

Myanmar Legal Developments
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Introduction

In our client alert dated 5 April 2012, we reported on legal and political developments in Myanmar in light of the national by-elections that won Daw Aung San Su Kyi a seat at the National Assembly on 1 April. Since that client alert, Myanmar has continued on a path of increasing openness to foreign investment as well as engagement with the global community, as witnessed by President Barack Obama's state visit in October 2012. Further progress has been made with the enactment of a new Law on Foreign Investment ("NLFI") in November 2012 and the issuance of implementation regulations under the NLFI ("Foreign Investment Rules") on 31 January 2013. This client alert summarizes these two developments.

As a cautionary note, our clients are advised to balance the country's legal and political progress against the consequences of on-going civil unrest in western Myanmar and Kachin State. Further, the state of Myanmar's infrastructure poses severe challenges for those wishing to establish operations in accordance with the customary expectations of global business in Asia. While the commercial press has enthusiastically reported on Myanmar's progress, investor expectations should be balanced, realistic and uninfluenced by media hype. Certainly, Myanmar presents a similar opportunity as China did at the time of the enactment of its Sino-foreign joint venture law in 1979. Graying professionals with memories of that era will recall that it took many years before China reached the take-off stage for foreign investment and even longer for the remittance of profits from such investments. Nevertheless, for businesses with an eye on the long-run, Myanmar presents an extraordinary Asian opportunity.

Myanmar's New Law on Foreign Investment

On 2 November 2012, President Thein Sein approved the NLFI and repealed Foreign Investment Law No. 10/1988 that previously governed foreign investment projects in Myanmar ("OLFI"). We had originally expected the NLFI Law to be enacted shortly after our April 2012 client alert. However, the executive and legislative branches of the Government of Myanmar did not reach a consensus on the extent of liberalization and foreign equity caps until later in the year.

Nevertheless, the delay has proven to be beneficial to foreign businesses looking at Myanmar because the NLFI leaves out restrictive provisions, such as the requirement of a minimum capital investment of USD 500,000 that were in earlier drafts. The NLFI also clarifies that foreign investors may own up to 100% of the capital in foreign-invested companies in certain sectors.

According to Section 56 of the NLFI, the Ministry of National Planning and Economic Development was obliged to issue implementing guidelines for the NLFI within 90 days of the

law's effective date. As a consequence, the Foreign Investment Rules were issued on 31 January 2013. These are supplemented by Notification No. 1/2013 of the Myanmar Investment Commission, also dated 31 January 2013, on types of business activities that are subject to particular restrictions or conditions (for the purposes of this note, the term Foreign Investment Rules is used for both the implementing regulations and the conditions and requirements set out in Notification No. 1/2013).

The Role of the NLFI vis-a-vis other Myanmar Laws

While the NLFI sets out requirements for foreign-invested companies and foreign projects in Myanmar, it must be read in tandem with other laws and regulations governing investment activities. The Myanmar Companies Act (1913) and the Myanmar Partnership Act (1932) continue to set out the details for the corporate investment structures and governance requirements for companies limited by shares, branches and representative offices of foreign-owned companies as well as partnerships between a foreign company and local companies. Further, the Special Company Act (1950) applies to joint ventures formed with State-owned companies.

Establishment and Procedures for Obtaining an Investment Permit

Under the NLFI, as in the past, the foreign investment process consists of three steps:

- (a) Obtaining an investment permit from the Foreign Investment Commission ("FIC");
- (b) Obtaining a Permit to Trade from the Directorate of Investment and Company Administration ("DICA"); and
- (c) Completing the registration of the establishment of the company with the Companies Registration Office.

Previously, foreign investors could, as an alternative way of investing in Myanmar, establish service and manufacturing companies solely under the Myanmar Companies Act (1913) and did not need to apply for an investment permit. Such companies were not entitled to preferential tax treatment but had significantly lower minimum share capital requirements; viz., USD 50,000 for service companies and USD 150,000 for manufacturing companies while under the OLFI, the requirements were USD 300,000 for service companies and USD 500,000 for manufacturing companies. This two-tier investment system continues to be available to foreign investors who do not seek to structure their investment under the NLFI. While this offers a simplified route to the market, the specific protections and preferential tax treatment offered to foreign investors under the NLFI are not available.

Investment Applications to the FIC

The FIC is the approval authority for investment applications. While the FIC replaces the former Myanmar Investment Commission, in practice, the Myanmar Investment Commission has simply been renamed and its members have now formed the FIC. However, the FIC may include not only civil servants but experts from non-governmental organizations or the private sector under Section 11(a)(ii) of the NFLI, thus providing a legal basis for the appointment of additional (non-Government) members in the future.

To balance the positions of interest groups and stakeholders, the NFLI has done away with many nettlesome requirements for foreign-invested companies that were included in previous drafts. Further, the NFLI grants considerable discretionary authority to the FIC. By way of example, Section 13(a) of the NFLI provides that the FIC may “*accept any proposal which in its opinion will promote the interests of the State and which is without prejudice to any existing law*”. Further, Section 3 of the NFLI and Sections 6 to 10 of the Foreign Investment Rules classify the investment sectors as open or closed to foreign investors.

Section 18(d) of the NFLI appears to allow an investor to challenge a decision of the FIC in the event of a denial of the application or the issuance of an approval adverse to the interests of a foreign investor under Myanmar law. Paradoxically, Section 49 of the NFLI provides that decisions of the FIC under the NFLI shall be “final”, raising concerns about whether decisions may be withdrawn. The Foreign Investment Rules only address the settlement of disputes between the FIC and the Government in general terms in Chapter 21. They do not provide for specific procedures to challenge a decision of the FIC.

Permitted Scope of Activities and Foreign Ownership Limits

As noted above, the NFLI and Section 17(a) of the Foreign Investment Rules theoretically permit foreign investors to own up to 100% of the capital in foreign-invested enterprises in Myanmar unless these operate in sensitive sectors. Further, Section 10(a)(ii) of the NFLI Law permits joint venture partners in non-sensitive sectors to determine their respective equity contributions in their own discretion. Under the NFLI, a foreign investor had to contribute no less than 35% of the capital of the joint venture. Foreign ownership in sensitive sectors is capped at 80% under Section 20 of the Foreign Investment Rules, a higher ratio than had been expected.

The NFLI articulates the principle that foreign investment in sensitive or restricted sectors requires prior approval by the Government of Myanmar. The Foreign Investment Rules elaborate further on this:

Investment areas reserved for Myanmar citizens	For manufacturing, traditional and religious products (such as traditional medicine and herbal plants, traditional food, handicrafts and religious products and for services, private traditional hospitals, ambulance services, medical research and printing and publishing).
Prohibited business lines	Printing, publishing and media broadcasting, manufacturing arms and weapons, exploration of jade and gems, energy trading, and certain environmentally hazardous activities, among others.
Business lines to be carried out by a joint venture	For example, <ul style="list-style-type: none"> • Production/distribution of seeds, • Production/distribution of certain foodstuff (biscuits, noodles, chocolate), • Paper manufacturing, • Pharmaceuticals manufacturing, • Plastics manufacturing, • Packaging manufacturing, • Certain construction and real estate development projects, • Tourism services, among others.
Business lines that require prior approval from a particular Ministry or the Government	For example, <ul style="list-style-type: none"> • Supermarkets / large-scale retail, • Natural resources, • Production/distribution of soft drinks, mineral water and beer, • Power generation, • Courier services among others.

In addition, the Foreign Investment Rules set out certain large-scale or environmentally sensitive investment projects that require a prior environmental impact assessment report as a part of the application process.

The Foreign Investment Rules do not provide an “encouraged list” for permitted or unrestricted investments. However, it may be premature to expect that the FIC and the Government of Myanmar will take a liberal view to foreign investment in certain sectors, such as banking or insurance. For example, the Myanmar Insurance Supervisory Board under the Ministry of Finance has indicated that foreign investment in the insurance sector will not be permitted until 2015.

Other sensitive areas for foreign investment are more commonplace limitations, such as restrictions on investment projects that adversely affect public health, that are detrimental to the environment or that relate to national security, such as projects within 10 miles of the national border, excepting designated economic zones.

Section 54 of the NLF I provides that international treaty obligations take precedence over the NLF I. Whilst this includes market access commitments made by Myanmar in multi-lateral international trade and investment agreements, these remain limited.

WTO

Although Myanmar joined the World Trade Organization on 1 January 1995, it has limited its commitments in trade and services to investments in the hospitality and tourism sector, such as hotels and resorts, travel agencies and tourism-related transport services. As a “least developed country” in WTO terms, Myanmar has, to date, not been required to make substantial concessions in offering market access, most-favored nation status or non-discriminatory treatment of foreign investors with domestic investors under its WTO undertakings.

Other International Agreements

Myanmar is party to several bilateral and multi-lateral investment treaties, including the ASEAN-Australia-New Zealand Free Trade Area (“AANZFTA”), the Bay of Bengal Initiative for Multi-Sector Technical and Economic Cooperation (“BIMSTEC”), which aims to establish a free trade area by 2017 among Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka and Thailand, and bilateral investment agreements with countries such as China, India, Kuwait, Laos, the Philippines, Thailand and Vietnam. Myanmar’s market access commitments under some of these agreements permit favorable treatment for investors from the relevant member country in service sectors, such as construction, software development and IT services, accounting services, transport-related services and warehousing.



Capital Requirements

The NLF I and the Foreign Investment Rules do not set a minimum capital requirement for a foreign investment project. However, Section 37 of the NLF I suggests that the FIC will consider the proposed amount of the capital investment in assessing the overall feasibility of an investment application. The FIC has indicated that the previous requirements will, in principle, continue to apply and that it will make a decision on the feasibility of an investment project on a case by case basis. This means that it may require a higher level of capitalization before approving the investment. In addition, certain activities require more capital under the Foreign Investment Rules, such as retail trading which will be permitted from 2015 but will be subject to a minimum “investment amount” of USD 3 million.

Land

Under the NLF I, foreign-invested companies may lease land from the Government for up to 50 years. The initial term may be extended for two additional periods of 10 years each subject to the approval of the FIC. Further, Sections 33 and 34 of the NLF I appear to suggest that the FIC will be responsible to determine the land rent payable under the

lease subject to the prior approval by the Government of Myanmar and then obtain the consent of the foreign investor to the terms of the land lease and the rent before issuing an investment approval.

Employment and Localization Requirements

While an investor must localize its work-force in its foreign-invested company in phases, Section 24 of the NLF I permits foreign-invested companies operating in sectors that require skilled personnel to employ up to 75% foreign employees for the first two years of operations. This ratio is then to be brought down to 50% for the following two years and to 25% or less for the 5th and 6th year of operations.

Taxation

Newly-established foreign-invested companies may apply for a tax holiday up to 5 years under Section 27(a) of the NLF I, as opposed to a 3-year tax holiday under the OLF I. In addition, Section 27(d) of the NLF I provides that export enterprises may be granted a 50% tax relief on profits made from exported goods. Losses incurred within the first two years after the expiry of the tax-exempt period may be carried forward for up to three years.

M&A

The NLF I is conspicuously silent on M&A-type investments by foreign investors. As a matter of prior policy, it was not possible for foreign investors to acquire shares from local Myanmar shareholders. Foreign investors were only permitted to acquire shareholdings from other foreign investors, thus effectively only replacing the foreign shareholder in the Myanmar entity. Although in certain circumstances, a similar outcome could be structured through the establishment of a new foreign-invested joint venture company along with the contribution of assets, such as licences, or the entire business by the local partner into the joint venture, these transactions were rare in practice. In particular, neither the OLF I nor the NLF I provide for corporate restructurings, e.g. in the form of a merger of a local Myanmar company into a foreign-invested company.

Sections 65 and 69 of the Foreign Investment Rules can be construed to allow a foreign investor to acquire shares from a Myanmar shareholder in foreign-invested enterprises (and vice versa). While this would still limit foreign investors to acquiring shares only in joint venture companies, the regulations, if implemented, could indicate a gradual loosening of the previous restriction. Under the Foreign Investment Rules, any such transfer is still subject to the approval by the FIC and subject to any foreign-ownership limits (whether explicit or policy-based).

Ancillary Developments

The adoption of the NLF I has been complemented by a further easing of international trade and investment sanctions. For example, on 16 November 2012, the US Departments of State and Treasury issued a waiver and general license no. 18 under Section 3(a) of the Burmese Freedom and Democracy Act of 2003 ("BFDA") to ease the ban of imports from Myanmar into the US. Exempt from the waiver and general license are, for example, jadeite and rubies that are mined in Myanmar for which trading and import restrictions remain in place as well as trade relations and transactions with "Blocked Persons" under the BFDA.

Summary and Outlook

To see whether the NLF I lives up to its potential, investors will need to monitor the manner and timeframe whereby the FIC is willing to accept and approve investment applications, in particular in any sensitive or restricted areas of the Myanmar economy. Since the entry into effect of the NLF I, the FIC has approved several investment applications for encouraged and less sensitive projects in the areas of manufacturing, infrastructure and some general services. The lists of restricted issues in the Foreign Investment Rules are not, on their face, complicated and onerous compared with other jurisdictions that had opened up to foreign investment in past years, such as China and Vietnam. Myanmar may therefore take a number of steps at a time in providing a more level playing field for foreign investors in the country.



Ear to the ground: Intellectual Property Update

Myanmar is overhauling its intellectual property regime. Existing rights are based on British law, including the Copyright Act 1911 and common law passing off. During the years of the United States and European Union embargo many foreign businesses were not permitted to retain Myanmar legal counsel beyond the registration and protection of their trademarks. However, there was little local experience in the absence of a trademark law and protection was limited to the filing of a declaration of ownership under the Registration Act which was taken to be prima facie evidence of ownership. As a member of WTO and the World Intellectual Property Organization, Myanmar is now looking at revamping its IP laws and is specifically considering introducing a substantive trademark law. It is likely that there will be some grace period for marks "registered" under the existing system, but new applications will eventually be necessary. Foreign businesses should begin taking appropriate measures to review their trademark portfolios and be aware of the risks of pre-emptive hijacking of marks by third parties under the new system. We will report further on this in a separate client alert.



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