

Myanmar: Foreign investment rules in practice

The Myanmar Government has implemented the country's 2012 Foreign Investment Law ("FIL") with two Notifications (together referred to here as "the Rules"), creating a practical framework to match the Government's policy of welcoming foreign investment. In general, Notification 1/2013 sets out the permitted activities for foreign investors and the activities which require a joint venture ("JV"), and Notification 11/2013 introduces various helpful regulations on applying for an investment license ("MIC Permit"), the use of land, transfer of shares, remittance of foreign exchange and the taking of security on land and buildings.

By and large, investment with 100% foreign ownership is permitted for the vast majority of business activities, including telecommunications, power generation, services, infrastructure projects, agriculture, hospitality and non-food manufacturing.

Remarkably, retail and wholesale activities have been opened to foreign investment as well, subject to certain conditions. A relatively limited number of activities require a local partner, such as food production, beverage production, plastics and certain chemical industries, mining and real estate development. However, even for those restricted sectors, foreign investors may hold up to 80% of the shares.

Equally important, Notification 11/2013 strengthens the land use rights by foreign-invested companies, including the possibility to lease land from anyone, and to take security on land and buildings. Furthermore, Notification 11/2013, in conjunction

with other measures in Myanmar and abroad (such as the general license issued by the US Treasury easing sanctions with respect to four Myanmar banks), has made it easier to remit foreign currency overseas.

However, Myanmar is a country where there are often significant differences between the theory and the practice. In this overview of how foreign invested projects work in Myanmar, we base ourselves not just on the laws and the new regulations, but on our on-the-ground experience with getting projects from inception to completion.

Onshore and offshore oil and gas

Oil and gas exploration, development and production are allowed for foreign oil companies under a Production Sharing Contract ("PSC") with the Myanmar Oil and Gas Enterprise ("MOGE"). Blocks are awarded through an open and competitive bidding process where

Highlights

- Investment with 100% foreign ownership is permitted for the vast majority of business activities
- Retail and wholesale activities have been opened to foreign investment
- Possibility to lease land from anyone, and to take security on land and buildings
- A JV, is as a rule, required for development of most types of property, including buildings, condominiums, apartments, offices and commercial space
- Gas-fired power plants are usually structured as a BOT in Myanmar, where a foreign investor can own 100% of the Myanmar entity that concludes the BOT with the Government.

technical experience and financial capability weigh heavily, both factors usually being in favour of foreign enterprises. Upon being awarded a block, operators are required to set up a Myanmar company or to register a Myanmar branch of a foreign company. Once a commercial discovery has been made a new agreement is concluded within the framework of the PSC, for example a gas sale agreement.

Notification 1/2013 only states that a JV is required for oil drilling using traditional methods with a maximum depth of 10,000 feet, but in practice, investors are required to have a local partner for exploration and production of all onshore blocks. However, the percentages of ownership of the local and foreign partner are left to the agreement between the parties.

Processing and construction of petrochemical facilities requires prior government approval, which will only be granted upon advice by the Ministry of Energy ("MOE").

The importation, transportation, storage, sale and distribution of petroleum/petroleum products and natural gas, also requires prior approval by the MOE.

Real estate development

In practice, the ownership structure of a foreign-invested property project will very much depend on the land rights for the project in question. In Myanmar, freehold, granted land and Government leased land are in practice the most relevant types of land when it comes to foreign investment.

For land that is privately owned, which has been granted to a local partner, or where the local partner holds a Government lease, a JV is as

a rule required for development of most types of property, including buildings, condominiums, apartments, offices, commercial space, houses in industrial zones and low-cost housing. In this case, the local partner will receive shares in the JV in return for transferring the land rights to the company. A JV is also required for the construction and development of new townships, golf courses, recreational areas, factories and mills, bridges, highways, underground railroads and construction related to transportation.

If the land is directly leased by the Government to the project company, such projects are usually conducted under a Build, Operate Transfer ("BOT" regime) and foreign investors may hold 100% of the Myanmar project company.

If a legacy building is involved, then a conservation management plan is also required. Large scale property projects require an Environmental Impact Assessment.

The provision of architecture services, construction consultancy services, production of construction materials supporting the urban housing sector, prefabrication of construction materials, construction of disaster-proof buildings, and the fixing and commissioning of machines and their parts are subject to a Mutual Recognition Arrangement and must follow the Myanmar National Building Code's rules and regulations.

Mining

Most large-scale mining projects are, as a rule, subject to the requirement of having a local partner, although there have been exceptions to this in the past. Mining concessions take the form of a Production Sharing Contract in Myanmar, where the Government's

take comprises royalties, production sharing and income taxes. Under the current rules, foreign investors may hold up to 80% of the capital in a large scale mining enterprise.

The mining of minerals from riverbeds or near rivers, the surveying and production of jade and other gems, and all small- and medium-sized mineral production enterprises are prohibited for foreign participants.

A JV is required for small- and medium-scale mining extraction, the exploration and testing of industrial raw materials related to mining, and the large-scale mining of minerals. A JV with the government is required for the production and sale of rare earths, strategic minerals, radioactive minerals and gems. Investors involved in exporting raw minerals such as granite, stone or coal must first obtain approval from the Government.

For investors involved in large-scale mining, the production period may not exceed 15 years, but it is extendable four times for periods of five years each with six months' advance notice. For investors involved in the production of pearls, the production period may not exceed 15 years, but it may be extended twice for up to five years each, with one year's advance notice.

For investors involved in carrying out mining feasibility studies, the feasibility study period must not exceed two years. For investors involved in prospecting, the prospecting period must not exceed two years. For investors involved in exploration, the exploration period must not exceed three years.

Telecommunications

The Government is expected to award two nationwide mobile telecommunications licenses by the middle of 2013 through a competitive bidding process administered by the Ministry of Communications and Information Technology (“MCIT”). According to the Prequalification Rules issued by the MCIT and based on Notification 1/2013, there is no formal requirement for a local partner. The Prequalification Rules are geared towards international mobile operators, but the possibility is created for these operators to conclude a consortium (and, upon awarding the license, a JV) with local or foreign partners.

Vendors of network equipment and service suppliers can, as a rule, be 100% foreign-owned in Myanmar. Depending on the situation, it may be possible to obtain an MIC Permit for investments by network suppliers. The provision of domestic/international mail services and network support services are subject to prior approval by the MCIT.

Electricity generation

Gas-fired power plants are usually structured as a BOT in Myanmar, where a foreign investor can own 100% of the Myanmar entity that concludes the BOT with the Government. The Government will normally supply gas to the developer on a pass-through basis, and purchase the electricity at a pre-agreed and indexed tariff. In practice, the Government harmonizes the tariff cautiously, but there may be differences in various economic terms anyway through negotiation.

Power projects are privately awarded or, more recently, through an open and competitive bidding process. The

first step is usually for the developer to conclude a non-binding MOU with the Ministry of Electric Power (MOEP), and to submit a feasibility study. If the feasibility study is approved, which is usually the case, a “Memorandum of Agreement” is negotiated, which is essentially a BOT contract. Within the framework of that BOT contract, a Power Purchase Agreement, a Gas Sale Agreement and a Land Lease Agreement are concluded in due course. More or less in parallel, the project company is established and the investment license (MIC Permit) is issued.

The production or sale of hydro-power electricity or coal-powered electricity requires the foreign owners to enter into a JV or BOT with the Government. Under the agreement with the Government, a royalty or a production share will usually be payable in the form of free electricity supply up to a certain threshold.

In virtually all cases, the investor must prepare an Environmental Impact Assessment for approval by the Ministry of Environmental Conservation and Forestry.

A gas-fired power plant with a capacity of 10MW or less is not permitted to be wholly foreign-owned. The trading of electricity is prohibited to foreign investors.

Distribution, wholesale and trading

The distribution of goods manufactured by investors themselves in Myanmar was already allowed under the previous regulation. There are no limitations on who investors can sell to. A foreign invested manufacturing company can sell its products directly to retailers, for example.

Previously, “trading” was considered a prohibited activity for all foreign-invested companies, even JV companies. In the wake of the new FIL, this policy is evolving. The limit on what the Government is prepared to allow in terms of distributing goods without manufacturing is not yet entirely clear. Wholesaling is also allowed for foreign investment, but is subject to the receipt of an opinion by the Ministry of Commerce beforehand. In addition, a JV is required for all “packaging enterprises.”

Retail, supermarkets and hypermarkets

The Government’s policy is aimed at facilitating foreign investment for large modern trade. Foreign investors are permitted to own and operate “supermarkets” so long as the store surface is between 12,000 and 20,000 square feet. They may own and operate “hypermarkets” so long as the store is at least 50,000 square feet. For smaller surface areas (so not supermarkets or hypermarkets), retail shops are not allowed to be located in close proximity to local businesses and they must sell mainly local products. In addition, if a retail shop is operated through a JV agreement, the local partner must have at least a 40% shareholding.

Retail enterprises other than those mentioned above are expected to be permitted as of late 2015 (except car and motorbike retailers), but will require a minimum capital investment of US\$3 million. In addition, such enterprises will be given no tax exemptions. Special rules apply for the retail of alcohol or tobacco products.

Manufacturing of beverages

A JV is in principle required for the “production, blending, distilling, bottling, and distribution of beverages”. A JV is also required for barley fermentation and the production/distribution of products made from barley fermentation. In addition, a JV is required for all “purified water enterprises”. In practice, the Commercial Tax (a combination of an excise duty and a turnover tax) dictates how a producer of beer or spirits should be structured in Myanmar. The Commercial Tax weighs heaviest on the importation phase and the manufacturing phase of the supply chain, and investors may need to carefully devise a supply chain over different entities in Myanmar, keeping in mind unnecessary tax imposts and licensing restraints.

For the production, distribution and sale of soft drinks and other beverages, the investor must use at least 20% local raw materials for the first three years of production. Afterwards, the investor must use at least 60% local agricultural raw materials.

Manufacturing of foods

A JV is as a rule required for the “production, canning and distribution of foodstuffs except dairy products”. However, the foreign investor may hold up to 80% in the JV as per current regulations. As is the case with all sectors of industry, in practice a foreign investor would not purchase shares from an existing Myanmar shareholder in a local company, or subscribe for shares issued by such existing Myanmar company. In other words, the JV company would not be the existing company of the local

partner. Instead, a new JV company is established under the FIL. Licenses, assets and land leases are transferred from the local partner company to the new JV company through a contribution in capital. The transfer is done based on the terms agreed between the parties, subject to MIC approval.

For the production, distribution and sale of vegetable and animal oils, at least 80% local raw materials must be used. For the production of MSG, local raw materials must be used for the first three years of production.

Non-food manufacturing

Generally, there is no requirement for a local partner when manufacturing non-foods. A JV is required only for a few selected sectors including the production, distribution and sale of cotton threads, various types of paper, rubber, plastic and leather.

Notification 1/2013 does not set out a lot of local content requirements in non-food (cosmetics and cigarettes being the main exceptions), but in our experience the Ministry of Industry may request the use of a certain amount of local raw materials. The Ministry of Industry provides recommendations to the MIC about the feasibility of proposed manufacturing investment projects.

Land used for manufacturing that is leased from the Government or private parties must be obtained with the permission of the Myanmar Investment Commission (“MIC”). In addition, according to the practice to date, generally a minimum capital amount of US\$500,000 is required for manufacturing companies with an investment permit.

Agriculture, forestry, livestock and fisheries

Currently, we mostly see interest in palm oil, sugar, rubber, rice and livestock. Although some agricultural and livestock activities feature on the list of activities that require a JV, it is our view that the Government may in practice decide to allow large investment projects in this field that are considered particularly beneficial to the country on a fully foreign-owned basis.

In most cases, the Government can offer land to the investor that is suitable for the project, either through the Ministry of Environmental Conservation and Forestry or through the Ministry of Agriculture and Irrigation. Different (usually modest) lease prices and maximum sizes of plots apply depending on the authority and the status of the land. Forests are normally not available for investment projects, but degraded forests may be leased for various projects, including wood based industries and reforestation. Although the Union Government in theory has final say, the local authorities also need to cooperate with the allocation of land for a project. If the land is already in use by local farmers or residents, the resettlement and compensation may be particularly challenging and at times a major risk to the completion of the project.

A JV is required for small-scale agricultural businesses, as well as for agricultural businesses that do not use modern machinery. A JV is also required for the “growing and planting of traditional medicinal herbs (plantations),” as well as the “production and distribution of hybrid seeds”.

A foreign investor involved in the development of modern farm land, production and distribution of seeds, fertilizer, pesticides, mechanized farm tools/machinery or crops must obtain a confirmation from the Union Government Board and comply with the guidance of the Ministry of Agriculture and Irrigation.

For livestock and fishery activities, a JV is required for:

- small-scale livestock businesses;
- livestock businesses that do not use modern machinery; and
- fishing in lakes, inland waters and from shores. Investors wishing to fish offshore in Myanmar territorial waters for saltwater fish, shrimp and other marine animals must operate through a JV and obtain the prior permission of the Government.

Investors involved in fresh or saltwater fish breeding may not breed such fish as would affect Myanmar's biodiversity. The production of bee products must be conducted in accordance with Good Manufacturing Practice ("GMP") technology. Lastly, investors involved in lab testing of marine products must perform such tests in accordance with ISO 17025.

Hospitality

100% foreign ownership of a hotel is permissible if it is classified as 3-stars or above. Hotels classified below 3 stars require a JV to operate. Hotels constructed on Government land are usually organized through a BOT structure. In this structure, the investor has the ownership and management of the hotel for a period of 15 to 30 years, after which the buildings are transferred to the Government. The Government, often through the Ministry of Hotels and Tourism, receives an annual lease fee

which is either a certain amount per square meter, or a percentage of the hotel's revenue. A substantial payment to the Government may also be due at the outset of the agreement for obtaining the land right.

Myanmar is preparing for the licensing of casino enterprises. Casinos require Government permission, must follow the rules and regulations of the Ministry of Hotel and Tourism and the Ministry of the Interior and must be located in restricted areas of hotels. They can only be accessed by foreign nationals. Wellness or spa enterprises must be located in 3-star or above hotels or boutique hotels.

Use of land in general by foreign investors

Foreign investors cannot actually purchase land (Transfer of Immoveable Property Restriction Act of 1987 - TIPRA 1987), but they can lease land from the Government or from private parties (since this year) with the permission of the MIC. In practice, when the project involves the use of land, foreign investors need to agree to a draft lease agreement with the (public or private) land owner before submitting their investment proposal to the MIC. The Government can lease land directly to the foreign-invested company (often in the context of a BOT agreement), but it is more common that a local partner who has already obtained the Government lease contributes the land rights to a JV company in return for shares.

Taking security

Until recently, there was largely no regulation in Myanmar on taking security over land and buildings. Notification 11/2013 now specifically

allows creditors to take security over land and buildings. The taking of security on bank accounts, receivables and movable goods is in theory possible, but it remains virtually untested and very uncommon in practice. Every type of security, mortgage or charge taken by a company in Myanmar must be registered with the Deed Registration Office within 21 days of creation.

Foreign currency remittances

The new FIL allows for the remittance of foreign currency through banks authorized to make such transactions at prescribed rates of exchange. The Foreign Exchange Management Law also provides some guidance on making foreign currency remittances, including:

- foreign-invested companies have the right to hold foreign currency and a foreign currency bank account;
- there are no limitations on inward/outward remittances from a current account;
- foreign currency may be retransferred overseas after examination and approval from the MIC (for companies registered with the MIC) or from the Central Bank (others).

In practice, a foreign-invested enterprise is required to open a capital remittance account in Myanmar for the inward remittance of the capital and monies raised through loans. In addition, in terms of outward remittances, the company is allowed to open any bank account with a licensed Myanmar bank in a foreign currency and in kyat. Payment of dividend, interest and repayment of capital on loans by a foreign invested enterprise with an MIC Permit must

be approved by the MIC before the bank is allowed to execute the outward remittance.

If you have any questions in relation to the issues raised in this briefing please contact the authors below.

Note: The two notifications referred to in this briefing are Notification 11/2013 of the Ministry of National Planning and Economic Development dated 31 January 2013 and Notification 1/2013 of the Myanmar Investment Commission.

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