners may also operate businesses in sectors specified in the negative lists if Thailand is bound to allow foreign investment by the terms of an international treaty. In this situation, foreign investment in the sector is still subject to registration requirements under Section 11.

The Investment Promotion Act

Investment Institution

The IPA establishes the Thai Board of Investment. The governance structure of the Board of Investment is set out in Chapter 1 of the IPA.

Determining Eligibility for Incentives

The central function of the Board of Investment is to administer a system of investment incentives designed to promote investment. This system operates through the issuing of “promotion certificates” to individual investors, which then entitle the “promoted” investor to the benefit of specified incentives. Under Section 16, the Board of Investment has the power to make policies that determine which types of investment are, in principle, eligible for “promotion certificates.” Individual investors still need to apply for and obtain a promotion certificate to be entitled to investment incentives under the IPA. Under Sections 17 and 18, the Board of Investment has the power to decide whether to grant investors a “promotion certificate.” Under Section 20, the Board of Investment also has broad powers to attach conditions to a “promotion certificate” granted to an investor. These conditions can include a range of performance requirements, such as local content requirements.

Scope of Application

The IPA itself does not distinguish between Thai and foreign investors. The central distinction under the IPA is between investors that are granted “promoted” status, which may be either Thai or foreign investors, and those which are not granted “promoted” status. However, under Section 20, in exercising its discretion to attach conditions to a “promotion certificate” the Board of Investment may consider the nationality of the investor and the source of capital.

Fiscal Incentives

The IPA contains a range of discretionary fiscal incentives that the Board of Investment may grant to “promoted” investments. They include exemption from income tax,¹¹⁶ and exemption from import duties on both machinery¹¹⁷ and inputs for production that will subsequently be exported.¹¹⁸

Investor Rights

The IPA grants a range of other rights and benefits to “promoted” investors. They include the right to remit capital brought into Thailand and returns on such capital¹¹⁹ and the guarantee that investments of a “promoted” investor will not be nationalized under any circumstances.¹²⁰ These rights are not extended to all investors, but only to investors issued with a “promotion certificate” under the IPA.

¹¹⁶ Thai Investment Promotion Act (1977), Sections 31 and 32.

¹¹⁷ Thai Investment Promotion Act (1977), Sections 28 and 29.

¹¹⁸ Thai Investment Promotion Act (1977), Section 36.

¹¹⁹ Thai Investment Promotion Act (1977), Section 37.

¹²⁰ Thai Investment Promotion Act (1977), Section 43.



Relationship to Other Laws

In general, the IPA is designed to prevail over other laws and to give the Board of Investment powers to grant benefits to “promoted” investors that would otherwise be contrary to Thai law. For example, Section 3 contains a general override provision, which provides that all other laws shall be replaced to the extent that they are inconsistent with the IPA. Similarly, Section 27 gives the Board of Investment the power to waive limits on land ownership that would otherwise apply to a “promoted” investor. In contrast to the general principle that the IPA prevail over other laws, Sections 24 to 26 make it clear that the powers of Board of Investment to grant immigration permits to foreign nationals associated with a “promoted” investor is subject to other Thai laws on immigration.



Vietnam

Vietnam's new Law on Investment was adopted in 2014 and entered into force in July 2015. The law covers a range of issues, including admission and approval processes for new investments, incentives and, unusually, provisions governing outward investment.¹²¹

Scope of Application

The Law on Investment applies to both Vietnamese and foreign investors. The basic distinction in the law is between foreign investors, a category which includes foreign nationals and companies incorporated outside Vietnam, and Vietnamese investors, a category which comprises Vietnamese nationals and Vietnamese entities that are wholly Vietnamese-owned.¹²² Companies incorporated in Vietnam in which foreigners hold 51 per cent or more of the share capital are generally treated in the same way as foreign investors, while companies incorporated in Vietnam in which foreigners hold less than 51 per cent of the share capital are generally treated in the same way as Vietnamese investors.¹²³

Approval of New Investment Projects

The Law on Investment establishes two sets of approval processes for new investment. The first set of processes is contained in Articles 30, 31 and 32. These Articles specify investment projects that require approval from the National Assembly, the Prime Minister and relevant provincial People's Committee respectively. These requirements apply to investments made by both foreign and Vietnamese investors. The highest level of approval is that of the National Assembly. Article 30 stipulates that very few projects require approval by the National Assembly—for example, those involving nuclear power, major land zoning or relocation of large numbers of people.¹²⁴ Projects that do not exceed the thresholds that trigger a requirement for approval under Article 30 may still cross the thresholds that trigger a requirement for approval under Article 31 or 32.

The second process for approving investment is through the issuing of Certificates of Investment. Certificates of Investment can be issued by the province-level Service of Planning and Investment and, in the case of investments in industrial parks and export-processing zones, the management board of the park or zone. All new foreign investments, including investments by Vietnamese-incorporated entities in which foreigners hold 51 per cent or more of the share capital require a Certificate of Investment.¹²⁵ Vietnamese investors do not require a Certificate of Investment.¹²⁶ Foreign investments approved under Articles 30, 31 and 32 are automatically issued a Certificate of Investment.¹²⁷ For those investments that do not require approval under Articles 30, 31 or 32, the issuing of a Certificate of Investment is the mechanism for regulating entry and approval of new foreign investment.

The Law on Investment also contains a list of six business lines in which investment is banned¹²⁸ and 243 business lines in which investment is conditional.¹²⁹ The Law of Investment does not, itself, distinguish between foreign and Vietnamese investment in banned and conditional business lines. However, the “conditions” that an investor must satisfy to invest in conditional business lines are not contained in the Law on Investment itself, but in other “Laws, Ordinances, Decrees and international agreements.”¹³⁰ In practice, different conditions are attached to foreign investment in conditional business lines.¹³¹ Our understanding is that the approval of new investment in conditional business lines is regulated through the process of issuing Certificates of Investment.

¹²¹ Vietnam, Law on Investment (2014), Chapter V.

¹²² Vietnam, Law on Investment (2014), Article 3.

¹²³ e.g. Vietnam, Law on Investment (2014), Articles 23 and 36.

¹²⁴ Vietnam, Law on Investment (2014), Article 30.

¹²⁵ Vietnam, Law on Investment (2014), Article 36(1).

¹²⁶ Vietnam, Law on Investment (2014), Article 36(2).

¹²⁷ Vietnam, Law on Investment (2014), Article 37(1).

¹²⁸ Vietnam, Law on Investment (2014), Article 6.

¹²⁹ Vietnam, Law on Investment (2014), Article 7 and Appendix 4 as modified by Law No 03/2016/QH14 (22 November 2016).

¹³⁰ Vietnam, Law on Investment (2014), Article 7(4).

¹³¹ Decree 118/2015 of 12 November 2015; LNT & Partners (2014).



Different procedures apply when investors buy shares in, or contribute capital to, businesses that are already operating lawfully in Vietnam. Article 26 defines the circumstances in which foreign investors are required to make an application to register such transactions. A Certificate of Investment is not required.¹³²

Incentives

The Law on Investment contains provisions dealing with incentives and other forms of “investment support.” The incentives available under the law include a range of tax exemptions, as well as reduction in rent on government owned land.¹³³ Article 16 specifies the business lines that are eligible for incentives in general terms, but does not specify the value of incentives, which is governed by regulations made under the Law. It appears that investors that meet the criteria established in the regulations are automatically eligible for relevant incentives. Incentives are administered through the process of obtaining a Certificate of Investment,¹³⁴ or through the tax system if a Certificate of Investment is not required.¹³⁵ Additional forms of “investment support” include the provision of concessional loans and infrastructure to investments made in industrial parks and export-processing zones.¹³⁶

Relationship to Other Laws

The basic principle established in Article 4(1) is that the Law on Investment does not override other Vietnamese law. Investors must continue to comply with other relevant laws. However, in cases where restrictions and conditions on new investment contained in other laws are inconsistent with those found in the Law on Investment, the provisions on the Law on Investment prevail, subject to a handful of specified exceptions.¹³⁷ Where regulations made under the Law on Investment and Vietnam’s international treaties are inconsistent, the terms of the treaty prevail to the extent of any inconsistency.

Investor Rights

The Law on Investment establishes a limited set of investor rights. These include:

- a commitment that assets of investors will not be nationalized through administrative measures;¹³⁸
- a commitment not to impose certain categories of performance requirements;¹³⁹
- a right for foreign investors to repatriate capital and investment income;¹⁴⁰ and
- a commitment that incentives granted to an investment will not be cancelled during the life of the project, although this commitment is subject to some exceptions.¹⁴¹

The Law on Investment does not contain the sorts of investor rights that are often found in investment treaties—for example, generalized guarantees of fair and equitable treatment and national treatment.

Dispute Settlement

The Law on Investment states that disputes between foreign investors and the Government of Vietnam should be resolved through the Vietnamese court system or arbitration in Vietnam, unless an “international agreement” provides otherwise.¹⁴² The term “international agreement” is not defined in the law but, from the context in which it is used, appears to include both treaties and investment contracts between the Government of Vietnam and a foreign investor. As such, the Law on Investment does not provide consent to arbitration, but does allow foreign investors to resolve disputes through international arbitration in cases in which consent to arbitration is provided by another instrument.¹⁴³

¹³² Vietnam, Law on Investment (2014), Article 36(2)(c).

¹³³ Vietnam, Law on Investment (2014), Article 15.

¹³⁴ Vietnam, Law on Investment (2014), Article 17(1).

¹³⁵ Vietnam, Law on Investment (2014), Article 17(2).

¹³⁶ Vietnam, Law on Investment (2014), Articles 19 and 20.

¹³⁷ Vietnam, Law on Investment (2014), Article 4(2).

¹³⁸ Vietnam, Law on Investment (2014), Article 9.

¹³⁹ Vietnam, Law on Investment (2014), Article 10.

¹⁴⁰ Vietnam, Law on Investment (2014), Article 11.

¹⁴¹ Vietnam, Law on Investment (2014), Article 13.

¹⁴² Vietnam, Law on Investment (2014), Article 14(4).

¹⁴³ Vietnam, Law on Investment (2014), Article 14(3).



Conclusion

This study highlights that investment laws have different functions in different ASEAN countries. In some ASEAN countries, the function of an investment law is to establish a process for the review and approval of new investment. In others, it is to establish a regime for the granting of investment incentives. Some ASEAN countries' investment laws have multiple functions. The variety of possible functions of an investment law is also reflected in the fact that some ASEAN countries have multiple investment laws, while others have no investment laws as such.

Even among ASEAN countries that do have investment laws, these laws form only a small part of the legal and regulatory regime governing investment. Other elements of the legal and regulatory regime governing investment include:

- laws of general application that are relevant to the regulation and operation of investments—for example, company laws, contract laws and environmental protection laws;
- laws of general application that deal with the rights of private persons (including investors) vis-à-vis state institutions—for example, Indonesia's Law on Government Administration (2014); and
- laws dealing with restrictions and conditions on investment in particular economic sectors—for example, the Thai Financial Institutions Business Act (2008).

As such, it is impossible to evaluate a country's investment law without considering how it fits into the wider legal and regulatory framework governing investment.

These findings cast doubt on the idea that there is a single template for “good practice” in the drafting of an investment law. Instead, the process of drafting a new investment law should begin by clarifying the functions the law is intended to perform, as well as the way that these functions relate to other aspects of the legal and regulatory regime in the country in question. Once these issues have been clarified, a law reform process can then turn to questions of drafting, including the combination of provisions that will allow the law to best perform its intended functions. Such a process might also lead to the conclusion that the country does not need an investment law and that questions of investment governance are better addressed through laws of general application and sector-specific regulation.

The findings of this paper also have important implications for the way in which future research on national investment laws is framed. Insofar as research on national investment laws has been conducted, it often involves comparing the provisions of a country's investment law to the investor rights provisions found in investment treaties. Such research is based on the implicit premise that investment laws have the same function as investment treaties. The findings of this paper suggest that this premise is unduly narrow. Investment laws have many important functions aside from the protection of investment from adverse government action. Moreover, it is not clear why legitimate concerns about uncompensated seizure of private property and the capricious exercise of public power should be dealt with through laws that are specific to “investment,” as opposed to laws of general application. In short, research should not assume that investment laws should be modelled on investment treaties, unless that assumption is carefully justified with arguments and evidence.



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