

# FOREIGN DIRECT INVESTMENT IN MYANMAR

# Introduction

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## Economic Reform in Myanmar

- The State Constitution of the Republic of the Union of Myanmar, Article 35 of the Constitution clearly declared that the Economic system of the Union is market economy system.
- This new constitution, implemented on January 31, 2011 after the general-election in November 2010. Then the new era is emerging.
- The new President U Thein Sein came to office in March 31, 2011. He promptly declared in his inaugural speech that “it was no longer ruler-based economic system and no more exercising cronyism. There also was to be no permit for grafts. He also expressed that “there are many steps to be taken and to work hard.” His mentioned steps including legislation rule of law and the country’s basic infrastructure. He also committed that the urgent need is to amend the existing laws and business sector

For several reasons, Myanmar, remains worthy of consideration for investment due to:

- ❑ a population of approximately about 64 million (4.5 million in Yangon);
- ❑ vast and virtually untapped natural resources;
- ❑ a relatively educated labour force and low wages;
- ❑ its strategic location in the region;
- ❑ sea and air links within the Asia region and beyond;

Myanmar's goods benefit, as a developing nation from the Generalized System of Preferences in trade with most developed nations (*i.e.* lower import duties and not subject to quotas);

- ❑ access for 100 per cent foreign-owned enterprises;
- ❑ familiar business structures and commercial laws (based on the British law codes of the pre-independence India Statutes);
- ❑ English being widely spoken and usually used when dealing with foreigners;
- ❑ significant incentives under the Foreign Investment Law for larger investments; and
- ❑ member country of ASEAN.

# ECONOMIC PRIORITIES

Since late 1988 the Government of the Union of Myanmar has made significant economic reforms and introduced new liberal trade policies to promote the development of the Myanmar economy. The "four economic objectives" of the nation under the present Government are the:

- ❑ development of agriculture as the base as well as all-round development of other sectors of the economy;
- ❑ proper evolution of the market-oriented economic-system;
- ❑ development of the economy, inviting participation in terms of technical know-how and investments from sources inside the country and abroad; and
- ❑ initiative to shape the national economy must be kept in the hands of the State and the national peoples.

# FOREIGN INVESTMENT POLICY

- Since late 1988 the Government has been actively encouraging foreign investment in Myanmar. Its main foreign investment policy objectives are stated as the:
  - Adoption of a market-oriented system for the allocation of resources.
  - Encouragement of private investment and entrepreneurial activity.
  - Opening up Myanmar's economy to foreign trade and investment which includes
    - promotion and expansion;
    - exploitation of natural resources which require heavy investment;
    - acquisition of high technology;
    - developing production and services industries involving large capital;
    - creating local employment opportunities;
    - developing of works which would save energy consumption; and
    - regional development.

# OPPORTUNITIES

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The Government has identified a number of potential investment opportunities for foreign investors and has also embarked on a privatization programme.

# LEGAL SYSTEM

The legal system of the Union of Myanmar is a unique combination of the customary law of the family, codified English common law and recent Myanmar legislation. The principles of English common and statutory law were implanted in Myanmar by the British law codes of the pre-independence India Statutes. These statutory laws, based on and incorporating the English common and statutory law of the time, include the Arbitration Act, Companies Act, Contract Act, Evidence Act, General Clauses Act, Negotiable Instrument Act, Registration Act, Sale of Goods Act, Transfer of Property Act, Trusts Act and the Civil and Criminal Procedure Codes.

Where there is no statute regulating a particular matter the Courts are to apply Myanmar's general law, which is based on English common law as adopted and moulded by Myanmar case law, and which embodies the rules of equity, justice and good conscience. Where there is no relevant statutory general law on point, the Myanmar Courts are obliged to decide the matter according to justice, equity and good conscience.

# Incentives

- A foreign investor (whether investing through a joint venture or a 100 per cent owned entity) manufacturing goods or providing services in Myanmar under the Foreign Investment Law will be granted an exemption from income tax for three consecutive years, inclusive of the year of commencement.
- In addition, any one or more of the following incentives *may* be granted by the Myanmar Investment Commission to the foreign investor:
  - ❖ Exemption or relief from income tax on the profits of the business kept in a reserve fund and reinvested in the business within one year after the reserve is made.
  - ❖ Accelerated depreciation in respect of machinery, equipment, building or other capital assets used in the business, at a rate approved by the Commission.
  - ❖ Relief from tax on up to 50 per cent of the profits accrued from the export of goods produced in Myanmar.
  - ❖ The right to pay foreign employees' income tax and deduct such payments from assessable income.

- ❖ The right to deduct from assessable income expense incurred in respect of necessary research and development carried out within Myanmar.
- ❖ The ability to carry forward and set off losses up to three consecutive years after the year in which the loss is sustained.
- ❖ Exemption from commercial tax on export-oriented commodities.
- ❖ Exemption or relief from customs duty, licensing requirements and internal spare parts and materials used in the business and deemed required by the Commission during the initial period/ period of construction.
- ❖ Exemption or relief from customs duty, licensing requirements and internal taxes on the import of raw materials imported within the first three years' of commercial production following start up/ the completion of construction.

The incentives actually granted by the Commission to the foreign investor are specified in the permit. Section 21 of the Foreign Investment Law.

In addition to the above tax incentives,-

- ❖ Foreign investors holding a permit under the Foreign Investment Law are entitled to lease land for up to 30 years from the Government and may be exempted from customs duties and internal taxes and from obtaining an import license from the Ministry of Commerce for the import of certain capital investment items and raw materials.
- ❖ Also, the Foreign Investment Law guarantees that foreign investment under a Foreign Investment Law permit shall not be nationalized and the ability of the Foreign investor to repatriate " the rightful entitlement of the foreign investor" in foreign currency after the termination of the business.
- ❖ A permit under the Foreign Investment Law also enables foreign employees of the company resident in Myanmar to repatriate their savings.

# INVESTING UNDER THE COMPANIES ACT

For smaller investments on where the foreign investor does not wish to go through the Foreign Investment Law procedures, there is an alternative way of doing business in Myanmar, under the Myanmar Companies Act 1914 and Companies Rules 1940.

The Companies Act governs the activities of both locally and foreign-incorporated companies wishing to carry on business in Myanmar and is in a form similar to early company law codes of other former British colonies in the region and England, which codes remain the foundation of the current company law in those countries.

# Application for a Permit to Trade

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The application for a Permit to Trade is to be submitted along with the application for incorporation of the company or registration of a branch to the Directorate of Investment and Company Administration. Where a permit under the Foreign Investment Law is being applied for, the Permit to Trade application and company incorporation or branch registration steps are to be followed only after issuance of the Foreign Investment Law permit. The application for a Permit to Trade under the Companies Act must be in the prescribed form and accompanied by the following documents.

The Government is also seeking to encourage foreign investment in the development of golf course, beach resorts, tourist villages, amusement parks, recreational centres, serviced apartments, condominiums, office complexes and infrastructure projects such as airports, roads, railways, telecommunications facilities, etc.

The right of any person (whether citizen or foreign, individual or company) to carry any economic activity or enterprise, apart from the 12 areas of economic activity specifically "reserved" to the Government, is enshrined in the State-owned Economic Enterprises Law 1989. The following common entities are recognized and available for foreign investment/ trade in such economic activities or enterprise. As to incorporation requirements, see below under "Incorporation".

# INVESTING UNDER THE FOREIGN INVESTMENT LAW

Although not always possible or advisable to obtain a permit under the Foreign Investment Law, the benefits attaching to investments under a Foreign Investment Law permit can be substantial. In addition, for those foreign investors who do invest under the Foreign Investment Law, a permit application and relevant documents addressing all areas appropriate to the proposed operation in Myanmar (including all other necessary approvals) can effectively provide a “one stop” approval process only dreamt about in many other countries in the region.

For large-scale projects, serious thought should be given to investing under the Foreign Investment Law which provides significant tax and other incentives. However, such investments must comply with a rigorous set of criteria and may be subject to significant conditions as to the operation of the investment.

In practice, any investment requiring Government land and all joint ventures with State-owned economic enterprises or any part of the Government are subject to and must apply under the Foreign Investment Law. Also, joint ventures to be formed with local private citizens or entities which have obtained approval or concessions under the Citizens Investment Law 1994, must obtain, prior to formation, a permit under the Foreign Investment Law. Failure to obtain a Foreign Investment Law permit in these circumstances will breach the Citizens Investment Law and will expose the joint venture company (and each of the shareholders) to the possibility of fines and, more importantly, of being blacklisted from any Government approval for any future business venture in Myanmar.

# Foreign Investment Policy

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The Government's main foreign investment policy objectives, which will be considered when appraising an application under the Foreign Investment Law are.

- Adoption of a market-oriented system for the allocation of resources.
- Encouragement of private investment and entrepreneurial activity.
- Opening up Myanmar's economy to foreign trade and investment which includes
  - promotion and expansion of exports;
  - exploitation of natural resources which require heavy investment;
  - acquisition of high technology;
  - developing production and services industries involving large capital;
  - creating local employment opportunities;
  - developing of works which would save energy consumption; and
  - regional development.

In order to provide more specific guidance to potential foreign investors, some 85 types of activities have been specified as open to foreign investment. Annexure 2 to this Chapter broadly outlines the areas declared available for investment under the Foreign Investment Law. A foreign investor may apply for and obtain a permit under the Foreign Investment Law for an economic activity not so specified, provided the foreign investor can explain how the activity would be mutually beneficial to Myanmar and the foreign investor.

# Application Procedures

A foreign investor wishing to invest in Myanmar under the Foreign Investment Law must apply to the Myanmar Investment Commission in the prescribed form for a permit, for the Commission's permission to undertake the proposed investment. Alternatively, the permit may simply not be renewed at the end of the relevant two-year period.

Paragraph 7 of "Procedures Relating to the Union of Myanmar Foreign Investment Law" (Notification No. 11/88).

# Amended foreign investment law set for July 4 parliament session

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- ❑ Myanmar's amended Foreign Investment Law will be resubmitted to parliament on July 4.
- ❑ Key changes to the draft that was submitted earlier this year concern land use. President U Thein Sein highlighted the importance of workable laws and regulations to potential investors during his state of the union address on national television on June 19. "That is why the needed laws and regulations are drawn again according to the international regulations and soon, the foreign investment law will be submitted to the Pyidaungsu Hluttaw."
- ❑ Also, the draft Myanma Special Economic Zone Law has been finished and after getting opinions from respective departments and business organisations, it will be submitted to the Hluttaw.
- ❑ The financial, taxation, trade, investment and industrial regulations within the draft law have also been amended.
- ❑ The country's economic doors were open and he welcomed investors.

- ❑ An additional amendment changes the duration of investment from an initial period of 30 years, followed by two 15-year extensions to a 50-year investment followed by two 10-year periods.
- ❑ The amended law enables companies to form joint ventures with domestic partners by putting in at least 35 percent of the investment or enter the country as wholly owned foreign enterprises. However, some sectors would remain protected and would not be open to 100pc-owned foreign firms.
- ❑ The economic situation of Myanmar in 2012 has improved from before.
- ❑ It could be considered that there are not any situations for potential investors to be worried about and the situation is looking good.
- ❑ Locals who rent land to foreign investors also opt to use the lease money to buy a share in the project, which is one way of providing extra opportunities for people.
- ❑ Although the Myanmar Foreign Investment Law has not passed yet we feel that people should be prepared.
- ❑ While huge multinationals had not begun investing in Myanmar yet, a patient approach would yield dividends in futures.

- US sanctions were only eased about a month ago, so it will take some time for big investments to come. And the investment law is going to be passed soon.

Thank You