

FOREIGN INVESTMENT REVIEW

Myanmar



Foreign Investment Review

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into law, policy and relevant authorities; procedure, including thresholds and timelines; substantive assessment, including interagency and international consultation, remedies and rights of challenge and appeal; relevant recent case law; and other recent trends.

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LAW AND POLICY

Policies and practices

What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Under the Myanmar Investment Law 2016 (MIL), the Myanmar Investment Commission (MIC) classifies a small number of investments as restricted investment activities and an extensive list of investments as promoted investment activities. Restricted investment activities are further divided into investment activities to be carried out only by the union government (federal government); investment activities that are not allowed to be carried out by foreign investors; investment activities allowed only in the form of a joint venture with any citizen-owned entity or any Myanmar citizen; and investment activities to be carried out with the approval of the relevant ministries.

There are also promoted investment activities (of both foreign and local investors) eligible for tax exemptions and reliefs.

The MIL requires certain investment activities to obtain an investment permit. These include: activities that are essential to the government's strategy; activities with large capital intensive investment projects; projects that are likely to cause a large impact on the environment and the local community; investment businesses that use state-owned land and buildings; and investment businesses required by the government to submit a permit proposal to the MIC. Other types of investment would require only investment endorsement.

The Central Bank of Myanmar (CBM) had been maintaining a managed floating exchange rate regime as a reference exchange rate since 2012 but changed to a market-based weighted average rate regime as the reference exchange rate in February 2019.

Law stated - 08 November 2021

Main laws

What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

- The MIL (18 October 2016);
- the Myanmar Companies Law (6 December 2017) (MCL);
- the Myanmar Special Economic Zone Law (23 January 2014) (MSEZL);
- the Transfer of Immovable Properties Restriction Act (16 March 1987) (TIPRA);
- the Income Tax Law (23 February 1974);
- the Union Tax Law (drafted and enacted anew each fiscal year);
- the Competition Law (24 February 2015) (CL);
- the Foreign Exchange Management Law (10 August 2012);
- the Insurance Business Law (24 June 1996);
- the Financial Institutions of Myanmar Law (25 January 2016); and
- the Environmental Conservation Law (30 March 2012).

Law stated - 08 November 2021

Scope of application

Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The MIL governs all investment activities outside special economic zones, while the MCL regulates company incorporation. The MSEZL deals specifically with all investment activities in Myanmar's special economic zones. The TIPRA restricts foreign persons and entities from owning immovable properties such as land (except short-term lease of up to one year). However, as an exception to the TIPRA, the MIL and the MSEZL allow foreign investors to obtain long-term leases of up to 70 years (50+10+10) with approval. Foreign operators in the insurance and banking sectors must secure permits from the Insurance Business Regulatory Board and the CBM respectively.

A limited range of investment activities such as manufacturing products for security and defence; manufacturing and servicing arms and ammunition for national defence; air traffic services; pilotage services; feasibility study and production of radioactive metals (eg, uranium and thorium); and administration of electric power systems to be undertaken by the government and private investors (either domestic or foreign) are not allowed. Investment activities such as publishing and distribution of periodicals in ethnic languages including Burmese; medium-scale and small-scale refinement of minerals; operating shallow oil wells; prospecting, exploration and production of jade or gemstones; tour-guide services; and small retail or convenience stores are not open to investment by foreign investors.

The CL deals with collaboration between business by merger, consolidation, acquisition or joint venture, and states that no business may collaborate if it significantly increases the market dominance over a certain period; if the collaboration decreases competition in a small market; or if the combined market share exceeds the market share specified by the Competition Commission (no such shares have yet been specified).

Law stated - 08 November 2021

Definitions

How is a foreign investor or foreign investment defined in the applicable law?

Under the MIL, a foreign investor is defined as a person who invests within the country and is not a Myanmar citizen. This also includes foreign companies (ie, companies with more than 35 per cent foreign shareholding), branch offices, and other enterprises established and registered in accordance with the MCL, as well as enterprises formed in accordance with the laws of any other country. Foreign investment is defined as any direct investment (an investment in which the investor has the right to control, influence or manage the assets that are invested) made by a foreign investor within Myanmar.

Law stated - 08 November 2021

Special rules for SOEs and SWFs

Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

No. Every investment made by a foreign person or entity, including of a foreign state-owned enterprise or a sovereign wealth fund, is considered a foreign investment in accordance with the MIL. There is no specific definition for state-

owned enterprises or sovereign wealth funds under the MIL.

Law stated - 08 November 2021

Relevant authorities

Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

There is no system of merger and acquisition review on national interest grounds, although the MIC will review proposed large-scale investments.

Law stated - 08 November 2021

Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

We are not aware of any transactions having been rejected on national interest grounds.

Law stated - 08 November 2021

PROCEDURE

Jurisdictional thresholds

What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The Myanmar Investment Commission (MIC) has delegated local investment committees and local governments to oversee and issue investment permits or endorsements for investments up to the threshold of US\$5 million and for non-strategic investment activities.

However, the following are considered strategic investments and are required to be reviewed by the MIC and the union government:

- investment exceeding US\$20 million in any business in the area of communication and information technology, pharmaceutical technology, biotechnology, similar technologies, energy, infrastructure and urban development, extraction of natural resources and media;
- investment exceeding US\$20 million under a grant of land use (or other property) rights, concession agreement, or similar authorisation by government department or government organisation;
- investment in agriculture on more than 1,000 acres of land;
- investment to carry out a business other than agriculture on more than 100 acres of land;
- large capital intensive investment if the expected investment value exceeds US\$100 million;
- investments with a large impact on the environment and the local community requiring an environmental impact assessment; and
- investment business located in a designated or proposed protected area, forest reserve area, key biodiversity area or area selected to support the ecosystem, and cultural and natural heritage including cultural monuments and unspoiled natural areas.

Law stated - 08 November 2021

National interest clearance

What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Usually, an investor or promotor can make an investment screening application to the MIC to determine whether the desired investment activity is eligible for immediate investment; would fall under restricted investment activity; or would require special clearance from union government or union parliament. The MIC will issue non-binding guidance in response to a screening application, explaining whether a potential investment would require national interest clearance.

Law stated - 08 November 2021

Which party is responsible for securing approval?

The applicant for approval would be the investment vehicle (eg, the joint venture company in a joint venture, or the target in an acquisition).

Law stated - 08 November 2021

Review process

How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Generally, the screening process will only take a few weeks.

Law stated - 08 November 2021

Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Yes, the review should be completed before parties finalise the deal.

Law stated - 08 November 2021

Involvement of authorities

Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

The Investment Monitoring Section of the MIC is open for all investors to consult before filing or arranging transactions to ensure compliance with the relevant laws.

Law stated - 08 November 2021

When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Such specialists are not used in Myanmar; however, law firms will frequently have meetings with MIC officials to discuss the case, and MIC officials are quite open to these meetings.

Law stated - 08 November 2021

What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

There are no pure mergers in Myanmar. If a restricted business was pursued without the relevant approvals, then there are various routes that the authorities could follow. In general, these could be warnings, fines or blacklisting.

Law stated - 08 November 2021

SUBSTANTIVE ASSESSMENT

Substantive test

What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

There are no specific test procedures for clearance. The Myanmar Investment Commission (MIC) decides in accordance with the scope of permissible investment types.

Law stated - 08 November 2021

To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

This is unlikely.

Law stated - 08 November 2021

Other relevant parties

What other parties may become involved in the review process? What rights and standing do complainants have?

The review process may garner involvement especially by respective line ministries, and sometimes by civil society organisations. Respective line ministries have the right to oppose, recommend or make exceptions.

Law stated - 08 November 2021

Prohibition and objections to transaction

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The MIC has wide discretion on whether to grant approval to a proposed transaction.

Law stated - 08 November 2021

Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

Theoretically, yes, especially for environmental impact-related projects. Respective parties must undertake the following: an initial environmental examination; an environmental impact assessment; a social impact assessment; and an environmental management plan, and they must comply with the tight regulations.

Law stated - 08 November 2021

Challenge and appeal

Can a negative decision be challenged or appealed?

Yes, a negative decision can be challenged and appealed to the union government. The decision of the government is final and conclusive on grounds of national interest.

Law stated - 08 November 2021

Confidential information

What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Competition law prohibits the breach of confidential information or trade secrets by any means. Such a breach, or dissemination of false news, is punishable by imprisonment, a fine or both.

Law stated - 08 November 2021

RECENT CASES

Relevant recent case law

Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

There is no news or other information available on transaction rejections.

Law stated - 08 November 2021

UPDATE AND TRENDS

Key developments of the past year




Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

To date, there are no proposed changes. However, since the military coup on 1 February 2021, the US and EU have imposed sanctions against high-ranking Myanmar public and military officials, including the chairman of the Myanmar Investment Commission appointed by the military, and ministers of the Ministry of Commerce and Ministry of Investment and Foreign Economic Relations. In addition, most of the foreign investors, for example, Metro and British American Tobacco, have been pulling back their investments from Myanmar.

Law stated - 08 November 2021

Jurisdictions

	Australia	Gilbert + Tobin
	Austria	Barnert Egermann Illigasch Rechtsanwälte
	Cambodia	Tilleke & Gibbins
	Canada	McCarthy Tétrault LLP
	China	Global Law Office
	Denmark	Bech-Bruun
	European Union	Allen & Overy LLP
	France	White & Case LLP
	Germany	Blomstein
	India	AZB & Partners
	Indonesia	Nagashima Ohno & Tsunematsu
	Italy	Gianni & Origoni
	Japan	Tokyo International Law Office
	Laos	Tilleke & Gibbins
	Malaysia	Nagashima Ohno & Tsunematsu
	Mexico	White & Case LLP
	Myanmar	Tilleke & Gibbins
	New Zealand	Russell McVeagh
	Norway	CMS Kluge
	Spain	White & Case LLP
	Sri Lanka	Tiruchelvam Associates
	Sweden	BOKWALL RISLUND Advokatbyrå
	Switzerland	Lenz & Staehelin
	Thailand	Nishimura & Asahi
	United Arab Emirates	Afridi & Angell

 USA	Cleary Gottlieb Steen & Hamilton LLP
 Uzbekistan	Winfields
 Vietnam	Tilleke & Gibbins