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A New Foreign Investment Law in Myanmar

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On 2 November 2012, President Thein Sein approved, after several months of intense debate between Parliament and the Government, Myanmar's new Foreign Investment Law ('FIL' or 'the Law'). The new Law revises the framework for foreign investment in Myanmar which had been in place since a military coup in 1988. Considering the country's abundant natural resources and its location between giant consumer markets India and China, many international companies were eagerly awaiting this new legislation to start investing or increase their existing investments.

The key features of the new Law and the main changes from the previous regime can be summarised as follows.

1. Creating a Favourable Investment Climate

For the purpose of promoting foreign investments and creating a favourable investment climate, the Act offers certain benefits and guarantees rights on the part of the investor.

a. Benefits

The Law distinguishes between benefits that are granted automatically, i.e. without any specific application having been made by the investor, and those that may be granted solely upon specific application.

There is only one 'automatic' benefit: a five year income tax exemption (it was three years under the old law) to investors engaging in the production of goods or services (article 27(a)). This exemption period may be extended for a reasonable period where it is deemed that the activities of the investor are beneficial to the State.

The 'upon application' benefits include, among others, a further tax relief for trade profits providing they are re-invested in the business within one year; an accelerated depreciation in respect of machinery, equipment, buildings and other capital assets used in the business; a right to carry forward and set-off trading losses for up to three years; a relief from customs duty on certain imported machinery and raw materials; an exemption from commercial tax on products manufactured for export and the right for foreigners to pay income tax at the same rates as Myanmar citizens (article 25(b) to (k)).

b. Rights/Guarantees

Under article 28 of the Law, the Government guarantees that foreign investments will not be nationalized during the term of, including any extension of, the investment permit (see *infra*). An earlier proposal, allowing for the nationalisation of foreign investments upon the payment of the market value thereof, was withdrawn. Article 29 guarantees that the Government will not suspend any investment activity ‘without any sufficient cause’.

Under article of 18(b) of the Law, investors are entitled to transfer their shares and business interests in the investment to both other foreign companies and Myanmar citizens. In the earlier versions of the FIL, this right was limited to the transfer to Myanmar citizens only. This is an important liberalisation. Caution remains, however, appropriate as articles 17(i) and (j) submit the transfer of shares, be it to nationals or foreigners, to the prior approval of the Myanmar Investment Commission (hereafter ‘MIC’; see *infra*).

In general, Myanmar law prohibits foreigners from owning land and imposes restrictions on foreigners leasing land. The new Law provides for a welcome exception. Under article 31, foreign investors may be granted an initial lease of up to fifty years to use land (it was thirty years under the previous regime), depending upon the nature of the business and the volume of the investment. The lease may be extended twice, for ten years each time (it was extendable for two periods of five years under the old law). With the approval of the Government, the initial and extended lease periods may even be further extended for investors investing in less developed and/or isolated regions.

As Myanmar has recently implemented reform to allow its currency, the kyat, to float with market exchange rates, the FIL provides that investors can remit funds abroad at market exchange rates. Previously, investors were only permitted to remit funds abroad at the official rate of exchange, which varied dramatically from unofficial exchange rates.

There are also certain protections in the FIL designed at allowing an investor to withdraw its original investment, as well as to remit profits after tax and foreign employees to remit their salary after income tax and living expenses.

2. Investment Permit

To fall within the scope of the FIL and be protected thereunder, foreign investors must apply to the MIC to obtain an investment permit. Investors not making an application will still be able to invest in the country, however, without being entitled to the benefits and guarantees set out above.

The MIC will allow proposed investments if they are considered beneficial to the interest of the country. These interests are set out in articles 7 and 8 of the Law and include, among others, the development of employment, export, road and rail infrastructure, energy production and the knowledge and skills of local workers. Clearly, the Government seeks to attract investments requiring substantial funds.

Stricter rules, yet to be adopted, may apply to investments in so-called ‘restricted sectors’. These include, among others, businesses carrying out activities prejudicial to ‘the traditional cultures and customs of ethnic nationalities in Myanmar, ‘public health’ and ‘natural resources, the environment and biodiversity’. Restricted sectors also include activities which can be carried out by Myanmar citizens themselves, such as certain forms of manufacturing, services, farming, animal husbandry and fisheries. In addition, the MIC will involve the Government and the Parliament in relation to investments that are considered to affect the security, economic, environmental and social interests

of the country.

Investments may basically be carried out in one of the following forms: either by a 100% foreign owned company; a joint venture between a foreign investor and a Myanmar citizen/company or a joint venture between a foreign investor and the Government or a State controlled entity. When forming a joint venture, the ratio of foreign capital and local capital invested can be freely determined by the parties. Previously, a foreign company had to invest at least 35% of the total capital.

The MIC has the discretionary power to set a minimum investment threshold for eligibility to FIL benefits on a case by case basis, having regard to the nature of the business. In practice though, as the MIC has not announced any new minimum investment thresholds, and in light of the fact that the FIL leaves in place existing rules and procedures not contrary to the FIL, the minimum investment thresholds previously put in place by the MIC, being approximately USD 300,000 for service companies and USD 500,000 for manufacturing companies, would still be in effect. Further, investors will still have the option of foregoing the benefits of the FIL and establishing entities directly with the Company Registration Office, which maintains a minimum investment threshold of approximately USD 50,000.

3. Duties of the Investor/Restrictions

Foreign investors must comply with the provisions of the laws of Myanmar, in general, and with the provisions of the FIL and the investment permit in particular.

Substantial restrictions apply in relation to the recruitment and employment of staff and workers (article 24). As to unskilled workers, investors are compelled to employ Myanmar citizens only. As to skilled workers, quotas apply. In first two years of the investment, citizens of Myanmar must make up at least 25% of the skilled workers. This increases to 50% in the third and fourth year and to 75% in the fifth and sixth year. For complex projects, the MIC may extend these time limits. Furthermore, in relation to the payment of wages, the investor may not differ between Myanmar and expat workers of the same level of expertise.

4. Dispute Resolution

Contrary to many other foreign investment acts and bilateral investment treaties, the FIL does not provide for the Government's consent to settle disputes with foreign investors by means of international arbitration, be it under the rules of ICSID, UNCITRAL or any other international arbitral institution.

Having said this, the Law does stipulate that disputes will be settled in accordance with the dispute settlement mechanism 'stipulated in the relevant agreement', if any. In other words, if a foreign investor contractually agrees with its joint venture partner, be it a Myanmar company or Government entity, that disputes will be settled by international arbitration, this choice should be respected. Nevertheless and so long as Myanmar has not signed and ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it remains to be seen whether on the ground arbitration clauses will be enforceable in Myanmar.

5. Relationship to the former FIL

Investors doing business under permits issued under the old foreign investment law will continue

to do business and enjoy the benefits under that permit until that permitted term of the investment expires. However, the FIL is ambiguous as to whether such investors will be able to enjoy all benefits under the new FIL, such as extended land lease terms. Further delegated legislation is more than welcome to clarify how current investors can avail themselves of the benefits of the new FIL.

6. Evaluation

The new Law makes investing Myanmar more attractive. The tax grace period is extended from three to five years. Land can be leased for a period of seventy years whereas it used to be forty years. When foreign investors set up partnerships with local partners, they are free to agree on the ratio foreign/local capital. The investment threshold remains relatively low with USD 300,000 to USD 500,000. When parties agree to have their disputes settled by international arbitration, it seems that this choice will be respected.

On the other hand, the proof of the pudding is still very much in the eating. The investment incentives are only available to those investors obtaining an investment permit from the MIC, with the Government and, albeit to a lesser extent, the national Parliament looking over its shoulder. A lot will depend on how ‘investor friendly’ and efficiently these bodies will apply and interpret the provisions of the FIL, for example in relation to important ‘restricted’ sectors such as farming and the extractive business. Supporting by-laws, expected to be adopted in the following months, will shed further light on how the new foreign investment framework in Myanmar will work in practice.

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