

Come you back to Mandalay

While there "*ain't no 'busses runnin' from the Bank to Mandalay*"ⁱ, that has proved to be no barrier to the surge of foreigners arriving to explore business opportunities in Burma/Myanmar. In this briefing, we provide an overview of recent developments and issues to be considered by investors wishing to do business in the country.

On 1 April 2012, Aung San Suu Kyi's National League for Democracy Party (NLD) won 43 of 45 seats contested in by-elections for Burma/Myanmar's parliament, representing around six percent of the total number of seats. The NLD's ability to contest the elections was the result of a series of recent reforms pursued by President U Thein Sein, who was elected as leader of the Union Solidarity and Development Party (USDP) in November 2010.

Foreign governments have been encouraged by recent reforms and have taken steps to normalise relations with Burma/Myanmar including by relaxing economic sanctions. The improving political environment is also driving private sector interest in the country.

Notwithstanding these positive developments many risks remain. In particular, Burma/Myanmar's legal framework for foreign investment creates various challenges for businesses seeking to enter the country. In addition, Burma/Myanmar is perceived to be one of the most corrupt countries in the world. Investors should also take note of risks and challenges stemming from Burma/Myanmar's poor human rights record.

International sanctions

In response to the landmark reforms initiated by U Thein Sein, many foreign governments that have maintained sanctions against the military regime for several years, have now started to ease certain economic restrictions, paving the way for greater investment and development in Burma/Myanmar.

Most recently, on 23 April 2012, the European Union (EU) Foreign Affairs Council announced its decision to suspend all EU restrictive measures imposed on the Government of Burma/Myanmar for a period of 12 months, except for an arms embargo which will remain in force. The changes are expected to take effect later in April.

Because the EU has suspended rather than lifted its sanctions, prospective investors will need to assess whether the further reforms necessary to persuade the EU to permanently lift the restrictions will be implemented by the authorities in Burma/Myanmar.

Other countries have also announced that sanctions will be eased. Australia, Norway and the United States have all lifted restrictions on certain government figures, while retaining arms embargoes and certain measures targeted at the Burmese

Contacts

For more information on the subjects covered in this briefing, please contact one of the authors

Rae Lindsay
Partner, London

T: +44 20 7006 8622
E: rae.lindsay
@cliffordchance.com

George Kleinfeld
Partner, Washington DC

T: +1 20 2912 5126
E: george.kleinfeld
@cliffordchance.com

Antony Crockett
Senior Associate, London

T: +44 20 7006 2332
E: antony.crockett
@cliffordchance.com

Michael Lyons
Senior Associate, London

T: +44 20 7006 4317
E: michael.lyons
@cliffordchance.com

Marc Rathbone
Counsel, Singapore

T: +65 6410 2222
E: marc.rathbone
@cliffordchance.com

military. The United States has indicated that it will consider further easing of their sanctions (which remain the most comprehensive measures in place) if democratic reform continues.

The US sanctions, imposed by the Treasury department's Office of Foreign Asset Control (OFAC) apply to all "US Persons", which include all entities organized under US law, all persons in the United States, and any US citizens or US green card holders globally. Entities domiciled outside the United States are not US Persons and thus do not have compliance obligations under the US rules, except in relation to their activity in or through the United States or otherwise involving US Persons.

As well as prohibiting dealings with designated persons (and entities owned or controlled, directly or indirectly, by designated persons) all persons to whom US sanctions apply are, with a few exceptions, prohibited from any new investment in the economic development of Burma/Myanmar's resources. This includes entering into any contract for the economic development of "resources located in Burma/Myanmar", the supervision or guarantee of such contracts, and equity investments or other participation in royalties, earnings, or profits of enterprises dedicated to the economic development of resources in Burma/Myanmar. Further, there are prohibitions against imports into the United States of products originating in Burma/Myanmar and the direct or indirect transfer of funds to Burma/Myanmar or the provision of financial services, including insurance services, investment or brokerage services, banking services, money remittance services, loans, guarantees or other extensions of credit.

Although the US has lifted travel bans imposed on certain Burmese officials and has relaxed certain financial restrictions in order to allow non-profit organisations to undertake development-related projects in the country, restrictions on private investment and provision of financial services remain in place for the time being. Speaking in early April, US Secretary of State Hilary Clinton stated that the US plans to ease its remaining sanctions against Burma/Myanmar, but not so quickly as to give up US diplomatic leverage over the political reform process in Burma/Myanmar. The speed with which the US will move to ease restrictions on commercial activities is difficult to predict, although it may proceed with more haste in light of the EU decision to suspend all economic sanctions.

Until applicable restrictions are amended or lifted, businesses considering investing in Burma/Myanmar should seek legal advice prior to entering into any transaction.

Burma/Myanmar's legal framework for foreign investment

Burma/Myanmar has generally been viewed as an unattractive jurisdiction for foreign investors due to the lack of adequate legal protections. For example, the Fraser Institute's 2011 Global Petroleum Survey ranks Burma/Myanmar as one of the least attractive jurisdictions for foreign investment. Whilst there are signs of positive reform, investors should continue to be wary of Burma/Myanmar's legal system, which presents significant and varied risks to foreign investors.

Burma/Myanmar's 1988 Foreign Investment Law (FIL) established the Investment Commission, which 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. One such restriction is the requirement that foreign investors must enter into joint ventures with local companies. The FIL also establishes foreign currency controls.

New foreign investment legislation was reported to have been approved by Parliament last month and is expected to be endorsed by the President this month. It is understood that the new law will abolish the requirement for foreign investors to enter into joint ventures with local partners. The new law is also supposed 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 legal framework for foreign investment, the Government is also pursuing monetary reforms, including a managed float of the Kyat and simplification of foreign-exchange rules.

Some observers have questioned the capacity of the Government and other institutions to deliver and have warned against a "too much, too fast" approach, including on grounds that poorly drafted legislation will be rushed through parliament without adequate consultation.

Another area of concern for prospective investors relates to the reliability of Burma/Myanmar's courts and the lack of alternative options for ensuring contracts and property rights of foreign investors are respected. In particular, investors should take note that Burma/Myanmar is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (although the government has recently announced that it will sign the Convention soon).

Enforcement of arbitration agreements and awards in Burma/Myanmar, at this time, would appear to depend upon legislation pre-dating the country's independence, chiefly the Arbitration (Protocol and Convention) Act 1937 which implemented the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. Burma/Myanmar's Arbitration Act 1944 (based on equivalent English legislation of the time) creates a regime for domestic arbitration and does not provide for the enforcement of foreign arbitral awards.

Burma/Myanmar's Companies Act 1914 provides for disputes to be settled via arbitration, but only under the Arbitration Act. Historically, the Attorney General's Office and the Investment Commission have refused to approve contracts providing for offshore arbitration.

Because of Burma/Myanmar's political risk profile, prospective investors in the country are advised to speak specialist advice on investment protection, including the possibility of structuring their investment in order to take advantage of investment treaties signed by Burma/Myanmar.

Respecting Human Rights

The imposition and maintenance of sanctions against Burma/Myanmar was in 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. Many foreign investors who were able to operate in Burma/Myanmar in recent years have faced allegations of complicity in human rights abuses, have been forced to defend civil litigation by victims and/or have divested from Burma/Myanmar following pressure from investors and other stakeholders. Foreign investors have also become embroiled 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 reportedly taken steps towards reforming Burma/Myanmar's labour laws (including by easing restrictions on the formation of trade unions) instances of forced labour and other abuses continue to be reported. The UK Secretary of State for International Development has stated that "the human rights and working conditions of workers in Burma/Myanmar, particularly the use of forced labour remains a serious concern."

While it is hoped that the human rights situation in Burma/Myanmar will 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 Burma/Myanmar should include a thorough assessment of risks relating to human rights.

In announcing the easing of sanctions against Burma/Myanmar, the EU Foreign Affairs Council recognised the vital contribution the private sector can make to the development of Burma/Myanmar and welcomed companies exploring trade and investment opportunities in the country. However, the Foreign Affairs Council also indicated that EU investors are 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.

Corruption – last but not least

Burma/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 Burma/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 Burma/Myanmar will need to ensure that existing assets were not originally acquired as the result of corruption.

When entering into joint ventures or acquiring interests in local entities, foreign investors will wish to ensure that the ongoing business activities of such entities comply with applicable anti-corruption laws.

Prospective investors may require the assistance of local intermediaries to pursue and develop commercial opportunities in Burma/Myanmar. Investors should exercise caution in the event of requests for payment of commissions or other fees, particularly in relation to public tenders or the development of other projects.

For more information

Members of **Clifford Chance's Burma/Myanmar Focus Group** have extensive experience in Burma/Myanmar and continue to monitor developments in the country.

For further information, please refer to Marc Rathbone (Singapore) marc.rathbone@cliffordchance.com

ⁱ Poem by the English Poet, Rudyard Kipling, "Mandalay", June 1890

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance LLP 2012

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.