# AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE UNION OF MYANMAR AND THE GOVERNMENT OF THE REPUBLIC OF KOREA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the Republic of the Union of Myanmar and the Government of the Republic of Korea (hereinafter referred to as "the Contracting

Parties"),

Desiring to create favourable conditions for greater investments by investors of one Contracting Party in the territory of the other Contracting Party, based on the principles of equality and mutual benefit,

Recognizing that the promotion and protection of investments on the basis of this Agreement will be conducive to the stimulation of individual business initiatives and will increase prosperity in both States,

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment and the promotion of consumer protection and internationally recognized labour rights,

Have agreed as follows:

## Article 1. Definitions

For the purposes of this Agreement:

1. "investment" means every kind of asset in the territory of one Contracting Party, owned or controlled directly or indirectly by an investor of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the former Contracting Party, including, though not exclusively:

(a) an enterprise (being a juridical person or any other entity constituted or organised under the applicable law of the host Contracting Party, whether or not for profit, and whether private or government-owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation);

(b) any other tangible, intangible, movable or immovable property, and

. any related property rights, such as mortgages, liens, leases, or

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Pledges;

(c) shares, stock, and other forms of equity participation in an enterprise;

(d) bonds, debentures, other debt instruments, and loans 1 2 3;

(e) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law 2 3;

(f) intellectual property rights;

(g) turnkey, construction, management, production, concession, revenuesharing, and other similar contracts; and

(h) futures, options, and other derivatives;

For the purposes of this Agreement, a claim to payment that arises solely from the commercial sale of goods and services is not an investment, unless it is a loan that has the characteristics of an investment. In order to qualify as an investment, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.

2. "returns" means the amounts yielded by investments and,(in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties and all kinds of fees.

3. "investor" means any natural or juridical persons of one Contracting Party who invest in the territory of the other Contracting Party:

(a) "natural persons" means natural persons having the nationality of the former Contracting Party in accordance with its laws; and

(b) "juridical persons" means any entities such as companies, public institutions,authorities, foundations, partnerships, firms, establishments, organisations, corporations or associations incorporated or constituted in accordance with the laws and regulations of the former Contracting Party.

4. "territory" means with respect to each Contracting Party, the territory of that Contracting Party including its internal waters, its territorial seas, and any

1 Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics.

2 Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of ' an investment.

3 The term "investment" does not include an order or judgment entered in a judicial or administrative action.

Maritime areas over which that Contracting Party has sovereign rights or jurisdiction under international law.

5. "freely usable currency" means currencies that the International Monetary Fund determines, from time to time, as freely usable currencies in accordance with the Articles of Agreement of the International Monetary Fund and Amendments thereafter.

## Article 2. Promotion and Protection of Investments

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and shall admit such investments in accordance with its laws and regulations.

2. Each Contracting Party shall accord to investments of an investor of the other Contracting Party treatment in accordance with customary international law including fair and equitable treatment and full protection and security.

3. For greater certainty, paragraph 2 of this Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of an investor of the other Contracting Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 2 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Contracting Party to provide the protection and security of the investment of investors required under customary international law.

4. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

5. Neither Contracting Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of investments by the investors of the other Contracting Party, nor impose unreasonable or discriminatory measures on investments by investors of the other Contracting Party concerning local content, technology transfer or export

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Performance requirements.

## Article 3. Treatment of Investments

1. Each Contracting Party shall accord in its territory to investments made in accordance with its laws and regulations by investors oFThe 'other' Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable than that which it accords in like circumstances to investments of its own investors (hereinafter referred to as "national treatment") or to investments of investors of any third State (hereinafter referred to as "most-favoured-nation treatment"), whichever is more favourable.

2. Each Contracting Party shall accord in its territory to investors of the other Contracting-Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable than r that which.it accords in

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Like circumstances to its own investors (national treatment) or to investors of any

Third State (most-favoured-nation treatment), whichever is more favourable.

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3. The standard of national treatment as provided for in paragraphs 1 and 2 of this Article means, with respect to a sub-national government, treatment no less favourable than the most favourable treatment accorded in like circumstances by that sub-national government to investors, and to investments of investors, of the Party of which it forms a part.

4. The national treatment and most-favoured-nation treatment as provided for in paragraphs 1 and 2 of this Article do not apply to:

(a) government procurement;

(b) subsidies or grants provided by a Contracting Party, including government-supported loans, guarantees, and insurance; or

(c) taxation measures.

5. The most-favoured-nation treatment as provided for in paragraphs 1 and 2 of this Article shall not relate to privileges which either Contracting Party accords to investors of third States on account of its present or future membership of, or association with, a customs or economic union, a common market or a free trade area or a similar international agreement.

## Article 4. Compensation for Losses

1. Investors of one Contracting Party, whose investments suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection,

Riot or other similar situation in the territory of the other Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other fonns of settlement, treatment no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.

2. Without prejudice to paragraph 1 of this Article, investors of one Contracting Party who, in any situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from:

(a) requisitioning of their property by the latter Contracting Party's forces or authorities; or

(b) destruction of their property by the latter Contracting Party's forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

Shall be accorded restitution, compensation, or both, as appropriate, for such losses. Any compensation shall be prompt, adequate, and effective in accordance with Article 5, mutatis mutandis.

## Article 5. Expropriation 4

1. Investments of an investor of one Contracting Party shall not be nationalized, expropriated (hereinafter referred to as "direct expropriation") or otherwise subjected to any other actions having an effect equivalent to nationalization or expropriation (hereinafter referred to as "indirect expropriation") in the territory of the other Contracting Party except for public purposes and against prompt, adequate and effective compensation. The expropriation shall be carried out on a non-discriminatory basis and in accordance with due process of law.

2. Such compensation shall amount to the fair market value of the expropriated investments immediately before the expropriation was taken or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at the applicable commercial rate from the date of expropriation until the date of payment, and shall be made without undue delay. It shall be effectively realizable and freely transferable and shall be freely convertible into the currency of the Contracting Party of the investors concerned, and into freely usable currencies as defined in the Articles of Agreement of the International Monetary Fund, at the market exchange rate prevailing on the date of expropriation.

3. Investors of one Contracting Party affected by expropriation shall have a right to prompt review by a judicial or other independent authority of the other

4 Article 5 shall be interpreted in accordance with the Annex.

Contracting Party of their case and of the valuation of their investments in accordance with the principles set out in this Article.

## Article 6. Transfers

1. Each Contracting Party shall guarantee to an investor of the other Contracting Party the free transfer of all payments relating to an investment into and out of its territory. Such transfers shall include, in particular, though not exclusively:

(a) the initial capital and additional amounts to maintain or increase an investment;

(b) returns;

(c) payments made under a contract including a loan agreement;

(d) proceeds from the sale or liquidation of all or any part of an investment;

(e) payments made pursuant to Articles 4 and 5;

(f) payments arising out of the settlement of a dispute; and

(g) earnings and other remuneration of personnel engaged from abroad in connection with an investment.

2. All transfers under this Agreement shall be made in a freely usable currency, without undue restriction or delay, at the market exchange rate prevailing on the date of the transfer.

3. Notwithstanding paragraphs 1 and 2 of this Article, a Contracting Party may delay or prevent a transfer, through the equitable, non-discriminatory and good faith application of its measures and laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities;

(c) criminal or penal offences;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(e) ensuring compliance with orders or judgements in judicatory proceedings. 4

4. A Contracting Party may adopt or maintain measures inconsistent with paragraphs 1 and 2 of this Article:

(a) in the event of serious balance-of-payments and external financial difficulties or the threat thereof; or

(b) in cases where, in exceptional circumstances, movements of capital

Cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

5. Measures referred to in paragraph 4 of this Article shall:

(a) not exceed a period of one year, however, if extremely exceptional circumstances arise such that a Contracting Party seeks to extend such measures, the Contracting Party will coordinate in advance with the other Contracting Party concerning the implementation of any proposed extension;

(b) be consistent with the Articles of the Agreement of the International Monetary Fund;

(c) be non-discriminatory; ^

(d) not exceed those necessary to deal with the circumstances set out in paragraph 4 of this Article;

(e) be temporary and be eliminated as soon as conditions permit;

(f) not be confiscatory;

(g) promptly be notified to the other Contracting Party;

(h) be applied on a national treatment basis;

(i) ensure that the other Contracting Party is treated as favorably as any non-Contracting Party;

(j) not constitute a dual or multiple exchange rate practice;

(k) not restrict payments or transfers for current transactions, unless the imposition of such measures complies with the procedures stipulated in the Articles ofAgreement of the International Monetary Fund; and

(l) not restrict payments or transfers associated with foreign direct investment.

## Article 7. Subrogation

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance given in respect of an investment of an investor in the territory of the other Contracting Party, the other Contracting Party shall recognize:

(a) the assignment of any right or claim of such investor to the former Contracting Party or its designated agency; and

(b) the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.

## Article 8. Transparency

1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of this Agreement. Where a Contracting Party establishes a policy which is not expressed in laws or regulations or by any other means listed in this paragraph but which may affect the operation of this Agreement, that Contracting Party shall promptly publish them or otherwise make them publicly available.

2. Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to the other Contracting Party on matters referred to in paragraph 1 of this Article.

3. Nothing in this Agreement shall prevent one Contracting Party from requiring an investor of the other Contracting Party, or its investment, to provide routine information concerning that investment solely for informative or statistical purposes. Nothing in this Agreement requires a Contracting Party to furnish or allow access to:

(a) information relating to the financial affairs and accounts of individual customers of particular investors or investments; or

(b) any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice the legitimate commercial interests of a particular enterprise.

## Article 9. Entry and Sojourn of Personnel

Subject to its laws and regulations regarding the entry and sojourn of aliens, a Contracting Party shall permit natural persons who are investors of the other Contracting Party and personnel employed by companies of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.

## Article 10. Settlement of Disputes between Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through consultations or diplomatic channels.

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2. If any dispute cannot be settled within one hundred and eighty (180) days from the date of request for settlement, it shall, at the request of either Contracting Party, be submitted to an ad hoc Arbitral Tribunal in accordance with the provisions of this Article.

3. Such an Arbitral Tribunal shall be constituted for each individual case in the following way: Within sixty (60) days from the date of receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal These two members shall then select a national of a third State who shall be appointed as a Chairperson of the Tribunal upon approval of the two Contracting Parties. The Chairperson shall be appointed within sixty (60) days from the date of the appointment of the other two members.

4. If the necessary appointments have not been made within the periods specified in paragraph 3 of this Article, a request may be made by either Contracting Party to the President of the International Court of Justice to make such appointments. If the President is a national of either Contracting Party or otherwise prevented from discharging the said function, the Vice-President shall be invited to make the appointments. If the Vice-President is also a national of either Contracting Party or prevented from discharging the said function, the member, next in seniority, of the International Court of Justice who is not a national of either Contracting Party shall be invited to make the appointments.

5. The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties.

6. The Arbitral Tribunal shall determine its own procedure.

7. Each Contracting Party shall bear the costs of its own arbitrator and its representation in the arbitral proceedings. The costs of the Chairperson and any remaining costs shall be borne in equal parts by both Contracting Parties. The Tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties.

## Article 11. Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

1. This Article applies to disputes between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former Contracting Party under this Agreement which causes loss or damage to the investor or its investment.

2. Such a dispute should, if possible, be settled by negotiations or consultations. If it is not so settled within one hundred and eighty (180) days from the date on which the dispute has been raised with written request by either party, the investor may choose to submit it for resolution:

(a) to the competent courts of the Contracting Party in the territory of which the investment has been made; or

(b) by arbitration in accordance with this Article under:

i. the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"), if the ICSID Convention is available;

ii. the Additional Facility Rules of the Center for Settlement of Investment Disputes ("ICSED Additional Facility"), if the ICSID Additional Facility is available;

iii. the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") 5; or

Iv. if agreed by both parties to the dispute, any other arbitration institution or any other arbitration rules.

3. Each Contracting Party hereby consents to the submission of a dispute to international arbitration in accordance with the procedures set out in this Agreement. The consent and the submission of a claim to arbitration under this Article shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Center) and the ICSID Additional Facility Rules with regards to the written consent of the parties to the dispute; and

(b) Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") for an "agreement in writing."

4. Once the investor has submitted the dispute to the courts of the disputing Contracting Party or any of the arbitration mechanisms provided for in paragraph 2, the choice of the procedure shall be final.

5. The seeking of interim relief not involving the payment of damages, from judicial or administrative tribunals, by a party to a dispute submitted to arbitration under this Article, for the preservation of its rights and interests pending resolution of the dispute, is not deemed a submission of the dispute for resolution for purposes of a Contracting Party's limitation of consent under paragraph 4 of this Article, and is permissible in arbitration under any of the provisions of paragraph 2(b) of this Article.

5 Both parties will consult on new version of UNCITRAL arbitration rules when the new version is effective in order to determine whether the new version will be applicable.

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6. A dispute may be submitted to arbitration ninety (90) days after the date on which notice of intent to do so was received by the Contracting Party which is party to the dispute, but no later than three (3) years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute. Notice of intent shall specify:

(a) the name and address of the disputing investor and the investment;

(b) the provisions of this Agreement alleged to have been breached and any other related provisions;

(c) the issues and the factual basis for the claim; and

(d) the relief sought, including the approximate amount of any damages claimed.

7. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under paragraph 2(b) of this Article. If the disputing parties fail to reach an agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

8. A Contracting Party shall not assert as a defence, counter-claim, right of setoff or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.

9. The arbitral tribunal, in its award, shall set out its findings of law and fact, together with the reasons for its ruling and may, at the request of a party, provide the following forms of relief:

(a) a declaration that the Contracting Party has failed to comply with its obligations under this Agreement;

(b) pecuniary compensation, which shall include interest from the time the loss or damage was incurred until the payment was made;

(c) restitution in kind in appropriate cases, provided that the Contracting Party may pay pecuniary compensation in lieu thereof where restitution is not practicable; and

(d) with the agreement of the parties to the dispute, any other form of relief.

10. Arbitration awards shall be final and binding upon the parties to the dispute. Each Contracting Party shall, in its territory, make provision for the effective enforcement of awards made pursuant to this Article and shall carry out without delay any such award issued in a proceeding to which it is a party.

## Article 12. Application of other Rules

If the laws and regulations of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement contain provisions, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such provisions shall, to the extent they are more favourable, prevail over this Agreement.

## Article 13. Application of the Agreement

1. This Agreement applies to the existing investments at the date of the entry into force of this Agreement, as well as to the investments made or acquired after this date.

2. The Agreement shall not apply to claims arising out of events which occurred, or to claims which had been settled, prior to its entry into force.

## Article 14. Denial of Benefits

1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is a juridical person of such other Contracting Party and to investments of such investor if persons of a non-Contracting Party own or control the juridical person and the denying Contracting Party adopts or maintains measures with respect to the non-Contracting Party or a person of the non-Contracting Party that prohibit transactions with the juridical person or that would be violated or circumvented if the benefits of this Agreement were accorded to the juridical person or its investments.

2. Subject to prior notification and consultation, a Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is a juridical person of such other Contracting Party and to investments of such investor if the juridical person has no substantial business activities in the territory of the other Contracting Party and persons of a non-Contracting Party, or of the denying Contracting Party, own or control the juridical person.

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## Article 15. Security Exception

Nothing in this Agreement shall be construed:

(a) to require a Contracting Party to furnish any information, the disclosure of which it considers contrary to its essential security interests;

(b) to prevent a Contracting Party from taking any actions which it considers necessary for the protection of its essential security interests; or

(c) to prevent a Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

## Article 16. Entry Into Force, Duration and Termination

1. This Agreement shall enter into force thirty (30) days after the date on which the Contracting Parties have notified each other in writing that their respective legal requirements for the entry into force of this Agreement have been fulfilled.

2. This Agreement shall remain in force for a period often (10) years and shall remain in force thereafter indefinitely unless either Contracting Party notifies the other Contracting Party in writing one year in advance of its intention to terminate this Agreement.

3. In respect of investments made prior to the termination of this Agreement, the provisions of Articles 1 to 15 of this Agreement shall remain in force for a further period of ten (10) years from the date of the termination.

4. The Agreement may be revised by mutual written consent of the Contracting Parties. Any revision or termination of this Agreement shall be effected without prejudice to any rights or obligations accruing or incurred under this Agreement prior to the effective date of such revision or termination.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto by their

Done in duplicate at Nay Pyi Taw on 5 ih June 2014, in the Myanmar, Korean and English languages, all texts being equally

authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Government of the Republic of Korea

For the Government of the Republic of the Union of Myanmar

Wunna Maung Lwin Union Minister Ministry of Foreign Affairs

Mr. Yun Byung-se Minister

Ministry of Foreign Affairs

Annex

Expropriation

The Contracting Parties confirm their shared understanding that:

1. An action or a series of actions by a Contracting Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.

2. Article 5 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

3. The second situation addressed by Article 5 is indirect expropriation, where an action or a series of actions by a Contracting Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or a series of actions by a Contracting Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including:

i. the economic impact of the government action, although the fact that an action or a series of actions by a Contracting Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

ii. the extent to which the government action interferes with distinct, reasonable investment-backed expectations; 6 7 and

iii. the character of the government action, including its objectives and context. Relevant considerations could include whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest.

(b) Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.

6 For greater certainty, whether an investor's investment-backed expectations are reasonable depends in part on the nature and extent of governmental regulation in the relevant sector. For example, an investor's expectations that regulations will not change are less likely to be reasonable in a heavily regulated sector than in a less heavily regulated sector.

7 For greater certainty, the list of "legitimate public welfare objectives" in subparagraph (b) is not exhaustive.