Myanmar Issues Revised Draft of Investment Law

The Directorate of Investment and Company Administration (“DICA”) recently released the second official draft of the Myanmar Investment Law (“MIL”) on 27 February 2015. The MIL is currently drafted with assistance from the International Finance Corporation and seeks to repeal and consolidate the Myanmar Citizens Investment Law 2013 (“MCIL 2013”) and the Foreign Investment Law 2012 (“FIL 2012”). Throughout the drafting process prior to the release of this draft MIL, DICA held consultations with a wide group of stakeholders including business investors, government ministries, professional advisors and civil societies. DICA is currently holding a public consultation on this draft of the MIL and invites all interested parties to submit their comments by 26 March 2015.

The overarching aim of the MIL is to establish a unified investment law regime for investors and create a level playing field for both local and foreign investors in Myanmar. To date, Myanmar is the only ASEAN country to have two separate investment laws, one for foreign investors and the other for domestic investors. The amalgamation of the two laws would bring Myanmar closer to the ASEAN Economic Community 2015 goal of facilitating the free flow of investments as part of a single integrated ASEAN marketplace.

Key Features of the Draft MIL

Spanning twenty five provisions in total, the key features of the draft MIL include:

1. Restructuring of the Myanmar Investment Commission (“MIC”)

Under the draft MIL, the MIC will be restructured into an autonomous organ of the Myanmar Government as opposed to its current status as a statutory body under the Ministry of National Planning & Economic Development. Further, provisions governing the composition and membership of the MIC are enhanced. For example, any member of the MIC is not allowed to hold office for more than three years for each term but will nonetheless be eligible for re-appointment. The President still retains the power to appoint the Chairman and members of the MIC but the most recent institutional reform to include private sector members within the MIC has been maintained.

2. Concept of foreign investors

Foreign investors are defined under the draft MIL as:

(a) a natural person who is not a citizen or permanent resident of Myanmar;

(b) a legal entity incorporated under the laws of a foreign jurisdiction; or

(c) a legal entity incorporated in Myanmar and defined as a foreign company under the Myanmar Companies Act.

Currently, a company is considered a foreign company under the Myanmar Companies Act 1914 so long as any share of such company is held by a foreigner. However, as part of DICA’s efforts to modernise and reform the Myanmar Companies Act, this definition of a foreign company may be subject to change. According to the current draft of the Myanmar Companies Act published for public consultation, a company will only be considered a foreign company if at least a certain prescribed ownership interest is held by foreigners. The precise level of this threshold ownership interest will be set out in the accompanying regulations to be promulgated following the enactment of the new Companies Act. As is
the case under the current FIL 2012, foreign investors will continue to enjoy the right to lease land for up to 50 years, with two extension terms of 10 years each.

3. Prohibited / Restricted Sectors

Although Section 8 of the draft MIL states that any investor (both local and foreign) may invest in any economic sector within Myanmar, this is subject to the “principle of progressive liberalisation” within the four categories set out under Section 9 of the draft MIL:

(a) sectors where both domestic and foreign investments are prohibited (i.e. sectors which can only be operated by the Myanmar Government);
(b) sectors where foreign investments are prohibited;
(c) sectors where foreign investments are only allowed via a joint venture with a Myanmar citizen or entity; and
(d) sectors where domestic or foreign investments are required to obtain prior approval from the MIC.

As these are mere categories, the precise sectors are expected to be listed and elaborated upon in the implementing rules and regulations to the MIL. The draft MIL now expressly gives the MIC specific powers to conduct an annual review of restricted sectors listed under any of the implementing rules and regulations. The MIC may consult with public and private sector stakeholders as part of such an annual review and any liberalisation in an industry sector cannot be revoked. Sections 10 and 11 of the draft MIL also explicitly state that the Myanmar Government commits to treat both foreign and domestic investors in a non-discriminatory manner and guarantees that all investors shall enjoy fair and equitable treatment.

4. Freedom to employ foreign skilled labour

Under the draft MIL, all investors including foreign investors will have the right to employ qualified persons of any nationality for senior management, professional and advisory positions. In this respect, we note that there are no longer provisions in the draft MIL which prescribe minimum local skilled labour quota as is mandated under the current FIL 2012. This proposal should be applauded as the current tight skilled labour situation in Myanmar could mean that certain foreign investors holding MIC permits may find it difficult to comply with the local skilled labour quota requirement of 75% as they enter into the fifth year of their investments.

5. Enhancement of repatriation and mortgage rights

According to Section 16 of the draft MIL, all investors are allowed to remit amounts related to:

(a) capital, which is subject to the Central Bank of Myanmar’s (“CBM”) capital account rules;
(b) profits, capital gains, dividends, royalties, license fees, technical assistance as well as technical and management fees, interest and other current income;
(c) proceeds from the total or partial sale or liquidation of a business or property owned in connection with the business;
(d) payments made under a contract, including a loan agreement;
(e) awards resulting from any settlement of disputes in respect of a business enterprise;
(f) compensation or other payments made pursuant to expropriation or nationalisation; and
(g) earnings and other remuneration of expatriate personnel legally employed in Myanmar.
This represents a strengthening of the guarantee granted to foreign investors in respect of repatriation of their investment and profits by extending it to compensation and awards that are legally obtained. However, it is unclear whether such remittance will be subject to another layer of capital controls by the CBM. It would appear based on the current drafting that only the first category in respect of remittance of capital may be subject to rules promulgated by the CBM. However, greater relaxation by the CBM of existing capital controls will need to be made in conjunction with this proposal. Another important development of note in this draft MIL is the proposal to grant both domestic and foreign investors the ability to mortgage rights over land and grant security over assets for the purposes of financing investments in Myanmar. At present, approval to seek financing is obtained on a case by case basis.

6. Investment incentives

Unlike the MCIL 2013 and FIL 2012 which specifically list the exemptions and reliefs available to investors, the draft MIL provides that such incentives will be stipulated in future accompanying rules and regulations. In this respect, the draft MIL provides that until the relevant rules and regulations are enacted, the existing laws will continue to apply. It is therefore unclear if the Myanmar Government is reconsidering the tax incentives to be offered. In August 2014 for example, the Myanmar Government removed certain tax exemptions from a number of sectors such as manufacturing of beer and cigarettes, vehicle repair, restaurant business etc.

Final Observations

The draft MIL demonstrates an encouraging move by the Myanmar Government to improve the investment regime in Myanmar as part of its ongoing reforms. However, certain provisions still lack clarity and there are questions over how they would operate in practice, in tandem with existing laws and policies. Further clarification may also be required in the form of subsidiary legislation. Naturally, the MIL should not merely be an amalgamation of the provisions under the current MCIL 2013 and FIL 2012, but should in substance eliminate the differences in treatment and incentives offered to domestic and foreign investors. All in all, the draft MIL is a promising step towards enhancing the investment regime in Myanmar, coming less than three years after the enactment of FIL 2012. Myanmar will however need to muster its political will to enact this piece of legislation before the General Elections scheduled for the end of this year rather than allow the polls to side-track its progress.
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