[MYANMAR] Enactment of Amended Foreign Investment Law in Myanmar

Myanmar's amended foreign investment law was approved by President Thein Sein on November 2, 2002, after having passed in the national parliament the day before. The amended law keeps the same framework of the version that passed in the national parliament this past September, but it has incorporated further changes requested by President Thein Sein to guarantee more benefits to foreign investors. In particular, the provisions that require a minimum foreign investment of USD 5 million as well as that caps a foreign investor's stake in a Myanmar joint venture at 50% have been deleted. The amended law is generally designed to increase the benefits to foreign investors in the government's efforts to attract foreign investment to Myanmar. However, many details that are essential for effective enforcement of the amended law are still yet to be determined, so it is still necessary to keep a close eye on the future actions of the government. The Ministry of National Planning and Economic Development has the power to issue necessary rules, regulations and procedures for enforcement of the amended law within 90 days of its enactment.

The amended foreign investment law replaces the older version enacted in 1988, but until specific rules, regulations and procedures are enacted for the amended law, the ones for the old law will apply unless explicitly stated otherwise in the amended law.

The following is a summary of important provisions in the amended law, officially named "The Republic of the Union of Myanmar Foreign Investment Law, 2002."

■ Restricted or prohibited activities

The amended law specifies the restricted or prohibited areas for foreign investment, whereas the old law did not. The following is a summary of the business areas that are restricted or prohibited for foreign investment pursuant to the amended law.

1) Activities that affect cultural traditions, customs, health, natural resources and environment
2) Activities that produce or use toxic chemicals or that bring in toxic chemicals to the country
3) Activities in the areas of manufacturing, services, agriculture, livestock breeding and fishing that are designated to citizens pursuant to the rules and regulations
4) Activities that introduce untested, unauthenticated technology, pharmaceuticals and utilities to the nation

Even though a foreign investor's business activity falls under one of the above categories, the foreign investor may engage in the business activity if the foreign investor gets the permission from the government to do so. For the agriculture/live stock breeding business, it is an area designated for Myanmar citizens. But if a foreign investor pursues a joint venture agreement with a citizen investor under the Myanmar agricultural contract farming system, the foreign investor may engage in the agricultural/live stock breeding business.

It is important to note that the activities in the areas of manufacturing, services, agriculture, livestock breeding and fishing that are designated for citizens are not clearly defined. So until the regulations for the amended law are enacted, the regulations for the old law governing the specified business areas where foreign investment was allowed would likely to continue to apply.

■ Rules for shareholding ratio and investment capital

The amended law allows for the contracting parties – whether between a foreign investor and a local investor or between a foreign investor and the Myanmar government – to freely negotiate the shareholding ratio of a Myanmar joint venture. According to the old law, a foreign investor needed to have owned 100% of the shares of a Myanmar business in which the foreign investor has invested.

In the case of a joint venture, a foreign investor needed to own at least 35% of the shares of a joint venture. The amended law does away with such requirements and allows parties to freely contract for the desired shareholding structure. Initially a version of the legislation that limited foreign investment to 50% was proposed, but the amended law does not include such a provision. It must be noted, however, that the amended law allows for regulations to be issued limiting foreign investment for the business areas that are restricted or prohibited. Thus, limitations, such as capping foreign investment for the restricted or prohibited business areas, may very well come into play through the enactment of regulations in the near future.

The amended law designates the Myanmar Investment Commission to issue the minimum foreign investment required for a venture given its nature and type. But no regulations have been enacted specifying such requirements for different categories of business areas. So it looks that, at least for now, capital requirements for foreign investors would be the same as specified in the regulations for the old law – i.e. the capital requirement being 500,000 USD for manufacturing and 300,000 USD for services business.

■ Benefits for foreign invested firms in Myanmar

The amended law increases tax benefits for foreign invested companies in Myanmar. It increases the corporate tax exemption for foreign invested firms from three years to five years. Tax relief is provided for profits kept in a reserve fund and reinvested in the business within one year. Also, the amended law gives foreign invested companies a tax exemption from customs duties on machinery, equipment and mechanical parts used for the expansion of the business during the investment period. For export items, the amended law provides foreign invested companies an exemption for commercial taxes on goods produced for export as well as on the imported raw materials for the production of such goods manufactured for export. Further, the amended law allows an exemption for up to 50% of the income from exporting goods manufactured by the foreign invested company.

■ Rights to use land

The amended law permits foreign investors to lease land or use land for industry, agriculture and livestock business for up to 50 years. The land to be leased can be either publicly owned or privately owned. After the initial term of the lease, the lease can be renewed twice for a ten year period for each renewal. The previous law allowed foreign investors to lease land for up to 30 years with possible two renewals with 15 year period each. The amended law extends the possible lease period for foreign investors from 60 years to 70 years, and in doing so, offers foreign investors further protection on their investment in Myanmar. For land in less developed areas in Myanmar, the amended law allows for a process of obtaining a longer lease term.

■ Rights and obligations of foreign investors

The amended law allows for foreign investors to dispose of, exchange or transfer assets with the approval of the Myanmar Investment Commission and for foreign invested companies to transfer their shares to foreigners/foreign invested companies or citizens/local companies. And whereas it was almost impossible to transfer shares from citizens/local companies to foreigners/foreign invested companies in the past, the amended law makes this possible.

Foreign investors must abide by the law, use the leased land in accordance to the law, and for subleasing/mortgage and transfer of shares or business, foreign investors must get the permission of the Myanmar Investment Commission. Additionally, foreign investors must not damage the leased land and must maintain the natural environment and report to the Myanmar Investment Commission if natural resources not part of the lease contract are found on and under the leased land.

As stated above, the government approval is still necessary for some legal activities. And if the government keeps to its practice of conducting tough and unpredictable scrutiny on reported activities, foreign investors still may need to deal with long delays and other practical problems.

■ Appointment of personnel and workers

Foreign investors must hire only Myanmar citizens for a business that requires no technical skills. But when hiring skilled personnel and technicians, the percentages of Myanmar citizen in the skilled workforce that need to be achieved more time are as follows: 25% after first two years, 50% after four years and 75% after six years.

■ Transfer of foreign currency

The provisions for transfer of foreign currency are not new to the amended law as they are carried over from the previous law. Foreign investors may transfer the following through Myanmar foreign exchange banks: 1) foreign currency entitled to by the person who brought in the foreign capital, 2) foreign currency that Myanmar Investment Commission has allowed for withdrawal by the person who brought in the foreign capital, 3) net profits received by the person who brought in the foreign capital after deducting from annual profits all taxes and related fees, 4) legitimate balance after taxes and related fees, as well as living expenses for the individual and family from the income earned by the foreign personnel.

■ Government guarantees

The previous law guaranteed that a foreign invested business formed upon the approval of the Myanmar Investment Commission would not be nationalized. The old law also assured the protection of a foreign investor regarding the investment and profits derived from the investment. These protections are in place in the amended law, but in addition to them, the amended law further guarantees that a foreign invested business formed upon the approval of the Myanmar Investment Commission will not be terminated or shut down during the term approved by the government.

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