



JONES DAY
COMMENTARY

MYANMAR'S NEW FOREIGN INVESTMENT LEGAL REGIME

On January 31, 2013, the Directorate of Investment and Company Administration (“DICA”) of the Myanmar Ministry of National Planning and Economic Development (the “NPED Ministry”) published on its web site the Foreign Investment Rules¹ and the Classification of Types of Economic Activities Notification² (collectively, the “Rules”) pursuant to Myanmar’s new Foreign Investment Law³ (the “FIL”). Like the FIL itself, the Rules reflect a Myanmar that is eager for foreign investment having, among other things, invited bids for 18 onshore oil and gas blocks in Myanmar’s second international petroleum licensing round.⁴ They come as part of a series of economic and political reforms as foreign investors and governments begin re-engaging with Myanmar in earnest following the relaxation of American and European economic sanctions against Myanmar.⁵ Companies as diverse as Nestle, ANZ, and GE have announced plans to begin or expand operations in Myanmar—MTV even held a televised concert in Yangon.

Observers, including Jones Day partners Darren Murphy and Kevin Murphy, who recently returned from a trip to Yangon, report sustained momentum for

economic and political reform and a genuine enthusiasm for the development that foreign money will bring.

In a more recent demonstration of its commitment to attracting foreign capital, the Myanmar Parliament agreed on March 6, 2013 to sign the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention”). This critical step should allow for more effective enforcement in Myanmar of arbitral awards made in signatory countries and provide foreign investors with needed confidence that contractual terms can be enforced in Myanmar.⁶

This *Commentary* summarizes the FIL and the Rules, and points out remaining ambiguities that will need to be clarified in the day-to-day practice of the Myanmar Investment Commission (“MIC”).

THE FOREIGN INVESTMENT LAW

The FIL permits foreign investment through 100 percent owned investment companies, through joint

ventures, or pursuant to a contract,⁷ a clause that the Rules interpret to mean a private–public joint venture contract with the Myanmar government. The law does not create a special class of foreign investment companies but rather provides for foreign investments to be conducted through companies formed under the existing Myanmar company law upon application to DICA.⁸

While foreign-owned companies and joint ventures will be subject to the same principles of company law (and, in general, the same environmental, labor, and other such regulations) as local companies, permitted foreign-owned companies and foreign joint ventures will have the advantage of a foreign investment permit. Such a permit carries with it a number of important benefits, including:

- Basic “guarantees” against nationalization and arbitrary state action: “that a business formed under the permit shall not be nationalized”; that the government will not “suspend any investment business carried out under the permit ... before the expiry of the permitted term without any sufficient cause”; and that invested foreign capital may be remitted in the same currency upon expiry of the term of the investment contract.⁹
- Provisions for the repatriation of profits and invested funds on an ongoing basis, subject to payment of taxes and creditors.¹⁰
- Long-term leases for permitted foreign or joint venture companies with terms of up to 50 years extendable twice for further 10-year periods (i.e., to a maximum of 70 years).¹¹
- Enforcement of the “dispute settlement mechanism” in joint venture and investment agreements.

In other words, the plain text of the FIL aims to provide investors with security of tenure, protection against state expropriation, and a means to enforce the terms of their agreements with local partners.

THE IMPLEMENTING RULES

Beyond that, however, the FIL is light on details on the governance regime for foreign investment. As a member of

Myanmar’s parliament told the Thai press, the FIL “is quite flexible,”¹² with much being left to the discretion of the Ministry and the MIC. The Rules are a solid start to addressing the FIL’s ambiguities:

Investments in Sensitive Sectors. The FIL prohibits investment in certain specified areas, such as “farming agriculture,” factories that produce or businesses that use hazardous chemicals, and activities that “can affect the public health” or “cause damage to the natural environment and ecosystem.” Further, activities “which can cause great effect on the conditions of security, economic, environmental and social interest of the Union and citizens” must be submitted to parliament prior to granting of a permit.¹³

The Rules add detail to these categories, providing that foreign investment is prohibited in a number of sectors, including (i) defense; (ii) the administration of electric power; (iii) small- or medium-scale mineral production; and (iv) Myanmar-language publishing and media. The Rules also limit foreign investment to a maximum of 80 percent of a joint venture with a citizen in a range of “restricted sectors,” including (i) many food and agricultural activities; (ii) infrastructure development and construction; (iii) residential and commercial developments; and (iv) air transportation services.

Investment in a third category of conditional sectors, which includes many of the restricted sectors, is subject to specific conditions and approvals, including clearances from relevant government ministries and regulatory offices. Certain investment projects in the minerals, construction, and manufacturing sectors will also be subject to environmental and social impact assessments.

The FIL repeals only the previous version of the foreign investment law. Investments therefore remain subject to the restrictions found in other applicable laws. In particular, the State-Owned Economic Enterprises Law, which provides the Myanmar government with the sole right to carry out certain activities, such as the exploration, extraction, and sale of petroleum and natural gas, air transportation services, and banking and insurance services, continues to apply to investments in regulated sectors. Indeed, the

Rules reiterate this point. For example, the Rules expressly condition the selling and marketing of air transportation services on governmental approval and the recommendation of the Ministry of Transport.

Guidelines for the Grant of Permits and Permissions. As noted above, the MIC has substantial day-to-day authority to, among other things, grant or deny investment permits and enforce their terms. The Rules provide basic procedures for the exercise of such authority, including (i) the general criteria the MIC will consider in exercising its discretion and (ii) the time limits within which the MIC will act. Encouragingly, the MIC seems committed to handling applications expeditiously. It will constitute an inter-department team to assist in reviews of investment proposals in regulated sectors, and its application committee will meet weekly to consider the investment proposals put forward in the preceding week. Further, while local governments will be provided an opportunity to comment on investment proposals, their comments must be made within a week of the MIC's request for remarks.

Not surprisingly, the Rules' procedural provisions will require further clarification. As one example, the Rules set out the extensive information that foreign investors must provide to the MIC in order to obtain an investment permit but make no express provision for the confidentiality of such information, much of which will be commercially sensitive.

Timeline for Acting on Investment Permits. Investors, too, will be held to tight timelines. Those proposing greenfield projects must complete construction within the time provided in their MIC permit, which is subject to only limited extension. Where such time limits are exceeded for reasons other than force majeure, the MIC can cancel the investor's permit without compensation.

The Rules also add detail to the process for obtaining land use permits and transferring capital in and out of the country as provided in the FIL. These provisions contain one or two surprises, including a suggestion that investors can, on a case-by-case basis, obtain initial land tenancies of greater than 50 years where they invest in less-developed regions of Myanmar.

But while the Rules do provide some useful details, other key issues faced by investors remain to be addressed:

Tax Relief. The FIL provides that the Commission shall grant an investor an income tax exemption for a period of five consecutive years. It also provides that the MIC "may grant" 10 other tax benefits, including extensions to the initial five-year tax holiday, exemptions from taxation for profits reinvested in Myanmar within a year, and exemptions from certain customs duties. Neither the FIL nor the Rules detail any additional criteria the MIC will use in exercising its discretion to grant such tax exemptions.

Transfer of Projects. The Rules do provide for the sale of interests in projects to Myanmar citizens or other foreign investors. However, such transfers are subject to approval by the MIC, which can be withheld on a broad range of grounds.

Employment of Foreign Nationals. The FIL differentiates between "skilled" and "unskilled" workers, and it provides that the latter must be Myanmar nationals. The FIL also provides for a minimum quota of Myanmar citizens in skilled jobs, which will increase over time, although the timeframe may be increased by the Commission for businesses "based on knowledge." The Rules, however, do not define what jobs will be categorized as "skilled."

The Rules are a good step in Myanmar's process of economic liberalization. However, they still leave significant day-to-day discretion with the MIC. The Myanmar government's latest moves are cause for optimism, but perhaps only cautious optimism until the MIC has developed a track record in practice.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Michelle Chen

Singapore
+65.6233.5530
mchen@jonesday.com

Darren Murphy

Singapore
+65.6538.3939
dmurphy@jonesday.com

Kevin J. Murphy

Singapore
+65.6233.5978
kjmurphy@jonesday.com

The authors wish to thank Sean Murphy and Nikhil Gore, associates in the Singapore Office, for their assistance in the preparation of this Commentary.

ENDNOTES

- 1 This *Commentary's* summary of the Foreign Investment Rules (Notification No. 11/2013, January 31, 2013) is based on an unofficial translation of the document published in the Myanmar language on DICA's web site. At present, an English translation is not available on DICA's web site.
- 2 Classification of Types of Economic Activities (Notification No. 1/2013, January 31, 2013) as published in English on DICA's web site at http://www.dica.gov.mm/includes/FIL-notification%20_English_%20A4.pdf.
- 3 The Foreign Investment Law (November 2, 2012) as published in English on DICA's web site at http://www.dica.gov.mm/includes/FIL-notification%20_English_%20A4.pdf. The NPED Ministry has published a different translation on its web site at https://www.mnped.gov.mm/images/stories/pdf_file/DICA/InvestmentLaw/new%20fil%20englishmyanmar.pdf.
- 4 See *Jones Day Commentary*, "Second Petroleum Bid Round in Myanmar" (January 2013).
- 5 See *Jones Day Commentary*, "Eased Sanctions Widen Doorway to Myanmar Oil and Gas Sector" (August 2012).
- 6 Implementation of the New York Convention in Myanmar through the adoption of domestic legislation remains to be completed.
- 7 2012 FIL § 9.
- 8 2012 FIL § 10.
- 9 2012 FIL §§ 28-30.
- 10 2012 FIL § 39.
- 11 2012 FIL § 31-32.
- 12 "Myanmar's Foreign Investment Law Lauded," *The Nation* (Nov. 7, 2012), available at <http://www.nationmultimedia.com/business/Myanmars-foreign-investment-law-lauded-30193800.html>.
- 13 Discussed at 2012 FIL §§ 3-6.

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. Jones Day does not practice Myanmar law, and the contents of this *Commentary* do not constitute an opinion or advice on Myanmar law. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.