

Mining 2019

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Mining

2019

Contributing editors**Michael J Bourassa and Alison Lacy****Fasken**

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Mining*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Michael J Bourassa and Alison Lacy of Fasken, for their continued assistance with this volume.



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MINING INDUSTRY

Standing

1 | What is the nature and importance of the mining industry in your country?

According to the Directorate of Investment and Company Administration (DICA) website, as of February 2019, US\$2.90 billion had been invested in 71 projects within Myanmar's mining sector, accounting to some 3.66 per cent of total foreign investment in the country.

The Ministry of Natural Resources and Environmental Conservation (MoNREC) (formerly the Ministry of Mines) has set up various mining enterprises to form joint venture companies to enter into bilateral partnerships for mineral exploring, developing and exploiting.

Target minerals

2 | What are the target minerals?

Myanmar has the largest jade deposits in the world, and its ruby deposits account for 90 per cent of the world's supply. Other precious stones include sapphire and diamonds. Copper is the largest mining export, but other mineral products are also widespread throughout the country, including gold, silver, lead, zinc, tin, tungsten, nickel and antimony. Certain mining activities may be prohibited based on the targeted mineral (see question 13).

Regions

3 | Which regions are most active?

Mineral exploration and mining are active throughout the country, but is under-reported. Currently, joint ventures mine in the following areas:

- gold in Benmawk, Kani, Kyaukpadaung, Yemathin, Tagon and Kyaukpons;
- copper in Shangalon, Kani, Kyaukpadaung, Heho and Monywa;
- tin in Dawei river;
- tungsten in Dawei river;
- nickel in MweTaung, Wuntho and Taguang;
- iron in Marliphant;
- limestone in Indaingyi; and
- coal in Ngaphe.

LEGAL AND REGULATORY STRUCTURE

Basis of legal system

4 | Is the legal system civil or common law-based?

The Myanmar legal system is based upon a mixture of common and civil law.

Regulation

5 | How is the mining industry regulated?

MoNREC regulates the mining industry. Under the former government, ruling until 30 March 2016, the Ministry of Mines comprised six enterprises and two departments. Since the Ministry of Mines and the Ministry of Environmental Conservation and Forestry was combined by the new government as MoNREC, there are three departments, namely:

- the Union Minister's Office;
- the Department of Mines (DoM); and
- the Department of Geological Survey and Mineral Explorer.

The four enterprises, which each focus on a specific area of mining, are:

- No. 1 Mining Enterprise – lead, zinc, silver, copper, iron, nickel, chromite and antimony;
- No. 2 Mining Enterprise – gold, tin, tungsten, rare earth, titanium and platinum;
- Myanmar Gems Enterprise – gems, jade and jewellery; and
- Myanmar Pearl Enterprise – pearls.

The DGSE is responsible for geological surveys and mineral exploration and DoM is responsible for forming mineral policy, enforcing regulations and environmental standards and collecting royalties.

6 | What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Laws governing mining in Myanmar include the following:

- the Myanmar Mining Law 1994 and its amendment in 2015;
- the Myanmar Mining Rules 2018;
- the Myanmar Investment Law 2016 (MIL);
- the Myanmar Investment Rules 2017;
- MIC Notifications;
- Notification No. 10/2017 (Designation of Development Zones);
- Notification No. 11/2017 (prescribed Investment Capital Amendments);
- Notification No. 13/2017 (Classification of Promoted Sectors);
- Notification No. 15/2017 (List of Restricted Investment Activities);
- the State-Owned Economic Enterprises Law 1989 (SEE Law) and its amendment Law in 1997;
- the State-Owned Economic Enterprises Procedure 1989;
- the Myanmar Gemstone Law 2019;
- the Gemstone Rules 1995;
- the Myanmar Pearl Law 1995 and its amendments in 2014 and 2018;
- the Myanmar Pearl Rules 2000 and its amendments in 2015 and 2016;
- the Environmental Conservation Law 2012;

- the Environmental Conservation Rules 2014;
- the Environmental Impact Assessment Procedure; and
- the Environmental Quality Standards (EQS) 2016.

The most significant mining news over the past year was the issuance of the Myanmar Mining Rules on 13 February 2018 by MoNREC, implementing the Mining Law and its amendments. The 2018 Rules are similar to the 1996 Rules, adding some sections and provisions to be compatible with present-day requirements and to be more precise.

Investors will be encouraged to see progress in mining regulation being made; most recently, with the approval of the Myanmar Mining Rules, which repealed the previous mining rules because 'priority sectors' for income tax benefits adopted in MIC Notification 13/2017 under the new Myanmar Investment Law did not include mining and the authority's apparent recent reluctance to approve new licences or continue the old ones.

MoNREC is principally responsible for administering mining and the Myanmar Investment Commission (MIC) oversees MIL.

An amendment to the Mining Law was enacted in November 2015, which included a number of revised definitions and clarifications of the authority of the Ministry, Department and Mining Enterprises. The law amending the Myanmar Mining Law was published in December 2015 with more details on the small, medium and large-scale production of minerals. This amending law also conferred more power to the Ministry relating to granting approval for specified foreign investment. MoNREC announced the new Myanmar Mining Rules on 13 February 2018 with Notification No. 13.

Classification system

- 7 | What classification system does the mining industry use for reporting mineral resources and mineral reserves?

There is no legal classification system for reporting mineral resources and reserves, except CD-ROMs can be bought from the DGSE.

MINING RIGHTS AND TITLE

State control over mining rights

- 8 | To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

According to the SEE Law, the government has the sole right to carry out the exploration and extraction of pearls, jade, precious stones and metals. The government also has the sole right to export these minerals. However, the government may by notification, under section 3 of the SEE Law, permit a private company to carry out mining activities. Pursuant to MIC Notification No. 15/2017, feasibility study and production of radioactive metals such as uranium and thorium is allowed to be carried out only by the country.

Publicly available information and data

- 9 | What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

MoNREC is responsible for maintaining information and data, which are presented at workshops from time to time. MoNREC's website is: www.mining.gov.mm. The DGSE provides CD-ROMs for reporting mineral resources and reserves.

Acquisition of rights by private parties

- 10 | What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

The Mining Rules 2018, and the law amending the Myanmar Mining Law 2015, provide for the issue of prospecting permits, exploration permits, small, medium and large-scale mineral production permits, subsistence mineral production permits and integrated permits for prospecting, exploration and production. The law amending the Myanmar Mining Law added a provision to issue a permit to conduct a feasibility study, value-added process and sale and purchase permit. In practice, mining is usually conducted under production sharing contracts (PSCs), according to the Mining Rules 1996. The current Rules state that joint venture agreements can be entered into in accordance with the Mining Rules 2018. Under the current model of PSC, MoNREC provides two years for prospecting. An exploration permit is granted for no more than three years with a one-year extension available upon submitting an application for extension. A production permit is generally granted for with extension. These PSC provisions differs from the Mining Rules 2018. There are substantial delays in the issue of permits, complicated by land acquisition problems.

MoNREC currently favours PSCs over joint venture agreements. A PSC is a straight split on total production. Alternatively, there can be a cost-recovery type of production sharing, where a certain percentage of total revenue is reserved for the recovery of production costs. A straight split of the total production is preferred in large-volume, low-price and low cost-production minerals, such as dimension stones, coal and other industrial minerals. For more valuable metallic minerals such as gold and copper, production sharing with cost recovery is preferred.

MoNREC is flexible about negotiating the terms of each arrangement. The sharing of production costs may be fixed for the term of the agreement or on a sliding scale, depending on the level of production. The government's share of production can be inclusive of royalty, valued upon a mutually agreed price, and sold back to the investor.

A profit-sharing arrangement is primarily used for current projects with active mines and plants. Parties may enter into a joint venture with a state-owned enterprise through competitive bidding or by entering into an agreement based on terms negotiated by both parties.

Renewal and transfer of mineral licences

11 | What is the regime for the renewal and transfer of mineral licences?

Permit renewal

MoNREC may renew a permit for prospecting, exploration or production. Applications for renewing a permit must be submitted to MoNREC three months before the expiry of the permit for the prospecting and exploration licences and one year before the expiry of production licences.

Permit transfer

Permits may be transferred with the consent of MoNREC and the approval of MIC. To transfer a permit, a permit holder must submit a transfer application with a copy of the draft transfer agreement.

Duration of mining rights

12 | What is the typical duration of mining rights?

A large-scale production permit lasts for a period of 15–50 years, a medium-scale production permit lasts from 10–15 years and a small-scale production permit lasts from five years to 10 years. Extension and renewal of mining rights is subject to the Mining Rules 2018.

The Ministry may reject an application for extension of tenure if any of the following circumstances is found:

- failure to comply with any condition of the permit by the applicant;
- the applicant has not carried out the mineral production operations in the large/medium/small-scale mineral production permit area at a reasonable rate of progress;
- no remaining ore deposits with reasonable quantities of mineral reserves to be produced;
- the programme of mineral production operation proposed to be carried out is not satisfactory; and
- if it is considered that it should not be extended in the interests of the people and the state.

Acquisition by domestic parties versus acquisition by foreign parties

13 | Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

MIC, in exercise of the powers conferred to it under sections 42 and 100(b) of the MIL, with the approval of the government, announced Notification No. 15/2017, provides that a feasibility study and production of radioactive metals such as uranium and thorium is allowed to be carried out only by national entities. Prospecting, surveying, performing feasibility studies and developing minerals for small and medium-scale business in accordance with the Mining Law and prospecting, exploration and production of jade or gemstones are not allowed to be carried out by foreign investors. Prospecting, exploration, feasibility study and production with foreign investment for large-scale production of mineral, prospecting, exploration, feasibility study and small, medium and large-scale production with citizens' investment for production of mineral, manufacturing and marketing of gems, jewellery and finished products with foreign investment and exploration, finishing and marketing of gems, jewellery and its products with citizen investment activities may be carried out with the MoNREC approval.

Protection of mining rights

14 | How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Myanmar was party to the Geneva Protocol on Arbitration Clauses of 1923, but was not party to the International Centre for Settlement of Investment Disputes Convention or other international conventions relating to arbitration. On 17 July 2013, Myanmar became party to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958.

A new arbitration law was enacted in January 2016 that allows Myanmar courts to enforce foreign arbitration awards under certain conditions.

There is no public record of any international commercial arbitration case having been conducted under the English law-based repealed Myanmar Arbitration Act 1944, nor under the present Arbitration Law 2016. There have been few international commercial arbitration cases conducted in Myanmar. This probably reflects Myanmar's pre-1988 policy of minimising economic relations with other countries. Since 1988, there have been a number of contracts between public and private sector Myanmar parties and foreign companies, in which a foreign governing law and foreign arbitration rules are prescribed.

Myanmar is party to the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement of 2009.

Myanmar became a member of ASEAN in 1997, and is obliged to ratify 14 key agreements prescribed by the Association. The Protocol on Enhanced Dispute Settlement Mechanism 2004 is one such agreement.

The arbitration provision in section 286 of the Myanmar Companies Law (MCL) states that: 'Without limiting any other means by which a company may seek to resolve a dispute, a company may by written agreement refer to arbitration, in accordance with the Arbitration Law or any other applicable law, an existing or future difference between itself and any other company or person. In respect of power for companies to refer matters to arbitration, section 354(f) of the MCL states that: "The provisions of the Arbitration Law, other than those restricting the application of the Arbitration Law in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of this section".'

The arbitration procedure must always be in accordance with the Arbitration Law 2016.

As a matter of government policy, most contracts between state-owned enterprises and foreign companies specify Myanmar law as the governing law, and prescribe that disputes be settled by arbitration under the Arbitration Law. In general, the attorney general's office and MIC do not allow foreign arbitration provisions when the Myanmar government is party to the contract.

In practice, most disputes between contracting parties in Myanmar are settled by the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) located in Yangon (when both disputing parties are members of it).

Surface rights

15 | What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

According to the 1987 Transfer of Immovable Property Restriction Act, private land ownership by a foreign national or a foreign company is not legal in Myanmar. Foreign nationals could only acquire land by way of a lease, which could not exceed a one-year term.

Since the Myanmar Investment Law was enacted in 2016, and under section 50 of that Law, foreign-owned companies investing under a MIC

permit are entitled to lease land for an initial term of up to 50 years, which may be extended twice for another 10 years each, depending on the type of industry and the amount invested.

Participation of government and state agencies

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Yes. The state has the sole right to carry out mining projects under the SEE Law. However, MoNREC may, by notification, allow private companies to carry out mining projects. Mining projects are usually allowed via either a permit-sharing or a production-sharing contract. Foreign investors should expect to carry out projects with local Myanmar companies.

Government expropriation of licences

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Rule 211 of the Mining Rules 2018 states that MoNREC may suspend or cancel a permit. The rules do not have compensation provisions. A permit may be suspended or cancelled for the following reasons:

- failure by the holder of a permit to make a required payment under the Mining Law or the Mining Rules on the date due;
- submission of false statements to the department or the organisation;
- discovery upon investigation that the permit has been applied for and obtained in contravention of the Mining Rules;
- after the death of the permit holder where the heirs are not qualified to obtain the permit under the Mining Law or the Mining Rules;
- where the permit holder is not able to pay in full the taxes and duties payable to the government, becomes insolvent or the company is liquidated;
- when the permit holder does not apply for the extension until the expiry of the permit without reasonable grounds; and
- when the permit holder does not hand over the permit despite notice of handover having been given.

Protected areas

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

A company is only allowed to mine in blocks for which the company has received a permit. Mining is banned on the beds of the Irrawaddy, Thanlwin, Chindwin and Sittang rivers.

DUTIES, ROYALTIES AND TAXES

Duties, royalties and taxes payable by private parties

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Royalty and dead rent

The holder of a mineral production permit must pay royalties to the government according to the Myanmar Mining Law. The rates are as follows.

Royalty rates

Royalty rates are the following:

- for gold, platinum, uranium and other precious metallic minerals the Ministry may, with the approval of the government, prescribe and publish by notification from time to time at the rate of 5 per cent;
- for silver, copper, tin, tungsten, nickel, heavy-earth, molybdenum, iridium, osmium, palladium, ruthenium, rhodium, tantalum, columbium, niobium, thorium, cadmium, rare earth element, beryllium, titanium and other precious metallic minerals the Ministry may, with the approval of the government, prescribe and publish by notification from time to time at the rate of 4 per cent;
- for iron, zinc, lead, antimony, aluminium, arsenic, bismuth, chromium, cobalt, manganese, magnesium and other precious metallic minerals the Ministry may, with the approval of the government, prescribe and publish by notification from time to time at the rate of 3 per cent; and
- for industrial mineral or stone, at the rate of 2 per cent.

Dead rent

The holder of the permit shall pay dead rent for the land related to the permit in accordance with the rate specified. The dead rent shall be paid yearly in two instalments, which shall be within the rates mentioned in the Mining Law. The rates are subject to the types of operation and minerals.

Income tax

Income tax rates depend on whether the joint venture company is a 'resident' (ie, formed under Myanmar law) or a non-resident formed under a law other than Myanmar law, such as a 'branch office'. For resident companies, the income tax rate is 25 per cent of profits. For non-resident companies, the income tax rate has been 25 per cent since April 2015. For enterprises or individuals permitted and operating under MIL, and foreign organisations engaged by special permission in a state-sponsored project, enterprise or undertaking, the income tax is 25 per cent. Foreign individuals engaged by special permission in a state-sponsored project, enterprise or undertaking are subject to income tax at a 20 per cent rate.

Commercial tax

Notification No. 117/2012, last amended in April 2015, prescribes commercial taxes of between 5 and 100 per cent depending upon the different goods and services businesses concerned. The application for registration must be in the prescribed form and filed one month before the commencement of business. Irrespective of the level of its sales at any time, a registered enterprise is required to comply with all the provisions of the law including submitting returns, paying tax monthly and keeping records, until its name is removed from the register. Only registered enterprises are allowed to deduct input taxes incurred on their purchases.

The commercial tax on services (all types of services except 30 services) is 5 per cent.

Stamp duties

Stamp duties collected from the sale of judicial and non-judicial stamps represent fees payable under the Court Fees Act 1870. Non-judicial stamp duty is levied on various types of instruments required to be stamped under the Myanmar Stamp Act 1899 and its amendments in 1957, 1990, 2011, 2014 and 2017.

Withholding tax

Type of income	Withholding tax deduction	
	Resident foreigner	Non-resident foreigner
Interest	0 per cent	15 per cent
Royalties for the use of licences, trademarks, patent rights, etc	10 per cent	15 per cent
Payments made for buying goods, rendering services, conducting businesses, by contracts or agreements, or businesses called by tender or auction or market competition by government-level organisations, government ministries, Naypyi Pyi Taw council, regional and state organisations and state-owned enterprises	2 per cent	2.5 per cent
Payment made to contractors for goods and services purchased or performed in Myanmar by agreements or contracts or any other means in joint ventures with the state, partnerships, joint ventures, company, organisations formed by individuals, any organisation or association formed by the existing law, cooperatives with the state between the foreign companies or foreign-owned businesses	Nil	2.5 per cent

Tax advantages and incentives

20 | What tax advantages and incentives are available to private parties carrying on mining activities?

MIL covers many activities with the exception of those reserved for the state under the SEE Law. However, if a foreign investor is interested in an activity not specified in a notification or defined in the SEE Law, the investor can apply to MIC stating its interest and demonstrating that such an enterprise would be beneficial to the state. Once satisfied, MIC may approve the application.

MIC may scrutinise and grant the following exemptions and relief, as required, to the investor if applied:

- exemption or relief from income tax if the profit obtained from the investment business that has obtained a permit or an endorsement is reinvested in such investment business or in any similar type of investment business within one year;
- right to depreciation for the purpose of income tax assessment, after computing such depreciation from the year of commencement of commercial operation based on a depreciation rate which is less than the stipulated lifetime of the machinery, equipment, building or capital assets used in the investment; and
- right to deduct expenses which are incurred for the research and development relating to the investment businesses carried out within the country and actually required for the economic development of the country from the assessable income.

Additionally, the new MIL offers a large range of incentives and guarantees to foreign investors including the guarantee against nationalisation.

Tax stabilisation

21 | Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

No tax stabilisation agreements are in force. However, MIL allows the Myanmar Investment Commission to grant exemptions from income tax (see question 20).

Carried interest

22 | Is the government entitled to a carried interest, or a free carried interest in mining projects?

The government is not entitled to a carried interest or a free carried interest.

Transfer taxes and capital gains

23 | Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

A licence is not considered a capital asset and is thus not subject to capital gains tax in Myanmar. However, the sale of a permit could be considered an 'other source of income' and under Union Tax Law 2018, the net profit realised would be taxed at 25 per cent.

Distinction between domestic parties and foreign parties

24 | Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

See question 19. Liability for income tax and withholding tax can vary between domestic and foreign parties.

BUSINESS STRUCTURES**Principal business structures**

25 | What are the principal business structures used by private parties carrying on mining activities?

Mining is generally conducted through a limited company. A Myanmar investor wishing to carry on business in Myanmar through a limited company may register a company under the 2017 Myanmar Companies Law. Limited companies have a Constitution (formerly known as memorandum and articles of association). There are no nationality or residence qualifications applicable to directors unless otherwise prescribed in the articles of association.

Local entity requirement

26 | Is there a requirement that a local entity be a party to the transaction?

See question 13.

Bilateral investment and tax treaties

27 | Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Myanmar has bilateral investment treaties with China, India, Laos, the Philippines, Thailand, Vietnam, Indonesia, Israel, Japan, Kuwait, Korea and the United States.

Myanmar currently has double taxation treaties with India, Laos, Malaysia, Singapore, Korea, Thailand, the United Kingdom and Vietnam.

FINANCING

Principal sources of financing

28 | What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Most foreign investors will be required to import capital into Myanmar. The availability of local capital is limited.

Direct financing from government or major pension funds

29 | Does the government, its agencies or major pension funds provide direct financing to mining projects?

No.

Security regime

30 | Please describe the regime for taking security over mining interests.

Given the restrictions on foreign ownership, security over land use rights and government permits are ongoing concerns. In the event of default, investors fear that they may risk losing any required government licences. Forms of security available under UK colonial law are provided in the Burma Code. However, practice has taken over in many respects. Most forms of security must be registered. MIC and Myanmar Central Bank approvals must be obtained for offshore security.

RESTRICTIONS

Importation restrictions

31 | What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Machinery and equipment may be imported into Myanmar subject to customs duty. However, MIC may exempt certain machinery from customs duty under MIL for a certain period of time such as a construction period.

Standard conditions and agreements

32 | Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There is no standard conditions and agreement covering equipment supplies; however, all the contractual terms and conditions shall comply with the provisions of Contract Act 1872. Regarding dispute resolutions, there is no restriction to choose the dispute resolution mechanism. However, if one of the parties is a government entity, it is advised to choose the Arbitration Law 2016.

Mineral restrictions

33 | What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

The SEE Law provides that the government has the sole right to export minerals. However, the Myanmar Mining Law 1994 states that one purpose of the law is to 'fulfil domestic requirements and to increase export by producing more mineral products'.

Import of funds restrictions

34 | What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Funds imported into Myanmar must be registered with MIC. The government has licensed 14 of the country's 24 private banks to hold currency accounts.

Under MIL, a person who has brought in foreign capital can transfer the following:

- their personal foreign currency entitlement;
- net profit after deducting all taxes and provisions;
- payments made under a contract, including a loan agreement;
- payments resulting from any settlement of investment disputes;
- other compensation or money as compensation under investment or expropriation;
- foreign currency permitted for withdrawal by the MIC, which may include the value of assets on the winding-up of the business; and
- a foreign employee may transfer his or her salary and lawful income after deducting taxes and other living expenses incurred domestically.

ENVIRONMENT

Principal applicable environmental laws

35 | What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Until 2012, there was no specific law protecting the environment in Myanmar. The 2008 Constitution does contain provisions guaranteeing the conservation of natural resources and the prevention of environmental degradation. The principle environmental laws applicable in the mining industry are:

- the Mining Law;
- the Mining Rules;
- the Environmental Conservation Law, enacted in March 2012; and
- the Environmental Rules, enacted on 5 June 2014.

The Environmental Impact Assessment Procedure and National Environmental Quality Emission Guideline were introduced in December 2015.

Environmental review and permitting process

36 | What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

See questions 34 and 35. The Environmental Conservation Law and its rules also regulate for the permit requirement. No estimate of timing can be given.

Closure and remediation process

37 | What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The holder of a permit may surrender the permit to close a mining process. MoNREC must be given at least one month's notice prior to the return of a permit. MoNREC will then cancel the entire permit if the return is with respect to the entire area or otherwise amend the permit accordingly. The permit holder has the right to remove from the permit area within six months of cancellation any building, machineries

installed or other movable property and mineral products that have been extracted prior to the cancellation of the permit. The holder of the permit shall pay a security deposit, advance payment or both. The fund for the closure shall be established at any of the state-owned bank deposits of at least 2 per cent of the investment amount.

Restrictions on building tailings or waste dams

38 | What are the restrictions for building tailings or waste dams?

There is a specific provision relating to monitoring, assessing and compensating for waste dams for five years continuously. The permit holder must prepare the plan for environmental conservation works that may have detrimental effects owing to mining operation. In disposing of liquids, wastes, tailings and fumes that have resulted from mineral production the holder of a mineral production permit or a manager shall undertake any laboratory tests as may be necessary for the prevention of pollution of water, air and land in the environment and for the safety of living beings. The Chief Inspector (the Director General of the Department of Mines) will inspect the environmental and social impact of the prospecting, exploration, production, processing activity of mineral, industrial mineral and stone.

HEALTH AND SAFETY, AND LABOUR ISSUES

Principal health and safety, and labour laws

39 | What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Chapters XVII–XXII of the Myanmar Mining Rules are the principal rules for health and safety, and labour laws applicable to the mining industry. Generally, a mine employee must be over 18 years of age and must work no more than five days in a week. Employees should work no more than eight hours per day and 40 hours per week. If an employee is required to work for a whole day because of the nature of his or her work, the employee may work no more than 48 hours per week. A permit holder must also provide on-the-job safety and health training and appoint a supervisor to ensure the safe operation of the mine.

Additionally, current labour laws in Myanmar include the following:

- the Employment and Skill Development Law 2013;
- the Employment Restriction Act 1959;
- the Employment Statistics Act 1948;
- the Factories Act 1951 and the amending Law 2016;
- the Labour Organisation Law 2011;
- the Labour Organisation Rules 2012;
- the Leave and Holidays Act 1951 and the amending Law 2014;
- Leave and Holiday Rules (Notification No. 69/2018);
- the Minimum Wages Law 2013 and its amendments in 2018 (Notification No. 2/2018);
- the Minimum Wages Rules 2013;
- the Payment of Wages Law 2016;
- the Shops and Establishments Law 2016;
- Shop and Establishments Rules (Notification No. 68/2018);
- the Workmen's Compensation Act 1923 and its amendments in 1955, 1957 and 2005;
- the Workmen's Compensation Rules 1924;
- the Labour Dispute Settlement Law 2012 and the amending Law 2014;
- the Settlement of Labour Dispute Rules 2014;
- the Social Security Law 2012;
- the Social Security Rules 2014; and
- the Workplace Safety & Health Law 2019.

These laws govern labour relation problems and deal with such subjects as working hours, holidays, leaves of absence, female and child labour, wages and overtime, severance pay, workmen's compensation, social welfare, work rules and other matters. The Social Security Law established a fund with contributions by employers, employees and the government.

The Myanmar Special Economic Zone Law 2014 foreign investment law (FIL) prescribes special rules applicable to foreign employees, work permits and minimum percentages of employees who must be citizens. MIL does not provide these provisions.

Myanmar has been a member of the International Labour Organization (ILO) since 1948. A Myanmar tripartite delegation consisting of representatives of the government, employers and workers attend the ILO conference held annually in Geneva.

Management and recycling of mining waste

40 | What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Under the Mining Rules, in disposing of liquids, wastes, tailings and fumes resulting from mineral production, the holder of a mineral production permit or a manager shall undertake laboratory tests as may be necessary for the prevention of pollution of water, air and land in the environment and for the safety of living beings. If in the course of tests toxic materials, which are harmful to living beings, are found, degradation shall be made by chemical means and systematic disposal shall be made only when it is certain that there is no danger.

Use of domestic and foreign employees

41 | What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

A company registered under the FIL must recruit 25 per cent of its skilled workforce domestically during the first year of operation, 50 per cent during the second year and 75 per cent during the third year. Myanmar citizens must perform all the unskilled work. MIL does not provide such restrictions.

SOCIAL AND COMMUNITY ISSUES

Community engagement and CSR

42 | What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

On 24 February 2015, Myanmar enacted a Competition Law, which came into force on 24 February 2017. The Rules came into force in 2018. It provides for the creation of a new regulatory body. Currently, there is no specific law relating to corporate social responsibility (CSR). In the MIC proposal to obtain a MIC permit, a CSR scheme and plan are required as mandatory documents.

Rights of aboriginal, indigenous or disadvantaged peoples

43 | How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

The holder of a mineral production permit shall carry out mineral production operations only after the coordinating and reaching agreement has been made and after payment of the agreed compensation

or damages to the individual or organisation, which have the right of cultivation, right of possession, right of use and beneficial enjoyment, right of succession or right of transfer of the land included in the permit.

International law

44 | What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

None.

ANTI-BRIBERY AND CORRUPT PRACTICES

Local legislation

45 | Describe any local legislation governing anti-bribery and corrupt practices.

Bribery of public officials is primarily regulated by Chapters IX and XIA of the Myanmar Penal Code, the Anti-Corruption Law 2013 and the Anti-Corruption Rules 2015.

On 3 August 2018, DICA issued an announcement enacting an anti-corruption code of ethics intended to be complied by all companies incorporated in Myanmar. Subsequently, it was superseded by the notification relating to the fundamental principles for business to develop a strong code of ethics issued by the Anti-Corruption Commission on 19 October 2018.

On 24 February 2015, Myanmar enacted the Competition Law, which came into force on 24 February 2017. It provides for the creation of a new regulatory body. The Myanmar Competition Rules were passed by the Ministry of Commerce with Notification No. 50/2017, dated 9 October 2017.

Foreign legislation

46 | Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Myanmar is party to the United Nations Convention Against Corruption (Resolution No. 58/4 of 31 October 2013), pursuant to which it has agreed to cooperate with other countries in addressing anti-corruption issues.

Disclosure of payments by resource companies

47 | Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Myanmar has not yet enacted the legislation in accordance with the EITI Standard. However, Myanmar was accepted as an EITI candidate at the International EITI board meeting on 2 July 2014 and an EITI report for the period of 2014–15 (oil, gas and mining sector) was submitted in March 2018.

FOREIGN INVESTMENT

Foreign ownership restrictions

48 | Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Under section 42(c) of MIL, in a joint venture carried out with a citizen in restricted business areas, subject to any express exception in the relevant notification, the minimum direct shareholding or interest of a Myanmar citizen investor in the joint venture is 20 per cent. This ceiling

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may be amended by MIC by notification, from time to time, with the permission of the government.

INTERNATIONAL TREATIES

Applicable international treaties

49 | What international treaties apply to the mining industry or an investment in the mining industry?

An investment in a mining project may qualify for investment protection under a bilateral investment treaty. Myanmar is also party to the 2009 ASEAN Comprehensive Investment Agreement. Mining and quarrying and services incidental to it are listed as one of the designated sectors to which the 2009 Agreement applies. However, Myanmar has an exemption to this Agreement regarding the gemstone sector.

During 2012, Australia, Canada, the European Union, the United Kingdom and the United States all relaxed various economic sanctions against Myanmar in light of recent reforms. However, attention must still be paid to the terms of the relaxations of the sanctions.

The US Department of the Treasury's Office of Foreign Assets Control (OFAC) authorised new investment by US persons by issuing General Licence No. 17, which includes a prohibition against investments or provision of financial services to persons on the US Treasury Department's Specially Designated Nationals and Blocked Persons List, and the new requirement for periodic reporting.

US citizens investing US\$500,000 or more, or contracting with MOGE, are required to report on a range of policies and procedures with respect to their investments in Myanmar, including:

- human, labour and land rights;
- community consultations and stakeholder engagement;
- environmental stewardship;
- anti-corruption arrangements with security service providers;
- risk and impact assessments and mitigations;
- payments to the government; and
- an obligation to notify the Department of State of any investments with MOGE and any contact with the military or non-state armed groups.

See www.state.gov/ and General Licence Nos. 17 and 19 for more information on US sanctions.

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