

## Opportunities and challenges for new investors in Myanmar

Recent democratic reforms in Myanmar have encouraged foreign governments to relax economic sanctions, leading to increased foreign investor interest in the country. Although there are positive signs of further reform, new investors in Myanmar face significant challenges.

In this briefing, we comment on recent developments and key issues to be considered by investors wishing to do business in Myanmar.

### Myanmar's legal framework for foreign investment

Myanmar has generally been viewed as an unattractive jurisdiction for foreign investors due to restrictions on sectors open to foreign investment and inadequate legal protection for investors in sectors which are open to foreigners. Although reforms are planned, investors should continue to be wary of Myanmar's legal system, which presents significant and varied risks to foreign investors.

Myanmar's 1988 Foreign Investment Law (FIL) establishes the Myanmar Investment Commission (MIC). The MIC is able to grant a variety of exemptions and relief to foreign investors, including tax reliefs and exemptions from licensing requirements. The FIL also imposes various restrictions on foreign investment. A key restriction is the current requirement that foreign investors must enter into joint ventures with local companies. The FIL also establishes foreign currency controls.

The Myanmar government is prioritising amendment of the FIL but having previously announced that the new FIL would be finalised imminently, it appears that the process has been delayed. It has been reported that the new law will abolish the requirement for foreign investors to enter into joint ventures with local partners. The new FIL is also expected to grant various tax incentives to foreign investors, to ease restrictions on land use by foreigners and to provide guarantees against nationalisation.

Apart from the proposed revisions to the FIL, Myanmar's government is pursuing significant economic reforms, including a managed float of the local currency (the Myanmar Kyat) and simplification of foreign-exchange rules. The Myanmar government is also considering, among other things, allowing foreign banks to invest in Myanmar through joint ventures with local banks or opening their own branches. The mining sector is also an area in which major law reforms are proposed and opportunities in that sector have attracted a great deal of interest from foreign investors.

Although many ambitious reforms have been proposed, international institutions are concerned that Myanmar's leaders and key bureaucracies, including the MIC and the Central Bank, do not have the capacity to deliver everything all at once. Observers have also said that there is a serious risk that poorly drafted legislation will be rushed through parliament without adequate consultation.

#### Key issues

- Myanmar's legal framework for foreign investment
- International arbitration
- Investment protection
- EU and US Sanctions
- Human rights
- Corruption and transparency

## International arbitration

A key area of concern for new investors relates to the reliability of Myanmar's courts and the lack of alternative options for ensuring contracts and property rights are respected. Myanmar is not party to the 1958 Convention on the Recognition and Enforcement of International Arbitration Awards (New York Convention) nor the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

The enforcement of arbitration agreements and awards in the country is governed by legislation pre-dating the country's independence, which only provides for the enforcement of domestic arbitration agreements and awards rendered by domestic arbitration tribunals. At present, it is not possible for companies incorporated in Myanmar to enter into agreements to submit disputes to arbitration outside of Myanmar. In addition, the Myanmar attorney-general's office has generally refused to approve contracts involving state-owned enterprises which include international arbitration clauses.

The government of Myanmar has formally announced its intention to introduce modern arbitration legislation based on the UNCITRAL Model Law and also that it will sign and ratify the New York Convention. However, the process of domestic implementation may take time. In the case of Myanmar, delays ordinarily to be expected in this process may be compounded due to the great number of reforms that are under discussion.

## Investment protection

Because of Myanmar's political risk profile, prospective investors in the country should consider the possibility of structuring new investments in order to take advantage of bilateral or multilateral investment treaties signed by Myanmar. UNCTAD records currently show that Myanmar has signed bilateral investment treaties (BITs) with the Philippines, China, India, Laos, Thailand and Vietnam. According to UNCTAD records, only the treaties with the Philippines, China and India have entered into force. Following a recent visit to Yangon, we understand that Myanmar is currently negotiating new BITs with Japan, and also with the Russian Federation, Mongolia, Bangladesh, Korea and Iran.

Myanmar is also party to two multilateral trade agreements which contain investment chapters providing protection to qualifying foreign investors:

- the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA); and
- the ASEAN Comprehensive Investment Agreement (ACIA).

It may be possible for foreign investors from countries that have not yet signed BITs or multi-lateral agreements with Myanmar, including Japanese investors, to take advantage of the protection offered by an existing BIT, the ACIA or the AANZFTA. This can be achieved by making new investments via subsidiaries incorporated in ASEAN member states (such as Singapore). Specialist advice should be sought before making any structuring decisions for this purpose.

## EU and US Sanctions

On 23 April 2012, the European Union (EU) Foreign Affairs Council announced the suspension of all EU restrictive measures imposed in relation to Myanmar for a period of 12 months, except for an arms embargo which remains in force. It is important to note that the EU has suspended rather than lifted its sanctions. Whether the EU sanctions are permanently lifted depends on the progress of reform in Myanmar.

On 11 July 2012, the US Treasury Department's Office of Foreign Assets Control (OFAC) issued two new General Licenses to the Burmese Sanctions Regulations (BSR) authorising the provision of previously-prohibited financial services to Myanmar and new investment in Myanmar by US Persons. For these purposes, US Persons means all entities organised under US law, all persons in the United States, and any US citizens or US green card holders globally.

The two new General Licences are subject to certain limitations (as discussed below) and US Persons may not deal with any Myanmar persons or entities who are listed as Specially Designated Nationals (SDNs). Also on 11 July 2012, President Obama issued a new Executive Order entitled "Blocking Property or Persons Threatening the Peace, Security, or Stability of Burma" (Executive Order) pursuant to which additional SDN designations may be made.

General License 16 authorises the "exportation or reexportation of financial services to Burma" from the United States or by US Persons, including the transfer of funds to Myanmar and the provision of other financial services, such as insurance, investment, banking, credit, and money remittance services to Myanmar. US sanctions had generally prohibited the provision of such services since the announcement of Executive Order 13310 in July 2003.

General License 16 does not authorise provision of financial services to the Myanmar Ministry of Defense, other armed groups in Myanmar or entities in which the Ministry of Defense or any armed group has an interest exceeding 50%. Provision of financial services to Myanmar persons or entities on the SDN list remains prohibited.

In view of the scope of the remaining US restrictions on certain financial services, we anticipate that US banks will continue to filter transaction messages to identify geographic references to Myanmar or references to Myanmar SDNs in order to review filtering "hits" manually for the possibility of a prohibited element. We also note that the US Treasury Department's Financial Crimes Enforcement Network has not changed the designation of Myanmar as a jurisdiction of primary money laundering concern, meaning that transactions with any Myanmar element will be subjected to close scrutiny.

General License 17 authorises new investment by US Persons in Myanmar, as long as such investment does not occur under an agreement with the Myanmar Ministry of Defense or other armed groups in Myanmar. General License 17 also requires that US Persons, as a condition of investing in Myanmar, comply with reporting requirements imposed by the US State Department.

All US Persons whose aggregate investments in Myanmar exceed US\$500,000 will have to submit detailed annual reports on those investments. The reports, which will be released publicly, must cover, among other things, details of arrangements with security service providers, the reporting investor's policies and procedures relating to human rights, workers' rights, anti-corruption, environmental protection and land acquisition. The reports must also include details of annual payments exceeding US\$10,000 to Myanmar government entities, including state-owned enterprises. US Persons investing in projects involving Myanmar Oil and Gas Enterprise (MOGE) will have to notify the US State Department within 60 days of making such investment.

Although US Persons will now be able to invest in Myanmar subject to the terms of General License 16 and/or General License 17, it should be noted that a US ban on imports from Myanmar remains in place.

International investors, including Japanese investors, should continue to monitor the position in relation to economic sanctions and restrictions imposed against Myanmar by the EU, US and others. While a number of countries have permanently lifted restrictions relating to Myanmar, the EU and US have been more cautious and have indicated that sanctions may be reinstated if the current reform process is not sustained. Any reinstatement of sanctions may affect international investors, particularly financial institutions.

## Human rights

The imposition of international sanctions against Myanmar was a response to the failure of the military junta (which first seized power in 1990) to respect basic political freedoms and human rights, in particular the rights of ethnic minorities. Foreign investors who were able to operate in Myanmar in recent years have faced allegations of complicity in human rights abuses, have been forced to defend civil litigation by victims of alleged human rights abuse and/or have divested from Myanmar following pressure from investors and other stakeholders.

Foreign investors have also been involved in disputes regarding land rights and the environmental impacts of extractive sector and infrastructure projects. Some foreign companies operating in these sectors have faced serious allegations of complicity in forced labour and other gross human rights abuses perpetrated by the military in connection with private sector projects. Prospective investors should be aware that although the government has taken steps towards reforming Myanmar's labour laws (including by easing restrictions on the formation of trade unions) instances of forced labour and other serious human rights abuses continue to be reported.

While it is hoped that the human rights situation in Myanmar will rapidly improve, the risk of reputational damage and potential liability associated with allegations of human rights abuse should not be underestimated. It is recommended that any assessment of commercial opportunities in Myanmar should include a thorough assessment of risks relating to human rights.

The EU Foreign Affairs Council has indicated that EU investors operating in Myanmar will be expected to adhere to the highest standards of integrity and corporate social responsibility, including as contained in the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and the EU's CSR strategy 2011-2014. Similarly, the US government's decision to impose reporting requirements for US investors indicates that foreign investment projects will be closely scrutinised.

## Corruption and transparency

Myanmar is ranked only three places from the bottom of Transparency International's 2011 Corruption Perception Index. The prevalence of cronyism and other forms of corruption in Myanmar poses a serious compliance risk for any business seeking to invest in the country. In addition to conducting comprehensive due diligence on prospective local business partners, investors seeking to purchase assets or invest in companies operating in Myanmar will need to ensure that existing assets were not originally acquired as the result of corruption.

The government of Myanmar has recognised that the prevalence of corruption is a factor which will discourage much-needed foreign investment. The government has referred to the need for greater transparency on numerous occasions and has recently indicated that it will seek to comply with the [Extractive Industries Transparency Initiative](#) (EITI).

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