



JONES DAY
COMMENTARY

EASED SANCTIONS WIDEN DOORWAY TO MYANMAR OIL AND GAS SECTOR

On July 11, 2012, the United States formally eased certain sanctions relating to “new investment” in the Union of Myanmar (“Myanmar”) and on the exportation of financial services to Myanmar.¹ This change in the scope of the Burmese Sanctions Regulations,² implemented by General License Nos. 16 and 17 and issued by the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”), will allow, under certain circumstances, U.S. individuals and entities to invest in Myanmar’s oil and gas sector for the first time in 15 years.

The decision to ease sanctions was presaged by announcements by President Barack Obama and Secretary of State Hillary Clinton in May of this year and followed the announcement in April by the Council of the European Union that it was suspending the majority of the EU’s separate, multilateral sanctions program in respect of Myanmar for a period of one year.³ Australia, Canada, and Norway also significantly eased their respective sanctions against Myanmar, and Japan announced that it planned to forgive some \$3.7 billion of Myanmar’s debt and resume full-fledged

development aid as a way to support the country’s democratic and economic reforms.

This *Commentary* will focus on the impact of General License No. 17 (“GL-17”) on investments in the Myanmar oil and gas sector, including areas in which the sanctions regime has been unaffected.⁴

MYANMAR SANCTIONS REGIME

Since 1990, the United States has imposed an array of trade sanctions and restrictions against Myanmar, which derive from various federal laws⁵ and Presidential Executive Orders that are now codified in the Burmese Sanctions Regulations.⁶ Some sanctions that initially arose out of Executive Orders have persisted by way of extensions granted through presidential proclamations under the International Emergency Economic Powers Act of 1997,⁷ which allows the U.S. President to extend certain sanctions where a national emergency finding is made. The key prohibition that affected the oil and gas sector has

been the prohibition on “new investments,” which is found in 31 CFR § 537.204 and originated in Executive Order No. 13047 issued by President Bill Clinton on May 20, 1997. It is an interesting turn of fate that President Obama delegated to Secretary of State Hillary Clinton the authority to lift the ban imposed by an Executive Order issued by her husband 15 years earlier.

Taken together, these federal laws and Executive Orders cumulatively have precluded virtually all commerce between the U.S. and Myanmar since 1997. In addition to prohibiting “new investments”⁸ in Myanmar, the Burmese Sanctions Regulations also prohibited, among other activities, the exportation or re-exportation of financial services to Myanmar from the U.S.;⁹ the importation into the U.S. of any “products of Burma”; the facilitation, for example through financing or guaranteeing, of any prohibited transactions; and attempts to evade or avoid the prohibited activities.¹⁰ The Burmese Sanctions Regulations also nullified transactions with certain Specially Designated Nationals and blocked their accounts. Exemptions included activity pursuant to an agreement in place before May 21, 1997, personal communications, distribution of information materials, or personal travel to Myanmar.

Prominent among the industries affected by the Burmese Sanctions Regulations has been the energy industry, where the Regulations have had a direct effect on resource development contracts, resource project management agreements, and equity investments in resource companies.¹¹ Oil and gas investments of any form, be they upstream, mid-stream, or downstream, whether directly with the Myanmar government or through equity in an investment vehicle, have been prohibited by the Burmese Sanctions Regulations. The major exception to this prohibition related to petroleum-related contracts entered prior to May 21, 1997 (in which case those activities were “grandfathered,” subject to certain importation restrictions provided in the Burmese Sanctions Regulations¹²). However, U.S. persons that were parties to these contracts were precluded from expanding their investment beyond their status as of May 20, 1997 unless options to do so were specifically contemplated by their grandfathered contracts.¹³ Another twist is that the exemption also does not remove the prohibition on imports into the U.S. of

“products of Burma,” which would include crude oil and natural gas from Myanmar.¹⁴

AUTHORIZATION OF NEW INVESTMENT BY GENERAL LICENSE NO. 17

On July 11, 2012, the director of the OFAC issued GL-17, which served to lift the prohibition on “new investment” in Myanmar that had been in place since President Clinton issued Executive Order No. 13047 on May 20, 1997. A “General License” authorizes a particular type of transaction for a class of persons. (In contrast, a “Specific License” is issued to a particular person or entity on the basis of a license application for a particular transaction.) Normally, a general license is issued following a governmental determination, pursuant to explicit conditions described in the regulations, that national interests overcome a regulatory prohibition.¹⁵

The operative provision of GL-17 is paragraph (a), which provides simply: “New investment in Burma by U.S. persons is authorized, subject to the limitations and requirements set forth in paragraphs (c), (d), and (e) of this general license.” GL-17 basically operates to reverse the prohibition on all “new investment” and now authorizes new investment activities in Myanmar, irrespective of the sector, that have been banned since 1997.

Pursuant to GL-17, U.S. persons may now, subject to certain limitations:

- Enter into contracts that include the economic development of resources located in Myanmar;¹⁶
- Enter into contracts providing for the supervision and guarantee of another person’s performance of a contract that includes the economic development of resources located in Myanmar;¹⁷
- Purchase equity interests in the economic development of resources located in Myanmar;¹⁸
- Enter into contracts providing for the “participation in royalties, earnings, or profits in the economic development of resources located in Burma, without regard to the form of the participation”;¹⁹ and

- Enter into a contract to perform or finance contracts to sell or purchase goods, services, or technology relating to the above activities.²⁰

“Economic development of resources located in Burma” is defined as “activities pursuant to a contract the subject of which includes responsibility for the development or exploitation of resources located in Burma....”²¹ While “resources in Burma” includes everything from human capital to agricultural resources, the Burmese Sanctions Regulations specifically include as an example “a contract conferring rights to explore for, develop, extract or refine petroleum, natural gas, or minerals in the ground in Burma....”²² In Myanmar, title to all hydrocarbons vests in the state,²³ and the government has the sole right to explore, extract, and sell petroleum and natural gas.²⁴ Myanmar law authorizes Myanma Oil and Gas Enterprise (“MOGE”), a division of the Ministry of Energy, to enter into joint ventures on behalf of the government with private domestic and foreign entities for the exploration, development, production, and transportation of hydrocarbons on behalf of the state.²⁵ Myanmar implements these joint venture arrangements by entering into the following types of contractual arrangements through MOGE:

- Production sharing contracts (“PSC”) (based on the Indonesian PSC),
- Improved petroleum recovery contract/performance compensation contracts (akin to a risk service contract), and
- Reactivation of suspended fields contracts.

Thus, while there may be other reasons to restructure the energy sector, there should be no need to redefine or restructure the current contractual structure to fit the forms of investment authorized by GL-17 as “new investment” in the “economic development of resources in Burma.”

LIMITATIONS ON GL-17

Caveat Investor: Burmese Sanctions Regulations Not Repealed. It is important to note that GL-17 does not repeal the broad sanctions regime comprising the Burmese Sanctions Regulations or the various federal laws and Executive Orders that underlie the Regulations, all of which are still in effect.²⁶ As emphasized in the Treasury

Department’s Press Release, “The core authorities underlying our sanctions remain in place.”²⁷ Instead, the President invoked his authority to waive the ban on new investment and authorized the issuance of a general license permitting new investments in Myanmar. GL-17 has no stated duration, either by law or its own terms, and may be revoked by OFAC at any time, which would have the effect of reinstating the prohibition on new investments in Myanmar, including oil and gas investments. Any future action along these lines would likely be dictated by the pace and direction of political and economic reform by the Myanmar government, whose progress prompted suspension of the ban on new investment in the first place.

Restrictions on Transactions with Ministry of Defense and SDNs. It is important to observe that GL-17 has not lifted the ban on new investments with all counterparties in Burma. GL-17 proscribes new investments through the Burmese Ministry of Defense, including the Office of Procurement, any state or non-state armed group, and any entity in which any of the foregoing owns a 50 percent or greater interest.²⁸ GL-17 preserves the ban on new investments with any person named in the Specially Designated Nationals and Blocked Persons List (“SDN List”) published by OFAC.²⁹

Given the recent political and military history in Myanmar, it is not surprising that these restrictions on new investments have been included in GL-17³⁰ and thus should not be taken lightly. Although the standard avenue of investment in the oil and gas sector in Myanmar is through public auction or direct negotiation with MOGE, if a U.S. investor wishes to acquire an oil and gas interest in Myanmar through farm-in or share acquisition, it will be important to ensure that any such new investment is sufficiently diligenced to ensure that it does not trigger one of these exceptions to GL-17. It also will be important for new investors to be able to demonstrate to OFAC, if challenged, that sufficient inquiry has been done to avoid dealings with unauthorized parties.

Reporting Requirements. GL-17 imposes two sets of mandatory reporting requirements applicable to “new investments” that will apply to new investments in the Myanmar oil and gas sector, and it incorporates by reference the Department of State’s “Reporting Requirements on Responsible

Investment in Burma.”³¹ Notably, the Department of State, rather than OFAC, has jurisdiction over this reporting regime.

MOGE Investment Notification. Any U.S. person who has undertaken a new investment pursuant to an agreement entered with MOGE must notify the Department of State in writing within 60 days of its investment.

At the moment, the interpretation of “new investments” that are subject to the reporting requirement remains unclear. OFAC’s definition of “new investments” contemplates both direct and indirect investments, and, as a result, we believe it is likely that OFAC would interpret the reporting requirement to include farm-ins and share purchases. However, the Department of State has not yet indicated that OFAC’s definition and guidance regarding “new investments” will apply to the new reporting regime.

Annual Reporting Requirement. In addition to the MOGE reporting requirement, GL-17 imposes an annual reporting requirement affecting all new investments, whether in the oil and gas sector or elsewhere, which is due on April 1 each year. One report is required to be made available to the public (“Public Report”), and the other report is required to be provided only to the government (“Government Report”). The annual reporting requirement is intended to help the U.S. government assess the effects of investments made under the new sanctions regime. The reporting scheme also allows investors to claim an exemption under Exemption 4 of the Freedom of Information Act (“FOIA”) and establishes a process to prevent the disclosure of such information to the public.

PUBLIC REPORT

The following principal information must be included in the Public Report:

- An overview of operations in Myanmar;
- The policies and procedures related to the submitter’s operations and supply chain in Myanmar;
- Arrangements with security service providers; and

- An acknowledgement that the Public Report will be made public, and that the submitter has redacted any information it considers exempt under FOIA.³²

In addition to providing the foregoing information, where the investment is for (i) the purchase of real property or the lease of any rights related to real property (which could be interpreted to include an oil and gas interest) for more than \$500,000 or (ii) the purchase or lease of more than 30 acres of real property, then additional information must be submitted, principally relating to the dislocation or resettlement of citizens caused by the investment.³³

Finally, details of all payments to each governmental (national or local) entity of Myanmar or subnational or administrative entity asserting authority over the submitter’s new investment activities in Myanmar must be reported. Each relevant payment must be reported by payment type, including royalties, tax obligations, and fees. Aggregate annual payments to a particular governmental entity below \$10,000 do not need to be reported.³⁴

GOVERNMENT REPORT

For the Government Report, the investor will need to include all the information provided in the Public Report except for the public disclosure acknowledgement. There are additional reporting requirements, including whether the submitter has had meetings or other communications with the armed forces of Myanmar or other armed groups that are material to the submitter’s investment in Myanmar, as well as details of such communications.³⁵

CONCLUSION

Relaxing the sanctions on new investment in Myanmar, particularly in the oil and gas sector, has been long awaited by the U.S. petroleum industry and the international petroleum industry at large. Whether the authorization granted in GL-17 is the dawn of a new era of foreign investment in Myanmar’s energy resources could be first tested by the

industry's participation in the next round of bidding for open blocks, which the Ministry of Energy has indicated will be announced in early September 2012. This follows on the heels of the last licensing round in 2011, which resulted in an award of contracts on nine onshore blocks.³⁶ According to MOGE, there currently are 12 foreign-operated onshore blocks and 29 foreign-operated offshore blocks.³⁷ With one exception, the foreign operators are all Asian entities. Total, the one exception, operates the large Yadana gas field, in which Chevron is a non-operating participating owner, and the related pipeline that transports natural gas to the Myanmar–Thailand border. Chevron is the only U.S. company with oil and gas interests in Myanmar, which were grandfathered by Executive Order No. 13047.

The Ministry of Energy has identified 14 deepwater blocks in the Rakhine Area and two in the Moattama/Tanintharyi Offshore Area as open for foreign investment. There are also offshore blocks in more shallow waters that the government of Myanmar has promised to open to foreign investment. MOGE claims Myanmar has approximately 215 million barrels of proved oil reserves, split evenly between onshore and offshore, and more than 15 trillion cubic feet of proved natural gas, nearly all of which lies offshore.³⁸ In contrast, the U.S. Energy Information Administration places proved oil reserves at 50 million barrels and proved gas reserves at 10 trillion cubic feet.³⁹

Meanwhile, GL-17 is only one piece of the Myanmar petroleum puzzle. Numerous other practical and legal reforms are required before most U.S.-based and other international oil companies are likely to be comfortable with making significant investments in Myanmar. Such measures include the establishment of essential infrastructure for business, as well as changes to the legal framework to support the fiscal regime underpinning oil and gas exploration and development and to ensure that foreign arbitral awards will be enforceable in Myanmar. And for U.S. persons, challenges to entering the market are still seen in the unavailability of political risk insurance through the Overseas Private Investment Corporation and the absence of a bilateral investment treaty between the U.S. and Myanmar.⁴⁰

Nevertheless, the relaxation of sanctions by GL-17 and the equivalent relaxation of trade sanctions by other countries should provide sufficient incentive and encouragement to enable the international petroleum industry to work with Myanmar to identify and exploit Myanmar's full petroleum potential.

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ENDNOTES

- 1 General License No. 16 and General License No. 17 issued by the Office of Foreign Assets Control, Department of the Treasury ("OFAC") on July 11, 2012; Executive Order 13619, "Blocking Property of Persons Threatening the Peace, Security or Stability of Burma," 77 *Federal Register* 41243-41245 (July 11, 2012).
- 2 The Burmese Sanctions Regulations were codified in 2005 in Title 31, Part 537 of the Code of Federal Regulations.
- 3 See Council Decision 2012/225/CFSP 2012 O.J. (L 115/25) (April 26 2012) (*available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:115:0025:0026:EN:PDF>).
- 4 In this *Commentary*, we refer to the Union of Myanmar as "Myanmar," except where the U.S. documents lifting the ban or explaining it or the Burmese Sanctions Regulations refer to "Burma," in which case we use the nomenclature utilized in those documents.
- 5 Customs and Trade Act of 1990 (P.L. 101-382); Foreign Assistance Act of 1961 (P.L. 87-195); Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 (P.L. 104-208); Burmese Freedom and Democracy Act of 2003 (P.L. 108-61); and Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 (P.L. 110-286).
- 6 Executive Order 13047, "Prohibiting New Investment in Burma," 62 *Federal Register*, 28301-28302 (May 20, 1997); Executive Order 13310, "Blocking Property of the Government of Burma and Prohibiting Certain Transactions," 68 *Federal Register*, 44853-44856 (July 28, 2003); Executive Order No. 13448, "Blocking Property and Prohibiting Certain Transactions Related to Burma," 72 *Federal Register*, 60223-60226 (October 18, 2007); and Executive Order 13464, "Blocking Property and Certain Transactions Related to Burma," 73 *Federal Register*, 24491-24493 (April 30, 2008).
- 7 P.L. 95-223.
- 8 The term "new investment" is defined at 31 CFR § 537.311.
- 9 Concurrently with the issuance of GL-17, OFAC issued GL-16, which authorizes "the exportation or re-exportation of financial services to Burma, directly or indirectly, from the United States by a U.S. person, wherever located..." General License No. 16, issued July 11, 2012.
- 10 31 CFR 537, Subpart B—Prohibitions.
- 11 31 CFR § 537.311(a).
- 12 31 CFR § 210(c). 31 CFR § 537.203 prohibits the importation into the United States of any article that is a product of Burma, unless otherwise authorized.
- 13 31 CFR § 537.409.
- 14 U.S. Customs and Border Protection ("CBP") relies on a body of established CBP regulatory and legal precedents to confer origin on an import if the matter is in doubt. A good shall originate in the territory of a party where the good is wholly obtained or produced entirely in its territory, including mineral goods extracted in its territory.
- 15 In the case of the sanctions on "new investments," the President is authorized by Section 570 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 (P.L. 104-208) to waive the prohibition on new investments "if he determines and certifies to Congress that the application of such sanction would be contrary to the national interests of the United States." Presidential waiver of the ban on new investments was set in motion by way of Executive Order 13619, dated July 11, 2012, in which President Obama delegated to the Secretary of the Treasury, in consultation with the Secretary of State, authority that resulted in the issuance of GL-17 by OFAC.
- 16 See 31 CFR § 537.311(a)(1).
- 17 See 31 CFR § 537.311(a)(2).
- 18 See 31 CFR § 537.311(a)(3).
- 19 See 31 CFR § 537.311(a)(4).
- 20 See 31 CFR § 537.311(b).
- 21 31 CFR § 537.302.
- 22 *Id.*
- 23 Section 37(a) of Burma Constitution (2008). English translation accessed on July 25, 2012 at http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf.
- 24 Chapter II, Section 1.3. of the State-owned Economic Enterprises Law (1989). English translation accessed on July 25, 2012 at <http://www.burmalibrary.org/docs12/SOEAct.pdf>.
- 25 Chapter II, Section 2 of the State-owned Economic Enterprises Law (1989). English translation accessed on July 25, 2012 at <http://www.burmalibrary.org/docs12/SOEAct.pdf>.
- 26 For example, sanctions on the imports of "products of Burma" remain in place, which could pose an issue for U.S. oil and gas companies that wish to import production to the U.S. See 31 CFR § 537.203. The prohibition on the import of "products of Burma" in Section 3(a)(1) of the Burmese Freedom and Democracy Act of 2003 was extended as of July 26, 2011, for an additional year. At the time of this publication, H.R. 5986, a bill to extend the import restrictions for another three-year period, was being considered by the House. However, as a practical matter, it is likely that regional markets will readily absorb any production coming out of Myanmar in the near term.
- 27 Joint Fact Sheet from U.S. Treasury and State Departments: "Administration Eases Financial and Investment Sanctions on Burma," July 11, 2012 ("Joint Fact Sheet").
- 28 Paragraph (c), GL-17.
- 29 Paragraph (d), GL-17. See also Executive Order No. 13619, issued July 11, 2012. The SDN List is accessible through OFAC's web site at <http://www.treasury.gov/sdn>.
- 30 The Joint Fact Sheet states that the "United States remains concerned about ... the role of the military in the Burmese economy."
- 31 Paragraph (e), GL-17 and "Reporting Requirements on Responsible Investment in Burma," accessed at <http://www.humanrights.gov/wp-content/uploads/2012/07/Burma-Responsible-Investment-Reporting-Reqs.pdf> ("Reporting Requirements"). The Reporting Requirements are pending approval by the Office of Management and Budget as of July 11, 2012.
- 32 Part II of the Reporting Requirements.
- 33 Part II, paragraph 7 of the Reporting Requirements.
- 34 Part II, paragraph 8 of the Reporting Requirements.
- 35 Part II, paragraph 10 of the Reporting Requirements.
- 36 Thu, M. "Government Calls for Offshore Block Investment," *The Myanmar Times* (May 28–June 3, 2012).
- 37 Myanmar Oil and Gas Enterprise dated July 2011 at <http://www.energy.gov.mm/moge.pdf>.
- 38 *Id.*
- 39 See <http://www.eia.gov/countries/country-data.cfm?fips=BM&trk=pl>.
- 40 Myanmar has investment treaties with China, India, Laos, the Philippines, Thailand, and Vietnam; of these, the treaties with China, India, the Philippines, and Thailand are in force. See the UNCTAD Database of Bilateral Investment Treaties provided by the United Nations Conference on Trade and Development, *available at* <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>.

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