

Where is Myanmar Headed with the New Investment Law?

Kluwer Arbitration Blog

August 25, 2017

Eddy Jabnoue (New York Bar Attorney)

Please refer to this post as: Eddy Jabnoue, 'Where is Myanmar Headed with the New Investment Law?', Kluwer Arbitration Blog, August 25 2017, <http://arbitrationblog.kluwerarbitration.com/2017/08/25/myanmar-headed-new-investment-law/>

According to the Doing Business Reports, from 2014 and 2016 Myanmar ameliorated the possibility to enter into business in the country by increasing its rank from 177 to 171. However, this evolution seems to be frozen as shown by the 2017 Report in terms of amelioration. Nonetheless, Myanmar's government is ready to take a next step forward toward opening to the world through the enactment of its new Investment Law, which was passed by Myanmar's Legislature, signed by President U Htin Kyaw in October 2016, and came into effect on 30 March 2017.

The said drafting started in 2014 by the Myanmar Investment Commission (MIC) with the collaboration of the International Finance Corporation, an international financial institution member of the World Bank that offers advice asset management services and investment to developing countries.

The country used to have two investment laws: the Myanmar Citizens Investment Law (MCIL), which governs investment by citizens,[fn] Citizen is defined at Chapter 1 (2) (m) as "includ[ing] associate citizen or naturalized citizen. This expression includes business organizations composed only with citizens". Foreign investors "means a person who is not a Citizen" according to Chapter 1 (2) (o).[fn] and the Foreign Investment Law (FIL), which governs investment by foreigners. Quite often, there were misunderstandings of the policies and each category felt disadvantaged compared to the other.

New Objectives for More Equality

Now, the law tries to make these two groups more equal. In that sense, it is worth mentioning that the definition of “investor” in article 1 (q) does not distinguish between domestic and foreign investors. In fact, on the one hand, the law still makes some reservations for domestic SME and domestic business, whereas, on the other hand, the law would give to a foreign investor of promoted sectors a corporate income tax holidays reduction from three to seven years depending on the location of the business.

More generally, the law permits the government to grant tax exemptions to businesses in sectors that the State needs to boost the economy in, and by the same way to favor some less economically dynamic regions. The possibilities are also extended since the prohibited areas have been reduced from 21 in the invest law of 2012 for foreign investors to only 12 in the new draft.[fn] See Chapter II article 4 of the Foreign Investment Law 2012, available here; and article 42 of the new draft.[/fn]

The objectives are in favor of local and international investors. The drafters are indeed aiming a long term inclusive growth and jobs creation “enabling the broader population to participate in and benefit from Myanmar’s economic reform, increased access to finance for rural and micro borrowers, and support for development of key infrastructure”. Chapter 13, which is titled “*employment and staff workers*”, illustrates exactly this objective.

Myanmar Investment Commission’s Delegation of Power to Region and State

Previously, the MIC, a government-appointed body, had to review any proposal to invest within the country regardless of whether it was substantial or minor. The process was thus long and costly for potential investors.

With the new law in force, the approval from an authority is still required. However, on the one hand, the State and Regions will now have to approve some investments of small to medium size. Myanmar is indeed divided in 21 administrative subdivisions, which now will have competence over investments to be made under their territory. This makes sense because those local authorities would know better the needs of their communities, and such a delegation of power to several actors will *per se* reduce the time needed to validate an investor.

To make an approval, Regions and States will have to follow the advice of the MIC. The MIC will remain competent for large investments. This system is more coherent for the implementation of companies in each region. Moreover, the delegation of the part of Commission's power will make the processing of all the requests for approval faster.

A Step Forward, but Not a Jump

There are indeed several criticisms that could be made.

For instance, the requirement to try to mediate before appointing an arbitrator or going to court is, like the previous investment law, blurred in terms of time limit, and it would compel parties to draft more detailed agreement in order to prevent delay at the dispute resolution stage.

Also, Chapter XII of the draft law ("*right to use land*") § 50 (b) and (c) kept the twice renewable 10 years extension on the 50 years period for leasing land from the government or a private owner. Whereas this is more than a disadvantage towards foreign investors, it is especially an unpractical limitation for a business and in its leasing rights. Even though the prohibition for a foreigner to own land is common in developing countries, the period of extension could have been more important.

Several Other Projects

The new investment law brings more clarity between domestic and foreign investors. There is no doubt that this will constitute a boost to the country economic dynamism. However, the text did not make substantial changes on what could be made to create a real equality between investors. The country has newly opened to new industries and it could be better to do it step by step. The corporate law project will more likely allow foreign companies to hold stakes in local businesses that could "reinvigorate" the economy.

Another good call is a brand new law on international arbitration that will assure trust in the enforcing contract system in court, which is one of the greatest drawbacks for businesses in the country according to the World Bank.

Focus on the New Arbitration Law

The Parliament of Myanmar has passed on 5 January 2016 a new arbitration law

(Republic of the Union of Myanmar Law No. 5/2016) (the Arbitration Law), aiming to get the mechanism of dispute resolution in line with the UNCITRAL Model Law on International Arbitration as amended in 2006, and to give effect to the country's ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Award, which Myanmar ratified in 2013.

There is no doubt that the common work of arbitration law and investment law will benefit the dynamism of Myanmar in the near future. It is necessary to polish both of them in order to reassure the safety of operation for foreign investors.