

在新兴的缅甸进行外国投资

Legal wheels turn for foreign investors in Myanmar

可能由于11月大选，对缅甸的外国投资热潮在2015年有所减退，但预计其在2016年仍然会快速增长。大选后，该国全部政权几乎已经移交给昂山素季领导的、过去是反对党的缅甸全国民主联盟（民盟）。这意味着缅甸向政局稳定和对外开放迈进了重要一步。

虽然军方仍保留很大权利，但不得不说这是该国一次非常重大的进步。有人曾猜测军方将在民盟大获全胜后会插手并拖延改革，但这种情况并未发生。对于这次政权交替以及近年来缅甸在政治和经济方面取得的整体进步，军方都功不可没。

据说，2008年《宪法》的修改是民盟无法逾越的军方警戒线。具体而言，《宪法》规定军方在议会占有25%的席位，而民盟修改《宪法》需要超过75%的赞成票，但要获得军方赞成票会很困难。

由于昂山素季的女儿持有外国护照，按照《宪法》规定她不能担任总统。据说自从民盟选举胜利后她一直与军方协商修改宪法的相关规定。但显然并未成功：该警戒线似乎仍然牢不可破。民盟可能因此在2016年3月10日宣布推选吴廷觉作为该党总统候选人。吴廷觉是昂山素季多年的亲信，显然会遵从她的指示行事（在公开场合她也曾坦言自己才是幕后决策者）。

政治变革

尽管如此，一场巨大的政治变革在缅甸已基本完成：民盟推选的新总统将在4月1日就任，而昂山素季可能会被任命为外交部长，民盟的一些领导人也将担任其他部长职位，并在议会中占据多数席位。缅甸目前为鼓励外商投资做好准备。

随着大部分国际制裁被取消，缅甸正在努力利用其地缘战略位置、丰富的自然资源、年轻的劳动力、5000多万人口以及与世界部分最具活力的经济体的密切关系，努力向现代化目标迈进。为此，缅甸正在积极鼓励外国投资。许多国际公司已经进驻缅甸，还有更多的公司计划进入。但是，在缅甸投资仍然具有一定风险。

尽管缅甸目前的法律环境处在改革和现代化的初期阶段，但军方的平民政府党在针对外国投资的法律起草方面已经取得进展，而民盟领导的新议会有望通过更有利于外国投资的法律。这些法律将与英国殖民时期制定的法律法规（大部分现在仍然作为基本法律框架）并存，此外还有各届军政府在过去五十年内颁布的法律法规。

这是普通法系法律与接近大陆法意味的法律的混搭；而过去几十年该国“政策和惯例”的随意应用更增加了其复杂性。这些“政策和惯例”并未具体落实在任何法律法规中，而且经常也并未被公布。因此，处理该国法律现状需要的不仅是耐心，更重要的是，需要深入了解殖民时期法律、以往军政府法律和惯例以及近期有利

While the initial rush of foreign investors to Myanmar slowed down in 2015, likely due to the November elections, 2016 is predicted to be a year of rapid growth. The almost complete transition of power to Aung San Suu Kyi's National League for Democracy (NLD), formerly in opposition, represents an impressive step forward to stability for the nation, and to opening up to the world.

Sure, the military maintains a significant amount of power, but it cannot be overstated how important this development is for the country. Some have wondered if, after the NLD landslide victory, the military would step in and slow reform, but that has not happened – the military should be credited with not only this transition but also for the overall political and economic advancements made in recent years.

One of the military's reported red lines not to cross is modifying the 2008 constitution. More specifically, the constitution provides the military 25% of the seats in parliament. To amend the constitution requires a vote of more than 75%, so it is unlikely as it would require approval by the military. This may be why on 10 March 2016 the NLD announced their presidential candidate, U Htin Kyaw, a long-time trusted associate of Aung San Suu Kyi who will apparently abide by her instructions (she has been frank in public comments that she will be making the decisions).

The constitution does not permit Suu Kyi to be president as her children do not hold Myanmar passports. Since the NLD's election victory she has been reportedly discussing with the military allowing this provision of the constitution to be modified, however the red line appears to remain firm.

Political change

Regardless, a huge political change is almost complete: the new NLD-nominated president starts his term on 1 April, and Suu Kyi will likely be named Minister of Foreign Affairs. Various other ministries will have NLD heads and the parliament is comprised with a majority of NLD parliamentarians. The country can now get on with encouraging foreign investment.

With most sanctions now removed, Myanmar is trying hard to turn its geopolitically strategic position, rich natural resources, young labour force, over 50 million-strong population and proximity to some of the most dynamic economies in the world into an engine that drives it into the modern age. To do so, it is actively encouraging foreign investment, and many international companies have arrived already, with more keen to come. However, risks remain.

Although the legal environment is in the early stages of reform and modernization, the military's civilian government arm has made progress in drafting laws oriented towards foreign investment, and more laws in this vein are expected to be approved by the new NLD-led parliament. These laws co-exist both with old British colonial laws and regulations – which provide much of



William Greenlee

外国投资的法律。在安排好法律和税务问题后，乐于承受风险的投资人可基于“高风险高回报”的原则提早行动起来。

外国投资规则

在缅甸进行外国投资的法律依据是2012年11月2日通过的《外国投资法》以及缅甸投资委员会于2014年8月发布

的第49号《通知》。缅甸投资委员会负责监管进入缅甸越来越多开放领域的外国投资。《外国投资法》关注国际公司获准进入的行业，以及进入的形式，其中侧重于能够带来专业知识以及技术的、劳动和资本密集型的基础设施和制造项目。

除了前期成功实施《外国投资法》等有利外国投资的法律外，缅甸在过去六个月内通过了一系列新法进一步开放外国投资。例如，商务部第96/2015号《通知》向外国投资者开放了以往禁止的贸易领域。该《通知》规定缅甸和外国公司成立的合营企业可以在以下领域开展进口和贸易业务：化肥、种子、农药和医院设备。

矿业发展

缅甸矿业一直受到外国投资人青睐，现在在这一行业进行外国投资也将变得更便利。新的《矿业法》于2015年12月24日颁布法规定，在得到矿业部批准后，由矿业局发出中小型采矿活动的许可证。根据规定，“中型开采”指获得期限最长十五年的采矿许可证、需要适量投资或少量技术的矿产商业开采活动，而“小型开采”指获得持有期限最长十年的采矿许可证、需要小额投资的矿产商业开采活动。

另外，新的《矿业法》规定采矿许可证持有人可用现金或矿石缴纳许可费和其他费用。如果用现金支付，需使用缅甸货币。

在缅甸这样的国家投资，外国投资者关注的一个关键问题是，在合同对方违约时他们的权益如何得到保护。就此问题，今年早些时候缅甸颁布了新的《仲裁法》，其大部分规定是基于《纽约公约》的标准条款。

上述动态以及其他法律制度的改善，加上政权的平稳交接，使缅甸成为更具吸引力的投资目的地。

the fundamental legal framework still in place today – and with laws and regulations issued by the various military governments in the past 50 years.

This mixture of a common law heritage with laws more akin to an abridged civil law approach has been further complicated by the liberal application in the past few decades of “policies and practices” that are not detailed in any laws or regulations, and are often unpublished. The result is a legal landscape that requires patience and, most importantly, a deep understanding of the colonial laws, former military government laws and practices, and finally the recent pro-foreign investment-oriented laws. With careful legal and tax structuring and an appetite for risk, foreign investment can be made in Myanmar on the principle of high risk/high reward for the early movers.

Foreign investment rules

The pillars for foreign investment in Myanmar are the Foreign Investment Law, passed on 2 November 2012 (FIL) and Notification 49 of August 2014, issued by the Myanmar Investment Commission (MIC), the body overseeing foreign investment into Myanmar that liberalized more sectors to foreign investment. The FIL focuses on industry sectors that international companies are permitted to enter, and in what form, with a focus on infrastructure and manufacturing projects that are jobs and capital intensive and that bring knowhow and technology to Myanmar.

In addition to its earlier successes in implementing pro-foreign investment laws like the FIL, Myanmar has in the past six months passed a number of new laws further liberalizing such investment. For example, it has opened to foreigners the previously banned trade sector through the enactment of Ministry of Commerce Notification 96/2015, which provides that a joint venture company between a Myanmar and a foreign entity can import and trade in fertilizers, insemination seeds, pesticides and hospital equipment.

Mining sector

The mining sector has always been an attractive field for foreign investors, and it is now easier for foreigners to invest under the Mining Law, enacted on 24 December 2015. The law provides that permits for small and medium production are issued by the Directorate of Mines, with the approval of the Ministry of Mines. According to the law, “medium-scale production” means the commercial production of minerals with the permission to produce for up to 15 years, requiring a moderate amount of investment or limited technologies, while “small-scale production” means the commercial production of minerals with the permission to produce for up to 10 years, and requiring small investments.

The Mining Law also sets out the requirement for any holders of mining permits to pay a royalty and other fees, either by cash or via the mineral proportion. If such royalty is paid in cash, it must be paid in Myanmar currency.

A key aspect foreign investors are interested in when entering a country such as Myanmar is the contractual protection of their investments in case of non-compliance with the contractual terms by counterparties. In this regard, the Arbitration Law was issued earlier this year, largely adopting the New York Convention model rules.

These and other improvements to the legal regime, coupled with a smooth transition of power, are making Myanmar an attractive place to invest.

作者: William Greenlee是DFDL律师事务所驻缅甸合伙人及执行主管。您可以通过电话+95 1 540 995或电邮 william.greenlee@dfd.com 与他联系

William Greenlee is partner and managing director at DFDL Myanmar. He can be contacted on +95 1 540 995 or by email at william.greenlee@dfd.com