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Practice Groups:

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*Corporate and
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Myanmar's New Foreign Investment Law

Introduction

This month has marked some significant milestones for Myanmar (also known as Burma) which, as a former pariah state, has recently emerged as the new investment hotspot in Asia due to its rich natural resources and untapped markets.

Last week, Barack Obama became the first United States President to visit Myanmar. Obama's visit follows on from the success of Myanmar's significant political reforms and the lifting of US and EU sanctions. These developments will no doubt reassure US investors looking at this market.

Among these momentous changes, the long awaited new foreign investment law ("**FIL**") was approved earlier this month by Myanmar's President, Thein Sein.

Overview

The FIL replaces the previous foreign investment law of 1988 ("**1988 Law**") and ushers in policies and provisions aimed at encouraging foreign investment for the purposes of jumpstarting the development of the wealth, infrastructure and productivity in Myanmar.

The key changes to the FIL include a wider range of permitted forms of investment, greater flexibility on the structuring of joint ventures, enhanced tax and investment incentives, and an enhanced legal framework for land use, employment, foreign currency and the resolution of investment disputes.

The relevant regulatory authority under the FIL is the Myanmar Investment Commission ("**MIC**") which functions under the direct control of the Myanmar Union Government Board. The MIC has broad powers to implement the objectives of the FIL, including the discretion to approve a foreign investment and dictate the terms of such approval. The MIC's decisions in this regard are final and conclusive.

The MIC is expected to promulgate implementing regulations under the FIL within the next three months. These regulations may assist in determining the scope and range of the MIC's wide discretion.

Whilst there remains some uncertainty surrounding the practical implementation of these changes, the FIL has been favourably received by foreign observers and the larger international investment community.

This purpose of this article is to summarise the key changes brought in by the FIL as well as identify the potential areas of ongoing uncertainty under the FIL and the process of foreign investment in Myanmar generally.

Key Changes

The key changes under the FIL which are designed to encourage foreign investment include:

- **Land use:** Foreign investors may be permitted by the MIC to lease land for up to 50 years, with the possibility of extending that term by two additional periods of 10 years each. The

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MIC may also prescribe longer terms for investments in remote or less-developed areas. However, foreigners are still not permitted to own land.

- **Tax incentives:** Foreign investments approved under the FIL will be entitled to a five-year income tax exemption from the year of commencement of commercial operation or production, with the possibility of an extension for a “reasonable” period if the investment is “beneficial” for the state. The MIC may also grant additional tax exemptions, exemptions on customs (for instance in respect of imported machinery and equipment to expand existing projects), and further relief and extensions including income and export tax relief.
- **Mode of investment:** Under the FIL, foreign investments can be made via 3 models:
 - Wholly foreign-owned entity
 - Joint venture with Myanmar enterprises or citizens
 - Permitted form of business contract
- **Minimum foreign participation:** In a joint venture structure with Myanmar enterprises or citizens, the parties are free to choose the ratio of foreign to local equity participation. However, the MIC still holds the ultimate power of approval in this regard.
- **No minimum capital:** There is no prescribed minimum capital requirement for foreign investment. However, the initial foreign currency capital requirement will be determined by the MIC on a case by case basis depending on the proposed industry sector of investment.
- **Transferability:** Foreign investors may transfer all or part of their shares in a company to one or more local or foreign entities subject to the approval of the MIC.
- **Foreign exchange:** The FIL provides guarantees for the remittance (at the prescribed exchange rate) in foreign currency of imported foreign capital and profits. Investors are permitted to open foreign currency accounts and Kyat accounts at banks which are approved by the MIC.
- **No nationalisation:** The FIL provides assurances that the Government will not, without a proper reason, terminate an enterprise operating under an MIC permit before the expiration of the permitted term, and will not nationalise an enterprise if the MIC extends the term of the enterprise.
- **Dispute resolution and treaties:** Dispute resolution mechanisms can be contractually agreed between the parties. If no such mechanism is provided for in the contract, Myanmar law will apply by default. Further, if the FIL conflicts with an international treaty or similar agreement approved by Myanmar, the terms of the treaty or agreement will prevail.

The areas where the FIL will continue to regulate foreign investment are:

- **Approvals:** All new foreign investment proposals must be submitted to the MIC for evaluation and approval. There are timeframes that the MIC must work within in terms of its review of an investment proposal:
 - The MIC must accept or decline to evaluate an investment proposal within 15 days from the date it was submitted to the MIC.
 - If the MIC decides to evaluate an investment proposal, it must approve or reject that proposal within 90 days from the date the MIC accepted the proposal for evaluation (i.e. 105 days from the date of submission of the proposal).

However, these timeframes are discretionary and could be extended by the MIC.

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- **Restricted activities:** Whilst certain “permitted” sectors for investment are prescribed by the MIC, the FIL also specifies 11 sectors in which foreign investment is restricted and can only be made with the approval of the MIC and the Government and must be made via a joint venture with the State or a Myanmar citizen. The activities that are restricted include activities that are detrimental to the public health or to the environment, prejudicial to the country’s culture, as well as certain services, manufacturing and activities relating to agriculture, livestock and fisheries that can only be undertaken by Myanmar citizens. However, the FIL does not prescribe which restricted activities are likely to be “prohibited” in terms of foreign investment. The impending implementing regulations are likely to provide some clarity as to the scope of these restricted activities and how the MIC will proceed regarding the approval of any foreign investment in these sectors.
- **Interplay with other laws:** The FIL does not repeal or amend any other laws in effect that may impact foreign investment, the most notable of which is the Myanmar State-owned Economics Enterprises (“SOEE”) law. The SOEE law restricts private sector participation (both local and foreign) in most sectors of the economy, unless granted an exemption by notification by the Government. These activities include, though are not limited to, exploration, extraction and sale of petroleum and natural gas; exploration, extraction and export of metals; certain electricity generating services; telecommunication services; banking and insurance services; broadcasting and television services; and air and railway transport services. Government policy will determine the extent to which any foreign investment is permitted in these sectors, and if so, on what terms, regardless of the FIL.
- **Energy projects:** Subject to Government policy and the position under the SOEE law, the MIC may allow investors to invest in enterprises requiring 'large amounts of capital' for energy production, such as petroleum, natural gas or metals. Such investments can only materialize in the form of a joint venture with the State or Myanmar citizens or may be approved in the form of a profit-sharing system between the investor and the Government or an authorised Government department or organisation, using the capital of the investor to carry out a feasibility study, exploration and calculation of the reserves, and extraction up to the commercial production stage. Any profits from such an investment must be divided between the parties on a proportional profit-sharing basis.
- **Domestic employment:** Foreign investors must employ at least 25% of their workforce with a locally skilled workforce during the first two years from the commencement of the enterprise, at least 50% during the next two years and 75% in the third two-year period. With respect to positions for unskilled workers, all hires must be local. Training must be provided to local Myanmar employees and these employees are entitled to the same benefits and salary as foreign staff, commensurate with their level of expertise.
- **Penalties:** The MIC has been given the power to impose a range of administrative penalties in order to enforce the FIL. These include revoking an investment licence and issuing warnings to and even blacklisting foreign investors against obtaining any future investment licences.

Ongoing Uncertainty

Although the FIL has been hailed as a positive step for investors, it still contains a number of broadly drafted or ambiguous provisions. The MIC’s interpretation and implementation of those provisions in practice will have a considerable influence on how the FIL and the MIC will impact foreign investment and the operation of businesses in Myanmar.

The policy position likely to be taken by the MIC in the exercise of its discretion regarding certain investment licence issues, such as the scope of the initial capital contribution to be made, is uncertain. It is also unclear what checks and balances will come into play to ensure that the MIC exercises its discretion consistently and that its decision making processes are transparent and free

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from influence. The commitment of the Myanmar Government to developing a consistent policy approach by the MIC will be critical to the MIC's success.

Further, the FIL does not address the position of investments made under the 1988 Law. The FIL has retrospective application; however, it is not clear whether the "benefits" it provides, such as tax incentives, will be available to those investments initially made under the 1988 Law.

These uncertainties are in addition to the typical issues that leave investors exposed or at the very least nervous about investing in Myanmar, including:

- ***Is the investment permitted?*** There is the threshold question as to whether investment is permitted by the laws of the state where the foreign investor comes from. Although there has been an easing of economic sanctions relating to Myanmar, there are still some sanctions in force that prohibit dealings with certain Myanmar Government departments or individuals. Investors need to be clear on these issues at the early stages of planning an investment.
- ***International treaty protections:*** Myanmar has yet to ratify the international instruments that would typically afford investors the ability to protect and/or enforce their rights. As this article is being written, Myanmar is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Washington Convention or the Energy Charter Treaty. In addition, Myanmar only has Bilateral Investment Treaties with China, India, Laos, Philippines, Thailand and Vietnam.
- ***Jurisdictional risk:*** Myanmar's legal system and institutions are neither well established nor transparent. For an investor, it is not clear to what extent certain rights under private contract can be successfully relied upon or enforced, what duties arise for investors under Myanmar law and what processes are available and effective to limit any potential exposure to liability. Further, the conduct of business transactions in Myanmar may expose investors to liability abroad, particularly if there have been allegations of corrupt practices that may potentially be caught under the far reaching provisions of the Foreign Corrupt Practices Act in the US or the UK Anti-bribery Act.

These issues can be managed and minimized by enlisting local assistance on the ground in Myanmar which will operate in a transparent, efficient and effective way.

Our K&L Gates Singapore office has the expertise and experience to assist clients in relation to the FIL and guide them through the potential minefield of issues arising in this jurisdiction. Should you have any questions about the FIL and/or any aspect of doing business in Myanmar, please contact us below.

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