

Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia



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Myanmar Legal Update: Moving Toward Market Liberalization

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Myanmar is in the midst of undergoing significant political and economic change. A full sixty-six years after its independence from Great Britain and after nearly fifty years of strict military rule, Myanmar has embarked on a path toward sustainable economic reform. The reform has, as its primary focus, the liberalization of most market sectors and the active promotion of foreign direct investment—objectives shared by Myanmar's regional counterparts and consistent with Myanmar's commitments as an ASEAN member country.

Thein Sein's Government

Since the current civilian government took political control in 2010 under the leadership of President Thein Sein, the pace of Myanmar's legal and regulatory developments to support foreign direct investment has been remarkable. From 2011, Parliament has passed more than 120 laws and a seemingly countless number of ministerial notifications and regulatory guidelines, many of which are aimed at facilitating market liberalization. With a substantial domestic commitment of resources and assistance from international legal and regulatory experts, Myanmar continues to evaluate, draft, and implement additional laws aimed at the country's long-term economic reform goals, and so far, the results have been very good.

According to the World Bank, foreign direct investment is at record levels in Myanmar, growing from a paltry USD 330 million in the 2009–2010 fiscal year prior to implementation of the country's economic reforms, then jumping to USD 1.9 billion in 2011–2012 and USD 2.7 billion in 2012–2013, to what is estimated to exceed USD 5 billion in the current period of 2013–2014.

This interest is based, in large part, on passage and implementation of Myanmar's foreign investment laws and subsequent ministerial notifications. A primary facilitator of such foreign direct investment has unquestionably been the Foreign Investment Law of 2012.

Foreign Investment Law 2012

Myanmar's Foreign Investment Law of 2012 replaced the country's Foreign Investment Law of 1988, providing a vehicle through which foreign investors can obtain economic incentives from the Myanmar Government in return for foreign capital infusion. While companies engaged in certain designated activities—such as manufacturing, oil and gas extraction, and major infrastructure deals—are required to register under the Foreign Investment Law, for the vast majority of wholesale and retail trade investors, registration is optional.

While companies registered under the Foreign Investment Law will be subject to the same principles of company law as unregistered companies (and, in general, subject to the same environmental, labor, and other such regulations), registered companies have the advantage of a number of important benefits, including:

- basic “guarantees” against nationalization and arbitrary state action and provisions allowing invested foreign capital to be remitted in the same currency upon expiry of the term of the investment contract;

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- provisions for the repatriation of profits and invested funds on an ongoing basis, subject to payment of taxes and creditors;
- long-term leases for permitted foreign or joint venture companies with terms of up to 50 years, which are extendable twice for further 10-year periods (i.e., to a maximum of 70 years); and
- tax exemption for a period of at least five consecutive years, commercial tax relief, and customs and other tax relief.

In addition, interpretations by the Myanmar Investment Commission (MIC) and the ministries relevant to Foreign Investment Law applications are guided by subsequent issuances of defining MIC notifications. These notifications are some of the first documents that foreign investors and counsel can seek guidance from in order to determine whether the investment model is likely to obtain regulatory approval.

The first set of defining regulations were announced in January 2013 with MIC Notification No. 1/2013, which set out categories of prohibited or otherwise restricted business activities for foreign investors. Changes to the regulations were most recently announced in August 2014 with MIC Notification Nos. 49, 50, and 51/2014. Specifically, Notification No. 49/2014 prescribes business activities which are:

- 1) prohibited;
- 2) allowed only in the form of a joint venture with a local partner;
- 3) allowed only in the form of a joint venture with a local partner, subject to the relevant ministry's approval; or
- 4) permitted, subject to another condition.

Overall, Notification No. 49/2014—the August 2014 Notification—which supersedes the January 2013 Notification, represents a step toward further liberalization of the Myanmar foreign investment regime. While some activities under the January 2013 Notification are now subject to tighter foreign investment restrictions, on the whole, the number of businesses that can be 100 percent foreign owned has increased. It is particularly notable that both wholesale and retail trading activities are omitted from the August 2014 Notification. Since this notification states clearly that activities not “expressly” prescribed in the notification may be undertaken by a 100 percent foreign-owned company, the formerly-restricted trade sector is now ostensibly open for foreign investment.

This represents a potentially significant opening for foreign investors in a broad variety of trade sectors. However, it remains unclear exactly how this will be interpreted over time by the MIC, which has broad discretionary authority for the approvals of all applications—a discretionary authority which has been criticized for encouraging inconsistency in the foreign investment review process. Initial indications are that each case will continue to be reviewed on its own merits by the relevant ministries and the MIC, even where a notification has not expressly restricted the activity. In fact, our experience suggests that internal policies at the relevant ministries and at the MIC will continue to be a factor in the review of foreign trade applications under the Foreign Investment Law and related investment laws, such as the recently enacted Special Economic Zones Law and the Myanmar Companies Act.

An Issue of Concern: Regulatory Interpretation

One of the ongoing issues of concern for many foreign investors is the fact that some uncertainty about regulatory interpretation remains. The laws and regulations are new and there is little historical guidance offered to many of the ministerial and governmental officers considering foreign investment applications. While internal guidelines do exist at various levels of review for the relevant government officers, there may exist inconsistencies in the interpretation and application of discretionary authority. This is an issue that we believe will improve through time as officers develop expertise in dealing with a variety of foreign investment applications.

Qualifying Applications

The Foreign Investment Law and its subsequent implementing notifications provide guidance for qualifying applications, such as those requiring approvals of long-term land leases or those involving large capital investments. Smaller investments, such as those in the service sector, are not covered by the notifications, although it is possible that the reviewing ministries and the Directorate of Investment and Company Administration may nonetheless look to the notifications for guidance. Since the notifications were developed based on input from various governmental ministries, it is fair to assume that they represent insight into some of their policies. This is valuable for investors seeking to anticipate how investment applications may be reviewed and interpreted.

Opposition to Reform

To date, Thein Sein's economic liberalization policies have been largely embraced domestically, but as certain business sectors are opened for foreign direct investment, some resistance has been met, complicating efforts to liberalize certain markets. It is not a surprise, however, that some local businesses are opposed to Myanmar's liberalization plans, particularly those in the trade and import/export sector—a sector valued in excess of USD 12.4 billion as recently as 2012. Many local business leaders have voiced their concern that they will be unable to compete with international companies which have better access to capital, technology, and skilled labor. Some even fear certain trade sectors could ultimately be monopolized by international investors.

The historical facts, however, prove otherwise. While market entry by international investors has reduced market share and, in some cases, eliminated local businesses, history suggests that the benefits to an emerging economy from foreign direct investment outweigh the negatives. Access to foreign capital and technology, in turn, assists in the development of domestic industry and encourages a skilled and competitive workforce. It is argued convincingly that countries such as South Korea, Japan, Taiwan, and Singapore are all examples of how such a model brings with it long-term benefits to a developing economy.

The Future of Myanmar

Myanmar, through the promotion of controlled foreign investment, seeks, at least in principle, to follow such a model. In fact, the Ministry of Commerce continues to consult with the World Trade Organization and other leading global institutions to determine how to best bring Myanmar's economy and investment policy slowly in line with international practice. While imperfect, the Foreign Investment Law, its subsequent notifications, and the actions of Myanmar's civilian government to encourage foreign trade all point down the path of long-term sustainable development. While many political and cultural challenges remain, we have reason to believe that Myanmar will maintain its commitment to economic trade reform. 