

Change and opportunity in Myanmar

5 April 2012



Further information

If you would like further information on any aspect of this client note, please contact a person mentioned below or the person with whom you usually deal.

Asia and the Middle East

Michael Aldrich
Partner, Ulaanbaatar
T +976 7012 1020
michael.aldrich@hoganlovells.com

Anthony Raven
Partner, Tokyo
T +81 3 5157 8302
anthony.raven@hoganlovells.com

Brad Roach
Partner, Singapore
T +65 6302 2556
brad.roach@hoganlovells.com

U.S.

Mark S. McConnell
Partner, Washington
T: +1 202 637 5796
mark.mconnell@hoganlovells.com

EU

Lourdes Catrain
Partner, Brussels
T: +32 2 505 0933
lourdes.catrain@hoganlovells.com

These materials have been compiled by Hogan Lovells International LLP. The information and opinions which are contained in this note are not intended to be a comprehensive study, nor to provide legal advice, and should not be treated as a substitute for specific legal advice. Please seek professional legal advice concerning individual situations.

Contents

Current United States and European Union sanctions against Myanmar	1
The European Union's sanctions regime against Myanmar	2
Targeted economic sanctions	2
Easing of sanctions	2
General characteristics of the Myanmar legal system	2
Revision to the Myanmar Foreign Investment Law of 1988	2
Foreign exchange reform	3
International commercial arbitration	3
Opening the market for foreign banks	4
Trademark registration	4
Oil and gas	4
Risks and the road ahead	5

Hogan Lovells partners visit Yangon¹

On 1 April 2012, Myanmar took a significant step in resolving years of political deadlock and international isolation. The country went to the polls to vote in a by-election for 45 members of the Parliament, which consists of 664 members. The National League for Democracy (“**NLD**”), led by Daw Aung San Su Kyi, the charismatic and well-known former political opponent to the regime, won 43 seats out of the 45 seats contested in the by-election. The by-election is widely perceived as the beginning of a step towards greater political freedoms in the country.

In order to monitor developments in Myanmar, three of our partners, Michael Aldrich, Anthony Raven and Brad Roach, attended the Myanmar Oil, Gas and Power Summit which was held during the week of the by-election. The Summit was attended by 350 delegates from 35 countries and reflected the tremendous interest in Myanmar’s political developments and the opportunities for investment in the oil, gas and power sectors.

Myanmar stands at the cusp of significant economic development. It has a population of over 58 million, which can serve both as a pool for skilled labour as well as a sizeable market for all types of goods and services. Compared to neighbouring countries in the region, Myanmar’s energy and infrastructure sectors are relatively underdeveloped. Its legal system has inherited a common law system that provides a suitable basis for amending and adapting existing laws to accommodate foreign direct investment. To this end, the Parliament of Myanmar has been reviewing draft legislative amendments and implementing foreign exchange reform to provide greater certainty to investors.

Currently, the United States and the European Union maintain sanctions against certain types of business transactions with Myanmar. Foreign investors must understand the current state of restrictions and monitor changes that may be implemented over the coming months.

UNITED STATES AND EUROPEAN UNION ECONOMIC SANCTIONS

Current United States sanctions against Myanmar

The U.S. Government has imposed a number of restrictions that affect the ability of “U.S. persons” to conduct business with, or engage in commercial transactions involving, Myanmar through a complex web of executive orders, federal laws and related regulations. The term “U.S. person” is defined to include any entity organized under U.S. law (including foreign branches of such U.S. entities), U.S. citizens and U.S. permanent residents (“green card” holders)

wherever located, and any person physically in the United States. The U.S. sanctions may also be triggered if a financial transaction involves U.S. dollars because international funds transfers denominated in U.S. dollars generally have to clear the U.S. financial system, which means that a U.S. person (i.e., a U.S. bank) would be involved.

The major restrictions imposed by the U.S. Government against Myanmar include the prohibition of:

- any new investment in Myanmar by U.S. persons (the term “new investment” is broadly defined under the applicable U.S. sanctions regulations);
- any facilitation by U.S. persons of a new investment in Myanmar by non-U.S. persons;
- the export or re-export of financial services to Myanmar from the United States or by a U.S. person, including fund transfers (and other types of payments), insurance services, banking services, loans and other extensions of credit;
- imports into the United States of Myanmar-origin items;
- exports or re-exports of arms and other defence-related items to Myanmar;
- any dealings with, and freezing (blocking) the assets and other property interests of, Myanmar persons or entities who are designated by the U.S. Government as Specially Designated Nationals (“**SDN**”)s because they are deemed to be involved in human rights abuses, corruption, or providing support to the military; and
- any dealings with any entity that is owned (at 50% or higher interest) or otherwise controlled by an SDN, even if that entity itself is not included on the SDN list.

There is no general prohibition under U.S. law on the exportation of goods and services (other than financial services) to Myanmar when no SDN is involved in the transaction. As such, U.S. persons are not prohibited by the U.S. sanctions maintained by the U.S. Treasury Department’s Office of Foreign Assets Control (“**OFAC**”) on exporting U.S. or non-U.S. origin items to Myanmar provided that no SDN is involved in the transaction. Pursuant to a general license set forth in OFAC’s regulations, all transactions ordinarily incident to such exports also are authorized (e.g., provision of cargo insurance for such shipment of goods to Myanmar, payment of fees to unload the goods in Myanmar, or the processing of payments received from Myanmar), so long as no SDN is involved in the transaction. However, we note that U.S. export control laws and regulations may still prohibit the export or re-export of certain commercial U.S.-origin items to Myanmar (or certain foreign-made items containing more than 25% of controlled U.S.-origin content), depending on the nature and export control classification of the item at issue.

¹ We are conscious that considerable debate has arisen over the years regarding the correct name of the country and its former capital. Arguments have been made that English speakers should reject the use of the words “Myanmar” and “Yangon” as these are endorsed by the military Government and that the correct usage should be “Burma” and “Rangoon”. Without wishing to go into the merits of this debate, we have elected to use the former names.

Hogan Lovells partners visit Yangon (cont'd)

The European Union's sanctions regime against Myanmar

The EU has imposed a wide variety of restrictive measures against Myanmar since 1996. Since early 2011, the EU has been lifting certain restrictive measures and further relaxation is expected after the 2012 by-election.

Targeted economic sanctions

The EU sanctions regime in respect of Myanmar is set out in a series of Common Positions, the first of which was adopted in 1996². Subsequently, they have been strengthened and extended on several occasions.

Measures have focused on individual sanctions, such as freezing of funds and economic resources as well as travel bans, and sanctions restricting trade, investment and services in respect to the following key industries:

- defence and military;
- extractive industries (metals and gems);
- forestry; and
- steel and iron.

The sanctions apply to any legal person, entity or body incorporated under the law of an EU Member State and its EU and non-EU branches, or any legal person, entity or body in respect of any business done in whole or in part within the EU. In addition, EU nationals whether residing abroad or within the EU, are also subject to the sanctions.

Easing of sanctions

As a result of the substantive political reform undertaken by the Government and Parliament in Myanmar, together with its commitment to economic and social development, the EU decided in February 2012 that the visa ban and asset freeze orders concerning certain key political figures should be suspended³. The EU is committed to a further easing of sanctions provided the path of positive reform continues. It is speculated that the EU will meet later this month to vote on sanctions, and that sanctions will be lifted in respect of most industries except defence.

GENERAL CHARACTERISTICS OF THE MYANMAR LEGAL SYSTEM

Notwithstanding its tumultuous history in the 20th century and its isolation from the world at large, Myanmar has retained a

British common law system that was established during the colonial period (1886 to 1948) and these laws enacted since the 19th century continue to be applied unless expressly amended or repealed. Further, Myanmar court decisions interpret laws with respect to prior case precedent according to the principle of stare decisis. Where there is no codified law, the courts have the discretion to apply Myanmar general law based on English common law as interpreted by Myanmar case precedent.



REVISION TO THE MYANMAR FOREIGN INVESTMENT LAW OF 1988

Despite media reports about Myanmar considering an entirely new draft law for foreign investment, existing practice set out in the Myanmar Foreign Investment Law of 1988 (the "**Foreign Investment Law**"), the Procedural Regulation for the Myanmar Foreign Investment Law of 1988, and even older statutory authority will continue to be the main framework for foreign investors seeking to establish a business presence in Myanmar.

The Foreign Investment Law provides for a three step process for foreign investment projects. These three steps consist of (a) obtaining a permit issued by the Myanmar Investment Commission ("**MIC**") for the foreign investment project, (b) obtaining a "trading permit", and (c) completing formalities with the Companies Registration Office⁴. These procedures are essential requirements for a foreign investment project to qualify for preferential tax treatment in Myanmar.

The MIC is the agency established under the Ministry of National Planning and Economic Development (the "**NPED Ministry**"), which is authorized to review both foreign and domestic investment application proposals and issue permissions for such applications. An MIC permit authorizes

² The relevant EU Common Position on Myanmar is set out in Council Decision 2010/232/CFSP of 26 April 2010 renewing restrictive measures against Burma/Myanmar, OJ L105, 27.4.2010, p.22, as amended by Council Decisions 2011/504/CFSP of 16 August 2011 and 2011/239/CFSP of 12 April 2011.

³ Council Decision 2012/98/CFSP of 17 February 2012 amending Decision 2010/232/CFSP renewing restrictive measures against Burma/Myanmar, OJ L47, 18.2.2012, p.6.

⁴ Among other vehicles, a foreign investor may incorporate a limited liability Myanmar company or register a Myanmar branch of its foreign headquarters. Both of these entities are defined as "foreign companies" under the Myanmar Companies Act of 1913. In addition, a foreign investor may incorporate a joint venture limited liability company with a Myanmar company. In order to qualify for preferential tax treatment, the foreign shareholder must hold no less than 35% of the equity of the joint venture.

Hogan Lovells partners visit Yangon (cont'd)

a foreign company engaged in the production of goods or the provision of services to qualify for an exemption from income taxes from the year of commencement of operations for a period of three years. Other preferential tax treatment for the reinvestment of profits or deduction for taxable income are available to foreign companies holding an MIC permit.

A "trading permit" is issued by the Directorate of Investment and Company Administration of the NPED Ministry pursuant to the Myanmar Companies Act of 1913 (the "**Myanmar Companies Act**"). The trading permit functions as the equivalent of a business license.

Upon obtaining an MIC permit and a trading permit, a foreign company obtains a certificate of incorporation from the Companies Registration Office, which evidences the formal commencement of the corporate existence of the enterprise in compliance with the Foreign Investment Law. Alternatively, a foreign company in the form of a branch commences its existence upon the issuance of a certificate of registration from the Companies Registration Office.

While these general approval procedures will continue to remain in place, the National Assembly is presently considering revisions to the Foreign Investment Law (the "**Revised Foreign Investment Law**") in order to update the terms of the statute and to address concerns expressed by the investor community.

There are three areas that are of special interest to foreign investors.

First, the National Assembly is expected to extend the exemption from income tax available to a foreign company with an MIC permit from three to five years.

Second, the Revised Foreign Investment Law will include a separate chapter addressing a previous uncertain area of land rights for foreigners and foreign companies. In prior years, foreigners and foreign companies could not lawfully hold land rights in fee simple or enter into a leasehold for more than one year. Because of these restrictions, real property speculators relying upon "connections" with their Myanmar counterparts often found themselves defrauded of their investments without any legal recourse, especially as the Contracts Act of 1872 holds that any agreement entered into effect for an unlawful purpose is void ab initio.

The Revised Foreign Investment Law will purportedly allow foreigners and foreign companies to obtain a leasehold of real property for thirty years, with two extensions of fifteen years each, depending upon the size of the investment. As the lessor must have acquired lawful rights to the land for such leases, procurement of the requisite supporting documents to such rights will predictably become an essential element of any due diligence exercise. The procedures for reviewing registration of deeds of title are well established in Myanmar law and practice.

Third, foreign companies will be obliged to increase their local work force on the basis of an increase of percentages over time. Within five years, 25% of the employees of a foreign company must be Myanmar citizens. These percentages increase to 50% after 10 years and 75% after 15 years.

Our lawyers learned of unofficial reports while in Yangon that there are some technical issues related to the drafting of the chapter of the Revised Foreign Investment Law with respect to land rights. It appears that these do not relate to a disagreement at the National Assembly regarding land right reforms but relate to a minor issue. Nevertheless, we understand that, because of this problem, the Revised Myanmar Foreign Investment Law will not be enacted until the May-June sessions of Parliament.

FOREIGN EXCHANGE REFORM

The Central Bank of Myanmar announced that, on 1 April 2012, it has adopted a managed floating exchange rate for the national currency, the kyat (pronounced "chat"), that will allow for market forces to determine the value of the kyat while allowing the Central Bank some flexibility in influencing the exchange rate.

This reform comes after 50 years of an antiquated exchange rate system that provided for a complex set of official, semi-official and unofficial exchange rates. Officially, the exchange rate has been pegged to one U.S. dollar to six kyat while unofficially, and in recent years openly, the United States dollar has been exchanged at a rate that has varied from six hundred to eight hundred kyat. Under the new managed float the kyat will trade at near the current free-market rate of around 800 to one U.S. dollar. This reference rate has been set by the Central Bank at 818 kyat and apparently the kyat will be allowed to move as much as 0.8% either side of this.

The unification of the exchange rate comes about partially as a result of support provided to the Central Bank and the Ministry of Finance by the International Monetary Fund and the Asian Development Bank. The local press in Yangon reported the Deputy Managing Director of the International Monetary Fund Naoyuki Shinohara as saying that the international financial institution was working with the Myanmar authorities to strengthen capacity in the area of "technical assistance, capacity building, especially in the area of central banking, [and] exchange rate policy and statistics".

INTERNATIONAL COMMERCIAL ARBITRATION

The topic of dispute resolution continues to be a significant one for foreign investors considering investing in Myanmar. The country is not a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"). Accordingly, the enforceability of a foreign arbitral award will depend upon the application of earlier conventions, such as the Geneva Protocol on Arbitration Clauses of 1923 (the "**Geneva Protocol**") or the Geneva Convention on the Execution of Foreign Arbitral

Hogan Lovells partners visit Yangon (cont'd)

Awards of 1927 (the "**Geneva Convention**") and the Myanmar Arbitration Implementation Act of 1937, which provides the implementation rules for the Geneva Protocol and Geneva Convention.

However, these colonial period authorities do not provide much comfort for foreign investors. There are no reported cases of a Myanmar court recognizing a foreign arbitral award. We understand that, in certain loan agreements and production sharing contracts, the Government of Myanmar has agreed to ad hoc domestic arbitration using the UNCITRAL rules or the rules of the ICC with a foreign governing law provision. The effectiveness of such agreement, or the reliability of ad hoc arbitration in Myanmar, have yet to be tested in the context of a dispute.

During the Myanmar Oil, Gas and Power Summit, Minister of Energy U Than Htay stated that the government was now actively considering acceding to the New York Convention. However, the Minister did not comment on the time frame for accession.

OPENING THE MARKET FOR FOREIGN BANKS

During our partners' visit, government officials, lawyers and business people mentioned that the government is further considering enacting legislation that will permit the establishment of foreign banks' joint ventures and branches. While the Myanmar Financial Institutions Law of 1990 sets out the procedures for the establishment of a representative office of a foreign bank, joint ventures and branches have not been available vehicles for foreign banks seeking to invest in Myanmar.

TRADEMARK REGISTRATION

Myanmar does not have a trademark law as such, but its legal system does provide a method for registration of a trademark. The Myanmar Registration Act provides for an optional registration process for documents that are not required to be registered by other statutes. Trademark registration formalities are to be completed at the Office of the Registration of Deeds. A decree, Registration Direction 13, clarifies that the registration of a trademark may be accomplished by way of the registration of a document or a declaration of ownership. In the event of an infringement of a trademark, a court may award the trademark owner a permanent injunction against passing off the mark as well as damages. A trademark owner may also seek criminal penalties against infringers.

Trademark registration falls outside the ambit of United States or European Union sanctions and can be completed at the present without violating applicable laws. Foreign investors considering the Myanmar market ought to complete registration of their trademarks promptly as certain famous trademarks have been registered in prior years by local companies. Any payment instructions by a U.S. person to a Myanmar legal counsel or trademark agent must cite the

following information so as to comply with U.S. law: **Pursuant to OFAC General License:** Burma (31 CFR Section 537.522).

OIL AND GAS

Myanmar's oil and gas industry has been well developed since the discovery of some of its largest on-shore oil fields in the 19th century, a number of which were operated by the Burmah Oil Company, although oil has been utilised since the 10th century from various natural seepages and man-made wells.

Despite the imposition of sanctions by the U.S. Government and the EU, the oil and gas sector has continued to develop and currently the country has over 30 production sharing contracts with foreign companies, and is about to enter into a further 9 blocks with 7 foreign companies following the 2011 onshore bid round. Ninety production sharing contracts have been signed since the Foreign Investment Law was enacted, and a further onshore bid round is scheduled to occur.

Production sharing contracts are entered into with the state-owned entity Myanma Oil and Gas Enterprise ("**MOGE**"). In practice, a foreign investor will establish a branch on the basis of the foreign investment regime under the Foreign Investment Law, obtain an MIC permit and trading permit and finally obtain a certificate of registration as a branch. Prior to these formalities, there are a series of steps that need to be taken with the Energy Planning Department of the Ministry of Energy and the MOGE with respect to the submission of a proposal for a certain block. Negotiations for a production sharing contract with the MOGE are followed by negotiations with the Contracts Department of the Attorney General's Office before the MIC submits the negotiated contract for approval by the Cabinet. While not complex, the approval process is time-consuming, requiring up to eighteen months for completion.

During the conference, Minister U Than Htay of the Ministry of Energy announced that, as a matter of policy going forward, foreign investors will need to procure a Myanmar partner in order to submit bids to MOGE, and demonstrate that a joint operating agreement exists by submitting a copy to MOGE.

Existing production sharing contracts impose a domestic market obligation of 25% and 20% respectively, of the Contractor's share of natural gas and crude oil, which must be sold at 90% of fair market prices.

The Minister also took the opportunity of the conference to announce that Myanmar and Bangladesh have resolved a dispute regarding four off-shore deepwater blocks previously claimed by Myanmar. It appears that, as a compromise, Myanmar will relinquish some of its claims to two of these blocks and reconfigure the coordinates of the two other blocks.

Current oil production is 19,600 bbl./day and natural gas production is 1.475 bscf/day. The largest project in Myanmar

Hogan Lovells partners visit Yangon (cont'd)

is the Yadana offshore gas project, operated by TOTAL, which produces 750 mmscfd, the bulk of which is sold to PTT plc of Thailand.

The Shwe offshore gas project, operated by Daewoo, is currently under development, and its substantial gas reserves are to be supplied to China and to the local domestic market via a 40" inch, 793 km onshore and offshore pipeline. CNPC is also developing, together with MOGE, a 771 km 32" inch crude oil pipeline to transport oil purchased from the Middle East and Africa from the coastline to mainland China.

RISKS AND THE ROAD AHEAD

The changes in Myanmar over the past five years are undeniably striking as evident from the availability of Daw Aung San Su Kyi t-shirts on the side streets of Yangon to the absence of vacancies at the international business hotels. The government under President Thein Sein clearly has embarked upon a path of reform and has reached out to its former opponents to help pave the way for a better future.

In terms of attitude, long-term foreign residents of Myanmar still speak of latent xenophobia and an authoritarian streak that will be nettlesome to both foreign investors and Myanmar reformists. Change will need to be measured by Myanmar's own reckoning of time.

Once Myanmar's political situation achieves a more mature settlement, there is still the challenge of maintaining the unity of a multi-ethnic state. The Burmans, who primarily inhabit the central part of the country surrounding the Ayeyarwady River Basin, constitute two thirds of the population. Various ethnic states, constituting the home land of groups such as the Shan, the Karen, the Kachin, the Mon and the Arakanese, are clustered on the western, northern and eastern borderlands of Myanmar. In the years ahead, the primary challenge of Myanmar's leaders will be to find a suitable compromise between secessionist aspiration and national unity.

The U.S. has welcomed the recent reforms undertaken by the government of Myanmar, and taken some steps to resume normal diplomatic relations with Myanmar, thereby paving the way for a possible future lifting of sanctions against Myanmar if reforms continue. In late 2011, the U.S. Government appointed its first special envoy to Myanmar. In January 2012, Secretary of State Hillary Clinton announced that the U.S. and Myanmar will exchange ambassadors, which would represent the first such relationship between the countries since the U.S. withdrew its ambassador to Myanmar in 1990.

Various U.S. officials have indicated a willingness to relax sanctions against Myanmar, or remove such sanctions entirely, if reforms continue at their current pace. There appears to be some bipartisan support in Congress to begin lifting restrictions on Myanmar. In addition, certain aspects of current U.S. sanctions have been imposed by the President's exercise of authority under the International Emergency

Economic Powers Act and could therefore be lifted without specific new legislation from Congress.



www.hoganlovells.com

Hogan Lovells has offices in:

Abu Dhabi	Colorado Springs	Houston	New York	Silicon Valley
Alicante	Denver	Jeddah*	Northern Virginia	Singapore
Amsterdam	Dubai	London	Paris	Tokyo
Baltimore	Dusseldorf	Los Angeles	Philadelphia	Ulaanbaatar
Beijing	Frankfurt	Madrid	Prague	Warsaw
Berlin	Hamburg	Miami	Riyadh*	Washington DC
Brussels	Hanoi	Milan	Rome	Zagreb*
Budapest*	Ho Chi Minh City	Moscow	San Francisco	
Caracas	Hong Kong	Munich	Shanghai	

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing.. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising.

© Hogan Lovells 2012. All rights reserved.