



New Myanmar Foreign Investment Law Enacted On 2 November 2012

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Background

On 2 November 2012 Myanmar's President Thein Sein endorsed the country's new Foreign Investment Law (FIL). The introduction of the FIL is good news for potential investors and came in the same week in which the World Bank pledged \$80 million in aid. The law was introduced just a few weeks prior to the visit of U.S. President Barack Obama who stated that Myanmar was taking "its first steps on what will be a long journey" and that the process of democratic and economic reform could "lead to incredible development opportunities."

The long-awaited FIL is the product of protracted negotiations between the parliament and cabinet. The new law has prompted debate about the role of foreign investment in national development and how it might affect other local interests. Myanmar's parliament passed a first draft of the FIL on 7 September 2012, only for it to be returned by the President with instructions to temper some of its more protectionist provisions. Lawmakers have since adopted ten of the President Thein Sein's eleven recommendations. As a consequence the final form FIL is less restrictive than earlier draft versions. However, a number of contentious issues have been deferred for the time present and will most likely be addressed in future subordinate legislation. While the FIL represents a move in the right direction, it does not represent a comprehensive investment framework.

On 3 November 2012 the Myanmar Ahlin newspaper published the original text of the FIL in Burmese. An online version is available [here \[Archived copy\]](#).

Myanmar Legal Services have published an unofficial English translation of the new act which can be accessed via their website [here \[Archived copy\]](#).

This newsletter is based on the above, unofficial translation. It provides general information on investment law in Myanmar. Charltons accepts no responsibility for its completeness and/or accuracy. Specific legal advice should be sought in relation to investment in Myanmar. Charltons does not currently advise on the law of Myanmar.

Overview

Section 57 of the new law repeals the Foreign Investment Law of the Union of Myanmar 1988 (1988 FIL). Section 44, acts retrospectively, and brings businesses established under the 1988 FIL within the scope of the new legislation. Some popular provisions from the 1988 FIL have been retained such as:-

- tax holidays;
- longer land leases;
- freedom to contract on dispute resolution; and
- the right to sell shares.

The FIL establishes a new foreign investment authority the Myanmar Investment Commission (MIC). However, the MIC has not been empowered to the extent some investors might have hoped.

The FIL is a framework document only. Implementing legislation has yet to be enacted. The government is free to adopt measures which could run counter to the FIL's investor-friendly approach. Pursuant to Section 56, the Ministry of National Planning and Economic Development shall issue implementing legislation within 90 days of the FIL's promulgation. Under Section 55, subordinate legislation to the 1988 FIL survives unless it conflicts with the FIL.

Key Changes

Investment Commission

The MIC is established pursuant to Section 11 of the FIL. The chairman of the MIC will be a member of government. Members will be drawn from among both government officials and representatives from the private sector. The 1988 FIL did not circumscribe the existing commission's powers. The FIL does not fare any better in this respect. On the contrary, it

arguably affords the MC greater discretion than its predecessor. The MC's duties and powers are mainly set out in Sections 12 and 13. Additional powers flow from other miscellaneous provisions.

Foreigners are free to incorporate a company in Myanmar under the Companies Act 1914. However, all foreign investments require MIC approval. Promoters or investors must submit a proposal in the prescribed form in order to obtain an investment permit. The MC is obligated to evaluate proposals in accordance with the basic principles set out in Section 8 of the new legislation. The majority of the guiding principles set out in the 1988 FIL have been preserved. The FIL contains new guiding principles which state foreign investments should fulfill the following criteria where applicable, investments should:-

- support the national economic development plan;
- be sizeable;
- promote the education of Myanmar's citizens;
- promote the modernisation of public infrastructure;
- promote the development of international banking standards;
- promote the exploration and development of natural resources; and
- promote environmental conservation and protection.

This emphasis on environmental conservation and protection marks a shift in the government's environmental policy. It follows on from the Environmental Law which was passed on 20 March 2012.

The MC can determine or vary the following:

- restricted or prohibited activities;
- work permits;
- minimum foreign capital requirements;
- minimum requirements in relation to the employment of skilled local workers;
- guarantees against nationalisation;
- land leases; and
- tax exemptions and relief.

The MC is also empowered to monitor active investments and impose administrative penalties. The exact division and separation of powers between the MC and other government agencies remains unclear. For example while the Ministry of National Planning and Economic Development is responsible for issuing implementing legislation, the MC may issue orders, notifications and directives. The MC both advises and answers to government. While the MC is required to seek government approval before issuing orders and notifications and directives the procedures by which it should apply for such approval are not set out.

New Restricted Or Prohibited Activities

Section 4 sets out certain restricted and prohibited activities. These activities include:

- manufacturing and service enterprises that can be operated by Myanmar citizens (to be prescribed by regulation);
- enterprises that are detrimental to public health, natural resources, the environment or biodiversity; and
- enterprises that import technology or equipment that are still being tested or have not yet been approved.

It is for the MC to identify permitted and/or restricted and prohibited activities. A permitted activity must:

- be beneficial to Myanmar and her people;
- endorsed by parliament; and
- approved by the MIC.

It is unclear how the FIL interacts with the State-owned Economic Enterprises Law 1989 (SEEC), which remains in force. The SEEC restricts a number of economic activities to state-owned economic enterprises, such as:

- forest cultivation and conservation;
- the exploration, extraction and sale or export of metals, petroleum, national gas and precious stones;
- postal and telecommunications;
- air and railway transport;
- banking and insurance;
- broadcasting and television;
- electricity generation; and
- the manufacture of security and defence products.

The government, not the MC, has discretion to provide exemptions from the SEEC. For example, the Ministry of Energy hosts international bidding rounds for oil and gas product sharing contracts and may grant licenses on an ad-hoc basis.

New Penalties

Pursuant to Section 41 the MC can at its discretion impose administrative penalties on investors who violate the conditions of their investment permits, the provisions of the FIL or the provisions of subsidiary legislation. The penalties available range from: -

- a warning;
- the temporary suspension of tax exemption or relief;
- the revocation of an investment permit; and
- 'Black-listing', whereby no further permits will be granted to the infringing investor for any business activity.

Section 45 creates a new criminal offence. Investors are personally liable if they are found to have deliberately made misrepresentations in their investment proposals.

Minimum Levels Of Foreign Ownership

Section 9 describes three forms of investment: -

- up to 100% foreign ownership in activities approved by the MIC;
- joint ventures with a citizen or government body; and
- joint ventures with a citizen by contract.

Section 6(a) of the 1988 FIL mandated a minimum foreign shareholding of 35%. Under the FIL, there is no general minimum requirement. The only exception is provided in Section 10(4). Activities prohibited or restricted under Section 10 (4), can only be pursued through a joint venture with a citizen of Myanmar. Equity ratios for such joint venture arrangements have

yet to be prescribed.

Minimum Capital Requirements

Historically the Ministry of National Planning and Economic Development was responsible for regulating minimum foreign capital requirements for foreign companies on a sector by sector basis, for example a minimum capital requirement of US\$300,000 applied to service sector companies. Pursuant to Section 10(3) of the FIL, the MC will inherit this role. The new FIL does not prescribe a minimum capital requirement for foreign investments. Capital requirements will be determined by the MC on a case-by-case basis depending on the business sector of the proposed investment, and subject to government approval.

Employees

Sections 24 to 26 impose specific requirements in relation to the appointment of personnel by investors. Locals and foreigner workers with the same level of expertise must be afforded the same rights. All unskilled workers must be hired locally. Investors must provide local skilled workers with professional training and education. The percentage of local skilled workers must increase by 25% every 2 years, until they account for 75% of all skilled workers. The MC can relax this timetable for more complex projects. The FIL makes no clear distinction between skilled and unskilled workers.

Guarantee Against Nationalisation

Section 28 of the FIL, provided a guarantee against nationalisation. The MC can extend the guarantee beyond the duration of a particular investment permit. In contrast, Section 22 of the 1988 FIL only guaranteed compensation in the event of nationalisation.

Section 29 assures that investment permits will not be terminated without sufficient cause. However, there is no guidance as to what constitutes sufficient cause, nor any guarantee of compensation in the event of termination. The MC appears to have discretion in this regard.

Dispute Resolution

Pursuant to Section 42 disputes between individuals shall be settled pursuant to the terms of the agreement entered into between the parties. This provision does not apply to disputes between investors and the government. Contracts entered into with state-owned enterprises will continue to be governed by the law of Myanmar. The Companies Act 1914 requires individuals to a contract to submit to arbitration under the Arbitration Act 1944 (**Arbitration Act**). Section 42 of the FIL is particularly significant in light of the Arbitration Act's shortcomings. The Arbitration Act does not provide for an independent adjudicatory body. The Myanmar Federation of Chambers of Commerce and Industry arbitrates commercial disputes. Foreign arbitral awards are not recognised under the Arbitration Act. Furthermore Myanmar has not yet signed the New York Convention on the Enforcement of Arbitral Awards 1958 (**New York Convention**) or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965. The government of Myanmar has however indicated its intention to adopt the UNCITRAL Model Law and ratify the New York Convention.

Given the lack of legal protection offered by the FIL, investors may increasingly seek to rely on investment protections offered by international treaties. Deals may be structured to involve subsidiaries incorporated in states with which Myanmar has signed bilateral treaties. Myanmar has entered trade agreements with China, India and the Philippines. It has also ratified two multilateral trade agreements, the ASEAN-Australia-New Zealand Trade Agreement and the ASEAN Comprehensive Investment Agreement. However, these agreements are focused on trade and do not contain provisions on the enforcement of arbitral awards.

New Rights And Longer Land Leases

Section 18 sets out investors' rights, such as the right to sell; exchange, or transfer assets. Investors are explicitly entitled to transfer some or all of their shares to a foreign or local purchaser. Pursuant to Sections 31 to 36 investors will also benefit from longer land leases. Leases may run for up to 50 years. The MC can also grant two ten year lease extensions. The Order relating to the right to use land in connection with the Myanmar Foreign Investment Law was issued on 30 September 2011. It provided a shorter initial term of 30 years and maximum of 60 years in total.

New Tax Breaks

Investors will welcome new tax breaks introduced in Section 27. These include:-

- up to five consecutive years' tax holiday, (an increase from the three offered by Section 21 of the 1988 FIL); and
- an exemption from corporate tax on exports.

The MC has the power to grant or extend tax exemptions and relief.

Risk Profile

Long-term opportunities in Myanmar's energy, mining and education sectors in particular are likely to increasingly attract foreign investors. While the FIL lends stability to Myanmar's foreign investing regime it is not a panacea against risk and market volatility. Potential investors should remain cautious and approach investment opportunities with the due care and attention they would exercise when investing in other emerging markets. The government of Myanmar remains in a state of transition. Provisions contained in Myanmar's 2008 constitution guaranteed that the former ruling military junta would maintain a firm grip on power. Military personnel appointed by the President are entitled to one quarter of parliamentary seats. Hardliners and reformists continue to clash, which may hinder the legislative progress, as already evidenced by the protracted deliberations which delayed the passing of the FIL. A major cabinet reshuffle took place on 27 August 2012, which may provide enough momentum for President's Thein Sein's second wave of reforms.

Myanmar's currency regime is also in transition. The move from a multiple exchange rate to a managed float system began on 1 April 2012. Restrictions on international payments will be lifted before the end of 2013. However the Kyat has fluctuated wildly against the currencies of

Myanmar's trade partners; and the growing influx of foreign capital is expected to affect the Kyat's stabilisation. In April 2012 the European Union, Norway, Australia and Canada lifted their economic sanctions against Myanmar (an arms embargo remains in place). The US followed suit one month later although some sanctions imposed by the US remain in force. Although likely, there is no guarantee that the easing of sanctions will continue throughout 2013 and beyond.

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