

MYANMAR INVESTMENT RULES

BRIEFING PAPER AND REQUEST FOR SUBMISSIONS

1 BACKGROUND

Reform of the investment regulatory framework in the Republic of the Union of Myanmar is being driven by the Myanmar Investment Commission (**MIC**) and the Directorate of Investment and Company Administration (**DICA**). One key piece of legislation that was recently enacted is the Myanmar Investment Law (**MIL**), the preparation of which was supported by the International Finance Corporation.

The MIL repeals and replaces with one unified law both the Myanmar Citizen Investment Law and the Foreign Investment law, levelling the playing field between Myanmar citizen and foreign investors. The previous investment laws were primarily aimed at attracting and facilitating investment in Myanmar. While the MIL continues to improve the regulatory framework it also importantly will provide the Government with more flexibility to target specific industry sectors as well as encourage investment in less developed parts of the country.

In order to fully implement the MIL rules need to be issued to provide mechanisms for and clarifications of its application. The MIC, with the support of the International Finance Corporation and international law firm Berwin Leighton Paisner, are currently drafting the new Myanmar Investment Rules (**Rules**).

The approach taken in preparing Rules includes: reviewing the existing rules and regulations under the Myanmar Citizen Investment Law and the Foreign Investment Law and assessing their strengths and weaknesses and seeing how they work in practice; carrying out a review of the current investment application assessment processes to identify how they work and how they can be applied to the requirements under the MIL; and focusing on what can be done to ensure that the investment process is clear and streamlined for all investments in Myanmar.

This briefing aims to provide an overview of the priorities which are being considered in drafting the Rules and to provide an opportunity for the relevant stakeholders to provide comments on areas that require attention or on priorities discussed below.

2 GUIDING PRINCIPLES

In drafting the Rules the overall approach determined by the MIC is to follow these guiding principles:

- *Simplification – the Rules should be simply expressed and easy to follow*
- *Streamlined procedures – the application and assessment procedures should be as efficient as possible*
- *Predictability – investors should have confidence that decisions will be consistent with published Rules and policies*
- *Compliance – to ensure the maximum benefit to the Country the MIC and DICA must have tools to ensure that the Rules are being complied with*
- *Clarity – the meaning and operation of the MIL and the Rules should be clear to all stakeholders*

3 PRIORITY AREAS

In line with the guiding principles, the Rules will clarify the requirements, rights and obligations under the MIL, while not going beyond the scope of the law or replicating provisions regulating matters dealt with by other laws. A number of priority areas relevant to the implementation of the MIL have been identified and will form the basic structure of what is to be covered in the Rules.

3.1 **Identification of promoted, restricted or prohibited sectors and rules for regulating investments in these sectors when an MIC Permit or Endorsement may not be required**

The MIL requires a full MIC Permit to be obtained only where the investment meets the relevant criteria specified in the MIL and further explained in the Rules. Investors that wish to apply for tax incentives and foreign investors seeking rights to enter into leases of more than 1 year in relation to investments that do not fit these criteria may also apply for a MIC Endorsement.

In addition to applying these criteria and incentivising investments in promoted sectors, part of the MIC's role is to determine and regulate investments in sectors in which investments will either be prohibited or restricted. Following a whole of Government consultation and review, their function will be to identify (i) investments only allowed to be carried out by the Government; (ii) investments which may be closed to foreign investors; and (iii) investments where foreign investment is only allowed in the form of a joint venture and/or subject to further regulatory conditions or approvals. This prohibited and restricted investment list (**Restricted List**) is expected to be in a format similar to MIC Notification 26/2016 (*Classification of Types of Economic Activities*). Investing in prohibited or restricted sectors may require certain additional approvals, for example approvals from specific Ministries with responsibility for the sector or from the Union Government.

Whereas under the previous laws MIC approval was required to make a Restricted List investment, under the MIL it is likely that some of these investments may be made without requiring an MIC Permit or MIC Endorsement. The Rules therefore need to specify how the MIC will supervise such investments, and how other Ministries which may have a role in the investment process will be engaged. Tools to ensure ongoing compliance will also be required, together with mechanisms for the review and management of the Restricted List.

While an MIC Permit or Endorsement may not be required for some Restricted List investments in the future, transitional provisions for the regulation of existing investments in Restricted List areas pursuant to a Permits may be needed, particularly in circumstances where additional restrictions or requirements were included in the Permit.

3.2 **Application and assessment procedure for investments requiring a Permit**

The MIL requires investment proposals in areas where a Permit is required to be submitted to the Commission and for investments to be made only after a Permit is granted (see section 36 of the MIL for a description of the types of the businesses, with these criteria likely to be further explained in the Rules).

The application procedure is expected to be similar to the current application procedure under the Myanmar Citizen Investment Law and the Foreign Investment Law. Consistent with the General Principles, however, the relevant application forms will be revised with the intent of only requiring information necessary to allow MIC to make an informed decision when assessing the proposal.

The procedure for applying for a Permit shall be clearly defined together with an outline of the steps to be followed by the MIC, in consultation with other Union Ministries and State/Regional Governments where relevant. Timing requirements for each stage of the process will be noted.

The Rules should accommodate investments which occur in stages or which may be conditional on other regulatory processes or other events. Prime examples are in the extractive resources industries where investments may be conditional on the discovery of resources and the obtaining of the necessary environmental approvals.

3.3 **Application and assessment procedure for an Endorsement – land**

The MIL provides a mechanism for separately approving proposed long term leases of land by foreign investors as an exemption to the general law requirement which prohibits the transfer land to foreigners except for a lease of not more than 1 year. The MIL allows foreign investors with an MIC Endorsement to lease land for up to 50 years with the option of 2 ten year extensions. This is the maximum lease term which will be granted, however it is subject to specific restrictions under other the relevant laws, for example shorter maximum lease terms available under the Vacant, Fallow and Virgin Lands Management Law 10/2012 and land use restrictions which may apply depending on the type of land.

Improving access to land is a priority for improving the ease of investing in the Union. The intention of MIC when reviewing applications for long term land leases and issuing Endorsements is to carry out an objective review on whether the type of land is permitted to be leased to a foreign investor and be used for its intended purpose. The approval process should be clear and simple; an appraisal of the merits of the investment project should not be part of the process when approving an Endorsement.

The only purpose of an Endorsement in relation to land is that it exempts the investor from the restriction under the Transfer of Immoveable Property Restriction Act (1987) which limits leases to foreigners to 1 year. It does not exempt investors from any other requirements when entering into a lease, including stamping and registration requirements, or other restrictions which may apply under other laws.

Endorsements will usually only be given for specific plots of land once the necessary documentation has been provided. In limited circumstances the MIC may give pre-approval for companies to enter into multiple land leases. This exception is intended to apply to projects with significant land requirements and where it is operationally not feasible to identify every land plot when applying for the Endorsement. Telecommunication tower companies are an example of a situation where a pre-approval can be given.

Endorsements with a pre-approval may come with certain conditions and do not in any way cure non-compliance under land law. For example if an investor leased land which is not allowed to be leased under the relevant land law, then obtaining an Endorsement does not cure the non-compliance, neither does it make the lease agreement enforceable. Having said this, it is recognised that in certain industries full compliance with relevant land law has not been possible; these issues are not affected by the Rules, but must be dealt with in accordance with the relevant laws.

In some other cases pre-approvals may also be given to comply with land use approval processes, such as under the Vacant, Fallow and Virgin Lands Management Law 10/2012.

3.4 **Application and assessment procedure for an Endorsement – tax exemptions**

With respect to tax relief, the Government must balance the steps it takes to attract investment with the requirement to ensure sound public financial management. The MIL allows for the targeted giving of tax relief as a tool to encourage investment in specific sectors and regions of the country and to encourage strategic investments, technology transfer and job creation.

The MIL allows the MIC to approve various tax incentives in support of an investment, namely (i) corporate income tax exemptions; (ii) relief from customs duties and other internal taxes; and (iii) an exemption or relief from income tax if profits are re-invested.

The Rules will provide a framework for MIC to clarify which business and activities will be eligible for tax incentives as well as which geographical areas of the Union are promoted by having longer corporate income tax exemptions.

The tax Endorsement application process is likely to be a more thorough process in comparison to the land Endorsement application process, and require that more information in relation to the project is provided. Procedures for the assessment of these applications will be noted along with guidance as to the criteria to be applied. Safeguards against the misuse of these incentives shall be considered.

The tax Endorsement shall not affect the investors tax incentives available under other laws, such as under the Vacant, Fallow and Virgin Lands Management Law 10/2012.

The Rules will include provisions to prevent investors from abusing tax incentives, such as selling equipment and materials which have been exempted from import duties, rather than the investor using the materials and equipment on their own project, and by clearly defining what are considered raw materials.

3.5 **Role and working of the MIC**

The Rules shall clarify the meeting procedure and how the appointment and departure of members are dealt with.

Overall the Rules shall support the MIL in its transition to an investment promotion and facilitation agency, while ensuring that it has the means to monitor compliance with the MIL and ensure that business is conducted in a responsible manner.

The Rules shall provide clear procedures for the interactions investors will have with MIC where MIC is required to provide a response or approval. Reporting obligations and other transparency requirements applicable to the MIC and investors will also be provided for (discussed further below).

The MIC's role in supporting investors once the investment is made will also be clarified, particularly measures it may take should issues arise between investors and other regulatory authorities to promote both investor confidence and compliance with the law. The role of MIC in these circumstances could be to act as a kind of investment ombudsman.

The Rules can also provide more details on the role of Regional or State Governments in the investment process.

3.6 **Reporting requirements**

Under the MIL the MIC is required to provide a quarterly report on its activities to the President and the Government as well as an annual report on the progress of the businesses it has approved. The Rules may provide more detail on the information which MIC must report on to the Government. In principle, the reporting requirements should be based on the information it already has, without requiring investors to provide information in addition to what they have already provided, and reporting requirements should not duplicate information which is gathered and reported by other regulators. The purpose of the report should be to provide the Government with information relating to the progress of investments in the Union and compliance. Effective measures to ensure that relevant information is made available to the MIC and tools to help the MIC to encourage and enforce compliance with the MIL are also needed.

3.7 **Framework and procedure regarding investor guarantee and potential investment expropriations**

The MIL provides significant investor protections and clarifies the limited grounds under which the Government may legitimately expropriate investments or relevant rights. This is consistent with international norms and is based on public interest grounds and the principle that the investor will receive fair and adequate compensation. Indirect expropriation is recognised as a form of expropriation under the MIL.

The Rules shall clarify what the procedures are in the event of an expropriation, including the rights to appeal. Details should also be included on the calculation of compensation and payment procedures in the event that an expropriation has taken place.

3.8 **Dispute settlement mechanism / grievance support**

The MIL provides for the establishment of a grievance mechanism with the objective to resolve disputes, particularly between an investor and the Government, before instigating a legal claim. The intention is that investors shall first always attempt to settle disputes under this procedure.

The Rules need to set out the dispute settlement mechanism and determine whether they will be mandatory or not, taking into account that the mechanism may need to respect or align with dispute resolution provisions in relevant agreements which the investor may have entered into.

The Rules need to clarify the responsible body that will facilitate the dispute resolution procedures and the rules or procedures to be followed.

The MIL reserves the right for investors to appeal if there are any changes to the terms under a licence, Permit or Endorsement. It needs to be considered if the Rules will include details on the appeals process.

3.9 **Transfer of funds**

As the transfer of funds provisions are already quite detailed in the MIL, which itself is consistent with relevant rules on foreign exchange and remittances administered by the Central Bank of Myanmar, it is expected that any Rules here will be quite simple, providing any clarifications that may be required. The Rules should not require MIC to provide any approvals which would overlap with the

authority of the Central Bank of Myanmar or other relevant regulator or which are not consistent with the Foreign Exchange Management Law 12/2012.

3.10 **Labour issues**

The provisions relating to employment in the MIL require that applicable labour laws are complied with, that capacity building programs are provided and that only citizens are employed for unskilled work. There are no quantitative restrictions on the employment of foreign persons in more highly skilled and managerial areas.

The Rules should not duplicate or regulate areas which are or should be regulated by other labour related laws. One consideration is if the MIC will continue to be involved with issuing stay permits/work permits to foreign employees working in Myanmar, if that is the case, what will be the procedure. Another area to be evaluated is whether more detailed criteria should be prescribed in relation to the skill and qualification requirements that foreign employees must meet

3.11 **Insurance**

The MIL requires that insurance coverage is obtained as prescribed. The Rules should provide that the necessary insurance policies are entered into to protect investments in the Union, however, the requirements need to take into account that the MIL will cover almost all investments in the Union and not only large investment projects with significant capital outlay. Also that for many operations in Myanmar the concept of fully insuring their operations is a new concept and may impose a financial burden. The prescribed insurances must also allow for the reality that the insurance market and insurance services in Myanmar are still developing.

3.12 **Loans and security**

Access to finance is one of the primary challenges which Myanmar investors face, and this can affect their competitiveness in competing in business.

The Rules should not place restrictions on obtaining access to finance and should minimise the circumstances in which the MIC approval is required for obtaining loans. The conduct of lending institutions in Myanmar is already regulated by the Financial Institutions Law 20/2016 and the requirements for obtaining offshore finance are regulated by the Foreign Exchange Management Law 12/2012. The Rules should not duplicate requirements which are already in place and should allow for maximum flexibility in how investors want to finance their investment.

Myanmar law already specifies the requirements when providing security to secure the obligations under a loan. The Rules should not in principle provide another level of approval or registration requirements. The Myanmar Companies Act 1914 (and the draft new Myanmar Companies Law), Registration Act 1909, the Transfer of Property Act 1882, the Farmland Law 11/2012 and the Vacant, Fallow and Virgin Lands Management Law 10/2012 already deal with security. In addition security is also part of a separate regulatory reform process, with the proposed implementation of a Secured Transactions Law and Insolvency Law.

One aspect that needs to be considered is if the MIC provides an Endorsement for a foreign investor to enter into a long term land lease and the foreign investor then seeks to grant security over the lease rights to a foreign lender. Should the MIC be involved in this process? Under the Myanmar Companies Act charges and mortgages over property need to be registered with DICA – whether there should be any further MIC approval or registration requirement should be considered,

along whether this would also cover assignments, pledges and other kinds of security not required to be registered under the Myanmar Companies Act.

Another consideration is any role the MIC may be able to play in working with other relevant Government agencies to assist with the efficient implementation of security arrangements, such as the Inland Revenue Department and the Deeds Registration Office.

3.13 Changes in ownership of an investment

In the MIL investors with a Permit or Endorsement must give notice to the Commission of any transfer of shares. In general investors should be allowed to run their business how they see fit and dispose of their interests in the business without any additional restrictions.

It should be noted that where there are no restrictions on transferring interests in a business, other restrictions may still apply, for example where there is a minimum citizen ownership requirement for investments which are considered restricted to foreign investors or if there are any restrictions under other applicable laws. Having no transfer restrictions would also not override any contractual change of ownership provisions in joint venture or shareholder agreements.

The previous Foreign Investment Law required approval for any share transfer in by a company with a Permit. Where the notification requirement is required it needs to be considered whether these restrictions apply similarly to change in ownership at the holding company level (and beyond) and whether the notification requirement similarly applies to other methods of transferring ownership to a business, such as transferring the assets of a business or changing control through issuing shares.

If the notification for changes of ownership is required at any level the threshold at where such notifications starts to apply needs to be considered, taking into account that in the normal course of business minority shareholders may transfer their interests in a business (particularly in the case of a publicly listed company) and in some cases where large businesses (the ultimate beneficial owner) gets sold and the investment may only be a small part of the ultimate owner's assets. It should be considered whether the concepts of a holding company and ultimate holding company as defined under the draft Myanmar Companies Law should be used.

3.14 Penalties

When considering penalties it is important to consider that the penalty is appropriate when taking into account the severity of the offence. Penalties should also provide MIC flexibility in ensuring compliance with the MIL. It is suggested that the administrative penalties which MIC is authorised to administer are not detailed or prescriptive in nature to provide MIC flexibility in their application. At the same time the process of administering penalties needs to be clear, transparent and applied indiscriminately so that investors are clear over their rights and obligations as well as confident in the impartiality of MIC.

3.15 Service fees

Service fees should not act as a barrier to investment, but at the same time shall help meet the funding requirements of MIC. The introduction of any service fees must take into account the nature of the business which is making a submission for registration or an application and the value of the services which are to be provided.

If service fees are introduced, it should be considered whether they are reduced for small and medium sized citizen owned enterprises.

3.16 **Miscellaneous clarifications and regulations**

3.16.1 Environmental and social impact related matters

An objective of the MIL is to encourage environmentally and socially responsible investment. It has included a number of safeguards to protect against the implementation of projects which will have a significant environmental and social impact as well as placing obligations on investors to ensure that their investment is carried out in a responsible manner. Relevant requirements under the MIL include:

- investments with a significant environmental or social impact need a Permit;
- MIC needs to consider the environmental and social impacts of companies when approving Permits for capital intensive projects;
- investments with significant environmental and social impacts can be placed on the prohibited list and if they were to go ahead would need approval from the Pyidaungsu Hluttaw (Parliament); and
- investors are required to comply with laws which regulate environmental and social impacts and reports under those laws must be submitted to the MIC, these reports must cover the entirety of the investment.

The MIC must finely balance its role with respect to environmental and social impact compliance to ensure that it promotes responsible investment while not becoming an environmental regulator, which is the responsibility of the Ministry of Natural Resources and Environmental Conservation.

3.16.2 Small and medium size enterprises

The MIL allows for Myanmar citizen owned small and medium size enterprises to benefit from additional incentives and benefits not available to other investors. It needs to be considered what the qualifying criteria are and what incentives and benefits they are eligible for. This may include provisions to decrease the barriers to investing, increasing tax incentives and lessening the compliance requirements.

3.16.3 Investor reporting requirements

The MIL will regulate all investment in Myanmar, of any scale. Ease of remaining compliant is one issue important to encouraging investment in the Union. Considering that currently companies operating outside of the Myanmar Citizen Investment Law or Foreign Investment Law have limited reporting requirements, the fact that they are now covered by the MIL should not impose significant additional reporting requirements.

In certain limited circumstances as required under the MIL or to promote compliance and good practice it may be desirable to consider applying reasonable reporting requirements to investors who have received MIC Permits or Endorsements in respect of tax exemptions.

4 REQUEST FOR SUBMISSIONS

As part of the reform and Rules drafting process, the MIC invites interested parties to submit their comments on:

- Matters which need to be addressed during the transition period from where the new MIL has been enacted but the rules and regulations under the Myanmar Citizens Investment and Foreign Investment Rules are still in force pending adoption of the new Rules;
- feedback on issues affecting investors and stakeholders under the previous Myanmar Citizen Investment Law and Foreign Investment Law, including examples of practical difficulties faced by investors and suggestions of procedural improvements in relation to applications; and
- feedback on the priority areas which the new Rules will focus on as explained above.

All submissions must be submitted in writing and sent by email, post or fax to:

Email policylegal.dica@gmail.com
Post Myanmar Investment Law reform project
 Myanmar Investment Commission
 1 Thitsar Rd, Yankin Township
 Yangon
Fax 01658139

Written submission in Myanmar or English may be made at any time, however, may not be considered if received after 4pm on 16 December 2016.

Submissions will assist in the Myanmar Investment Law reform project and in drafting of the new Rules and will only be carefully considered by MIC. Please note that the MIC is under no obligation to adopt any particular comments or proposal submitted.

All submissions shall be considered non-confidential and MIC may make public, without specifically identifying the sender, any submission it receives.