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Myanmar's New Foreign Investment Law, Rules and Notification

by

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I. The Law

Myanmar's New Foreign Investment Law (FIL) was passed on November 2, 2012. It replaces the Myanmar Foreign Investment Law of 1988. Generally the FIL is optional except in the case of a) major infrastructure deals 2) manufacturing and 3) the State Owned Enterprise Law of 1989 (SOE Law).

With FIL approval comes waiver from the relevant ministry of the restrictions of the SOE Law, which make certain industries, for example, oil & gas, hard minerals and broadcast media, state monopolies. For a foreigner to invest in one of these fields there must be a notification issued under the SOE Law to grant an exemption.

Where the FIL is optional, the reason investors use the FIL is to get the benefits, like the tax holiday, discussed later.

The FIL is administered by the Myanmar Investment Commission.

The following are some of the benefits afforded by the FIL

- A guarantee against expropriation.
- Foreign exchange benefits (guaranteed remittance of profits; remittance upon exiting the investment)
- Outside the FIL, foreigners and foreign companies cannot own real estate and cannot lease it for longer than a year. Depending on the type of enterprise and investment amount, the FIL allows investors to enter into a lease up to 50 years with two ten-year extensions. A longer lease may be available for projects in remote areas.
- As to tax matters, there is:

- A 5-year tax holiday that may be extended
- Thereafter, an exemption for re-invested profits
- Accelerated depreciation on capital assets
- Relief on income tax up to 50% on profits from exports
- Deductions for R & D
- Exemption from customs duties on capital assets to be used in the business imported during construction period
- Exemption from customs duties on raw materials imported during first 3 years of production
- A deduction for expat salaries at normal rates.
- Relief on customs duties on imports for expansion of the business
- Exemption from commercial tax for exports

- Equity in an FIL company can be transferred with the approval of the MIC.

Under the FIL, for oil & gas, mining and other large-investment projects—upfront costs (e.g. exploration and drilling) must be borne by the foreign party, same as present PSCs in the oil & gas field. Profits are then shared. Cost recovery, now allowed under PSCs, is still allowed.

All MFIL investors must now form companies. Branches may be acceptable with the recommendation of the line ministry.

For skilled positions, the FIL provides an obligation to increase the use of local Myanmar staff over time. The investor must achieve:

- At least 25 % of an FIL company's workforce must be Myanmar nationals during the first two years,
- At least 50% during the second two years; and
- At least 75% during the third two years.

The FIL introduces new rules relating to timing with respect to the reviewing and granting of applications. The MIC is required to evaluate proposals for completeness and accept/reject these within 15 days of submission of the application. It will thereafter issue (or deny) an investment permit within 90 days.

II. The Rules

The Rules (the Rules) to the FIL were passed on January 31, 2013.

There are a few prohibitions for foreign investors in the Rules, notably

- Drilling oil and gas hand-dug wells up to 1000 feet in depth
- Small and medium mineral production
- Electricity generation under 10 megawatts
- Small farming
- Small livestock breeding
- Fishing

The Rules provide that if a foreign investor proposes to invest in the restricted and prohibited business activities set forth above, the MIC may submit it to the government for an exception if approved by:

- Local groups
- Regional administrative entities and
- The regional government or state.

Under normal circumstances, company formation comes after MIC approval. If the investor has a reason for requesting formation of the company before the approval, however, the Directorate of Investment and Company Administration may allow temporary incorporation. [Rule 19]

The procedure and documentation for an application is clearly set forth. [Rule 31-47]. Timing [Rule 48] is consistent with that in the law mentioned above.

Investors must submit a progress report to the MIC every 90 days [Rule 51] If an extension is needed for the construction period, the investor must apply to the MIC at least 60 days before expiration of the construction period. [Rule 57]

An investor may sub-lease or mortgage a long-lease on application to the MIC. [Rule 62]

Shares in an FIL-approved company, whether owned by a foreigner or a Myanmar person, may be transferred to a foreigner or a Myanmar person with MIC approval. [Rule 65]

FIL registered companies must procure fire, marine, injury, natural disaster and life insurance from locally-registered companies. [Rule 77]

Local staff must have contracts approved in form by the Ministry of Labor, Employment and Social Security. [Rule 82]

Leases for land are 50 years plus two ten year extensions. [Rules 99 and 100] These periods may be extended if the lease is in a remote region. For agriculture in vacant, fallow or virgin lands as defined by statute, the maximum is 30 years.

The investor must open a foreign currency account in any bank in Myanmar that has a foreign currency authorized dealer license. [Rule 133]

The investor must submit a schedule of investment if the proposal provides that the investment will be brought in over a period of time. [Rule 135]

Disputes between parties to the agreements in an FIL deal must be settled using the laws of Myanmar [Rule 170], namely the Arbitration Act 1944 and the Protocol and Conventions Act 1939.

The Rules are not applicable to trading, i.e. importing for sale in the market and applications for this will not be granted. [Rule180]

III. The Notification.

The Notification to the FIL was issued on January 31, 2013. It provides four categories of requirements as follows:

Category 1. Activities Prohibited for Foreign Investors. Important examples:

- Production of arms and explosives for defense
- Prospecting, exploration and production of jade and gemstones
- Small and medium scale production of minerals
- Printing and broadcast media.

Category 2. Only Joint ventures are allowed in these fields for foreign investors. Important examples:

- Bakery products, confectionery
- Beer production
- Drinking water production
- Liquor production
- Manufacturing and marketing of plastic ware, rubber
- Manufacturing and marketing of paper
- Large scale production of minerals
- Construction of buildings, infrastructure projects

- Development, sales and rental of residential buildings
- Domestic and international air transport services
- Tourism businesses

Category 3. Businesses permitted to be carried out under conditions specifically provided. Important examples:

- Saw mills—maximum 25% for foreign investor
- Semi-finished wood products—maximum 35% for foreign investor
- Capital intensive, high tech wood production—maximum 49% for foreign investor
- Mining—there are limits on periods of exploration feasibility study, can be extended; production: 15 year production period, 5-year extensions.
- Cigarettes—50% of local tobacco leaf must be used in the first (3) years (or) at least 50% of raw material used must be bought in using income earned from selling local tobacco leaf to foreigners. 90% of production must be exported.
- Commercial real estate renting business—if the investment is one hundred percent foreign owned, it must be carried out using a BOT system. In case of a joint venture between a foreigner and a citizen, the citizen must contribute the long-term land use, or grant a land lease.
- Casinos—Myanmar people can't play.
- Hotels—100% foreign ownership allowed in 3-stars and above hotels. All others must be joint ventures.
- Retail—small retail not allowed to foreign investors. Retail allowed for foreign investors only in supermarkets, shopping centers and department stores. If in a joint venture, the local party must have at least 40% of the equity. After 2015 ASEAN provisions will apply. In 2015 all retail will be allowed for foreign investors but an investment must be at least US$3 million and there will be no tax holiday for retailing. No car or motorcycle sales.

Category 4. Projects for which environmental impact statements will be required. Important examples:

- Hard minerals
- Oil & gas
- Hydroelectric power
- Large-scale cultivation and production of crops
- Many infrastructure projects
- Large-scale pulp and paper production
- Iron, steel and metal production
- Cement plants
- Liquor and beer production

- Large scale foodstuffs
- Leather, rubber production
- Petrochemical industry
- Large-scale fish cultivation and animal husbandry
- Large-scale timber business
- Large-scale housing construction
- Large-scale hotels and resorts
- Large-scale production of crops
- Large-scale timber cultivation and production
- Electricity and production of electricity for the grid.