CHRISTIAN TEO & Partners
LAW OFFICES
(in association with Stephenson Harwood LLP)

MYANMAR MINES LAW AMENDMENTS - TAKING THE INITIATIVE BUT NOT REALLY GETTING THERE [1][2][3][4][5]

INTRODUCTION

As Indonesia continues to struggle for consensus on what to do about its 2009 Mining Law, Myanmar moved forward, in late December 2015, with substantial amendments to the 1994 Myanmar Mines Law.

Given Myanmar is a potential, regional competitor of Indonesia for foreign investment in the mining industry, Indonesia should see the move by Myanmar as something of a "wake up call" for Indonesia to quickly "get its own house in order" in terms of creating a more investor friendly legal, policy and regulatory regime for mining.

Fortunately, however, for Indonesia, the recent Myanmar Mines Law amendments fall well short of what is required before larger, multi-national mining companies are likely to begin regarding Myanmar as a serious alternative to Indonesia in terms of a regional destination for foreign investment.

In this article, the writer will review the recent Myanmar Mines Law amendments before making an assessment of how they are likely to be perceived by foreign investors.

BACKGROUND

The 24 December 2015 amendments to the 1994 Myanmar Mines Law ("**2015 MML Amendments**") have been a considerable time in the making. During this time, the Myanmar Mines Department received input and suggestions from a variety of sources both external and internal. These external sources included the Australia Myanmar Chamber of Commerce ("**AMCoC**").

Early in the fourth quarter of 2014, AMCoC formed a working group of various interested and experienced parties (including the writer and one of his colleagues, Peter Church, from Stephenson Harwood LLP) ("**AMCoC Working Group**")[6] for the purpose of coming up with specific recommendations in respect of the then under discussion proposal to amend the 1994 Myanmar Mines Law. The AMCoC Working Group focused its attention on what changes were required to the 1994

---

1 Bill Sullivan, Licensed Foreign Advocate with Christian Teo & Partners (in association with Stephenson Harwood LLP).

2 Bill Sullivan is the author of "*Mining Law & Regulatory Practice in Indonesia – A Primary Reference Source*" (Wiley, New York & Singapore 2013), the first internationally published, comprehensive book on Indonesia's 2009 Mining Law and its implementing regulations.

5 This article appeared in the February-March 2016 issue of Coal Asia Magazine.

6 The views expressed in this article are exclusively those of the writer only and do not necessarily reflect the views of any other members of the AMCoC Working Group or of the AMCoC Working Group as a whole.

Myanmar Mines Law in order to address the likely minimum needs of potential, world class foreign investors in the Myanmar mining industry.

The AMCoC Working Group initially provided a List of "Red Flag" Issues to the Myanmar Mines Department, in October 2014, which highlighted, among other things, serious reservations about providing for State Participation Rights in the local mining industry through a Production Sharing Model. This was followed, in early December 2014, by detailed recommendations in the form of a comprehensive and substantial discussion paper. Later in December 2014, a meeting was held with the Myanmar Mines Department to discuss the specifics of the recommendations.

The AMCoC Working Group recommendations were based on the premise that Myanmar's mining regulatory regime should ensure that Myanmar and its people derive the maximum benefit, on a long term and sustainable basis, from the local mining industry and in a manner consistent with Myanmar's obligations and role as a responsible member of the international community.

The AMCoC Working Group sought to emphasize, in its written submission, that (i) both local and foreign participation in the Myanmar mining industry is desirable, (ii) there is "good" foreign investment and "bad" foreign investment and (iii) the benefits to Myanmar will be maximized by encouraging "good" foreign investment in the form of investment from companies committed to "best international practice" in terms of mining technology, payment of royalties & taxes, worker health & safety, environmental protection and local community advancement & development.

In arriving at its recommendations, the AMCoC Working Group looked at the history of foreign investment in other mineral rich countries in South East Asia and elsewhere with a view to ascertaining what type of regime has been most successful in developing a sustainable local mining industry on the basis of a mixture of domestic and foreign investment. The 2009 to 2014 experience and many travails of foreign investors in the Indonesian mining industry ranked high as a reference point in terms of both how **not** to regulate a mining industry from a sustainable development perspective and of the dangers associated with putting in place a regulatory regime that does not recognize the inevitability of the mineral commodities price cycle.

The main recommendations of the AMCoC Working Group were that, as part of the proposed amendments to the 1994 Myanmar Mines Law and the implementing Myanmar Mines Rules, the following changes should be introduced:

(a) **Permits**

(i) increase maximum periods for Exploration and Production Permits;

(ii) reduce number of Permits and their subdivisions;

(iii) allow transferability of/granting of security over Permits;

(iv) guarantee right to progress from exploration to production; and

(v) allow for right of retention during low commerciality periods.

(b) **State Participation**

(i) move away from mandatory State Participation Right to reliance upon Royalties and other taxes; and

(ii) drop Production Sharing Model.

(c) **Investment Agreements**

(i) introduce Investment Agreements or Contracts of Work;

(ii) reduce reliance upon Licenses and Permits; and

(iii) provide for international dispute resolution.

(d) **Regulation & Administration**

(i) set permitted size of Production Permit areas having regard to infrastructure, logistics, utilities and services requirements etc;

(ii) make clear the criteria for granting Permits;

(iii) specify applicable foreign ownership limitations;

(iv) guarantee prior notification of proposed cancellation of Permits; and

(v) create and make publicly available Mining Maps and Register of Issued Permits.

(e) **State Imposts**

(i) reduce uncompetitive Land Rents;

(ii) do away with Signature Bonuses;

(iii) calculate Royalties based on actual net sales proceeds to Permit holders; and

(iv) ensure Royalty rates are:

a. competitive with other countries; and

b. fixed for project life (**i.e.**, guarantee fiscal certainty).

(f) **Environmental & Social Considerations**

(i) address environmental requirements through the existing Environment Conservation Law only; and

(ii) address community and social requirements through specialist laws and rules.

(g) **Land Considerations**

Provide comprehensive guidelines for:

(i) land acquisition;

(ii) compensation determination;

(iii) timely resolution of competing land use claims/disputes; and

(iv) co-operation between large-scale miners and small-scale/subsistence miners.

It was originally envisaged that the proposed amendments to the 1994 Myanmar Mines Law might be passed by the Myanmar Parliament as early as January 2015. Owing, however, to a variety of factors, including the ongoing political transformation taking place in Myanmar, the 2015 MML Amendments were not finally adopted and issued until the last days of 2015.

The Myanmar Mines Department now has 90 days to make the supporting changes to the Myanmar Mines Regulations required to properly reflect the 2015 MML Amendments. It presently seems unlikely, however, that the Myanmar Mines Department will be ready with the required changes to the Myanmar Mines Regulations within 90 days. The AMCoC Working Group is hoping this probable delay will provide it with a further opportunity to provide additional input on technical and other issues particularly relevant to the required changes to the Myanmar Mines Regulations.

COMMENTARY

1. Main Changes Introduced by 2015 MML Amendments

The main changes introduced by the 2015 MML Amendments are summarized in the following table[7]:

1.	Large Scale Extraction/ Production (Section 2(k))	-	Permit term now 15 to a maximum of 50 years
2.	Foreign Investment (Section 4(a))	-	Specifically allowed for any of: (a) prospecting (b) exploration & testing (c) feasibility study (d) Large Scale Extraction/Production only (e) processing (f) trading and selling

[7] Section references are to The Law Amending the Myanmar Mines Law being Union Parliament Law No. 72/2015 dated 24 December 2015.

3.	Joint Ventures (Section 4(f))	-	Joint ventures with foreign investment are allowed for Large Scale Extraction/Production by way of conversion or upgrading of existing locally owned small or medium sized Projects depending upon: (a) survey reports (b) quality and volume of deposits
4.	Permits (Section 7(a) & (c))	-	Ministry of Mines with consent of Union Government authorized to grant Permits for: (a) all permitted mining Projects with foreign investment (b) conversion/upgrade of locally owned small/medium scale Projects to large scale extraction/production Projects operated as joint ventures with foreign investment
	(Section 11(a))	-	All Permits for other non-foreign investment Projects to be granted by newly formed Regional or State Permitting Boards [limited regional autonomy?]
5.	Classification of Production (Section 11)	-	Classification of production scale will be made taking into account: (a) operating conditions/area (b) distances (c) amount of investment required (d) equipment and machinery usage
6.	Right to Extraction/ Production Permit (Section 11(a))	-	Guarantee of right to Extraction/Production Permit for those who have successfully carried out prospecting/exploration/feasibility study
7.	Availability of Buying/Selling Permits (Section 11(b))	-	Non-producers wanting to carry out purchasing and processing of minerals may obtain Buying/Selling Permits
8.	Royalty Payment Currency (Section 12(g))	-	Foreign investors must pay Royalties: (a) in Myanmar currency (b) calculated using exchange rate published by Central Bank

9.	Royalty Rates (Section 18)	-	Applicable rates changes as follows: (a) gold, platinum, uranium etc. - now 5%, previously 4% to 5% (b) silver, copper, tungsten etc. - now 4%, previously 3% to 4% (c) iron ore, zinc, lead, aluminum, manganese etc. - now 3%, previously 3% to 4% (d) industrial minerals and stone - now 2%, previously 1% to 3%
10.	Calculation of Royalty Amount (Section 19)	-	Royalty amount to be calculated based on: (a) percentage of pure metallic mineral content (b) using prevailing international prices
11.	Environmental Obligations (Section 13(e)(1))	-	Obligation to establish [and make annual contributions?] to Reserve Fund for environmental conservation
12.	Reclamation Obligations (Section 13(e)(2))	-	Obligation to prepare and carry out Mine Exit/Reclamation Plan re post mining period
13.	Exclusion of Gemstones (Sections 2(b), 19 and 21)	-	Gemstones and gemstone mining are no longer part of Mines Law and will, presumably, be separately regulated
14.	Offences and Penalties (Sections 30(a) and 32-A)	-	Large increases in prison terms and fines for Mines Law offences
15.	State Participation (Section 35(A))	-	Ministry may [discretionary?] carry out mineral extraction/production with Permit holders jointly/in joint venture Ministry production joint ventures shall be in the form of: (a) production sharing with allowance for certain expenses [cost recovery?] (b) equity sharing [free carry or no free carry?] (c) profit sharing based on parties' respective contributions [free carry or no free carry?]

2. Assessment of 2015 MML Amendments

2.1 **Areas of Progress for Foreign Investors**: The AMCoC Working Group List of "Red Flag" Issues and subsequent detailed recommendations, as outlined in the Background section above,

provide a convenient benchmark against which to assess how well or otherwise the 2015 MML Amendments are likely to meet the minimum requirements of world class foreign investors.

There have, unquestionably, been some areas of progress for foreign investors as a result of the 2015 MML Amendments. These areas of progress include:

(a) Increasing the **maximum** Production Permit period, for Large Scale Production Projects only, to 50 years;

(b) Giving Exploration Permit holders a clear right to Production Permits;

(c) Allowing joint ventures, between foreign investors and local investors, in the case of Small and Medium Scale Production Projects upgraded to become Large Scale Production Projects; and

(d) Specifying the criteria for determining size of individual Production Permit areas.

The increase in the **maximum** Production Permit period, for Large Scale Production Projects only and from 15 to 50 years is, of course, essential for substantial foreign investment to take place. However, there has to be a residual concern that the reference to "maximum" may mean that, in practice, parties will only receive 15 years initially when they are issued with a Production Permit for a Large Scale Production Project, thereby obliging them to seek successive renewals thereafter in order to obtain the benefit of the full 50 year maximum Production Permit period. If this is, indeed, the case then foreign investors will be exposed to the almost certain risk of opportunistic rent seeking behavior every time they apply for a renewal. This could substantially dilute the otherwise perceived benefit of a 50 year Production Permit period for Large Scale Production Projects.

2.2 **Areas of No Progress for Foreign Investors**: Notwithstanding 2.1 above, the 2015 MML Amendments have failed to make any progress, from the perspective of foreign investors, in a number of critical areas and, indeed, have arguably made the position worse, in some respects, for foreign investors than it was prior to the 2015 MML Amendments being adopted. These area of no progress and even regress include:

(a) **Continuing** insistence on a possible **State Participation Right**, at the production stage, based on Production Sharing, Equity Sharing or Profit Sharing Models;

(b) Tightening up already **uncompetitive** Royalty rate ranges;

(c) Calculating Royalty payment amounts based on **mineral content** rather than on net sales proceeds; and

(d) **Not** providing for:

(i) Investment Agreements;

(ii) Right to transfer/grant security over Permits;

(iii) Fiscal certainty for the life of mining projects;

(iv) Right of retention; or

(v) International arbitration of disputes.

It is hard to overstate the likely negative impact, on large scale foreign investment, of the "triple whammy" of (i) a continuing State Participation Right, (ii) uncompetitive Royalty rates and (iii) using mineral content rather than net sales proceeds to calculate Royalty payments.

Although the State Participation Right may now be in the form of an Equity Sharing Model or a Profit Sharing Model as well as in the form of the originally proposed Production Share Model only, this does not really address the likely more fundamental objection of foreign investors to the State effectively seeking to "double dip" through a combination of **both** a Participation Right **and** Royalties as well as other taxes.

Foreign investors will be concerned about the implications of a continuing State Participation Right for possible State interference in management decision making, particularly in the case of the Equity Sharing Model. Put simply, no foreign investor is going to relish the prospect of having the State as a shareholder in its local operations.

There is also much residual uncertainty as to when and how the State Participation Right will apply. More particularly, does the State Participation Right automatically apply to all Production Stage Projects or is this something to be discussed, negotiated and agreed, on a case by case basis, between the Mines Department and individual Production Permit holders? Further, where an Equity Sharing Model/Profit Sharing Model is to be used, for the purpose of giving effect to the State Participation Right, is the State's equity share/profit share "free carried" or "not free carried"? The reference, in the 2015 MML Amendments, to the Profit Sharing Model being "based on the parties' respective contributions" may indicate some understanding of foreign investors' inevitable opposition to a State Participation Right that is "free carried". It is far from clear, however, what form of **useful/valuable** "contribution" the State can really make to a mining project at the production stage other than by granting the necessary Production Permit and, thereafter, not interfering in the project. Of course, these are "negative" or "notional" contributions at best that hardly justify an equity share/profit share for the State in addition to Royalties and other taxes.

If the State's equity share under the Equity Sharing Model is to be substantially "free carried", this will raise further issues, in due course, about the impact of this "free carried " interest on the viability of future equity capital raisings and the likely insistence of the State on an anti-dilution mechanism to ensure that its equity share, as a percentage of total issued capital, can never be reduced despite the fact that it does not participate in future equity capital raisings.

While the Production Sharing Model has been "tweaked" by specifying an "allowance for certain expenses", this apparent reference to Production Permit holders being allowed some form of "cost recovery" is definitely not going to overcome the inherent "double dip" problem with a combined State Participation Right and Royalty/other taxes payment system.

Bearing in mind Myanmar's weak and opaque domestic legal system, the apparent refusal to move to a regulatory regime, at least in the case of large scale mining projects, based on Investment Agreements with dispute resolution by way of international arbitration rather than on Licenses or Permits with domestic dispute resolution, is also a very considerable setback for foreign investors. The apparent unwillingness of the Mines Department to accept international arbitration of mining related disputes is curious given that, on 5 January 2016, the Myanmar Parliament passed the Arbitration Law (Law No. 5 of 2016) in order to ratify the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, thereby paving the way for the enforcement, in Myanmar, of foreign arbitration awards against local parties including the State.

2.3 **Explaining the Relative Lack of Progress**: Given the openness and relative professionalism of the Myanmar Mines Department as well as its willingness to engage constructively with the AMCoC Working Group, in terms of receiving and discussing the recommendations made by the AMCoC Working Group, it is something of a puzzle as to why so very few of the AMCoC Working Group's recommendations have actually become part of the 2015 MML Amendments. A number of possibilities, however, suggest themselves to the writer.

First, the Mines Department has to be mindful of the needs of many different stakeholders in the local mining industry and not only foreign investors. Faced with the competing interests of different stakeholder groups, the Mines Department may have chosen to view the AMCoC Working Group's recommendations as more of a "menu" of possible changes which could be adopted individually or not, without adversely impacting the overall level of foreign investor interest, rather than as a holistic set of changes which foreign mining companies would need to see adopted as a substantially complete package if they were to start seriously considering Myanmar as a potential destination for large scale investment.

Second, the Mines Department may be intending to rely on the new Mines Rules, due in 90 days, to implement at least some of the other recommendations of the AMCoC Working Group. This, though, seems unlikely given that the Mines Rules are merely an administrative device for giving effect to the 1994 Myanmar Mines Law and, as such, should not be inconsistent with, far less contradict, the 1994 Myanmar Mines Law itself.

Third, the Mines Department or the Myanmar Parliament may have continuing reservations about the importance of world class foreign investment for the development of the Myanmar mining industry in a way that ensures maximum benefit for the country and its people. This, however, also seems improbable given the apparent concern of many parties about the relatively modest benefits derived, to date, by Myanmar and its people from the local mining industry and many of the existing foreign investors in the same. This concern was quite evident at the Myanmar Mining Development Summit 2016 that the writer attended and spoke at in Yangon in late January and where the emphasis of the writer's presentation, on the need for Myanmar to differentiate, more clearly than it has done in the past, between "good" foreign investment and "bad" foreign investment, seemed to resonate with a lot of the attendees including the significant number of current and former senior officials of the Mines Department present.

Fourth, it may simply be that the Mines Department or the Myanmar Parliament was reluctant to go too far with reforming the 1994 Myanmar Mines Law during a period of major political change in Myanmar and until such time as the incoming Myanmar Government and its own Mines Department appointees have the opportunity to be more fully involved in the overall reform of the 1994 Myanmar Mines Law. In other words, the decision may have been taken to make a few changes now to the 1994 Myanmar Mines Law, in order to get the reform process started, while fully realizing that this would not be enough to satisfy world class foreign mining companies and in the expectation that the incoming Myanmar Government and its own Mines Department appointees would address the other required changes in due course. A couple of well informed attendees at the Myanmar Mining Development Summit 2016 expressed views, somewhat along these lines, to the writer.

SUMMARY AND CONCLUSIONS

The 2015 MML Amendments represent something of a lost opportunity to create a legal and regulatory environment conducive to world class foreign investment in the Myanmar mining industry.

While some progress has been made in addressing areas of concern to foreign investors, many important issues remain outstanding and much further work is required before world class mining companies will look seriously at large scale investment in Myanmar.

It is possible the forthcoming new Mines Rules may help to address some of the outstanding issues but the scope to do so seems quite limited in the absence of more sweeping reform of the 1994 Myanmar Mines Law itself.

Many foreign investors will be disappointed but probably not unduly surprised by the relative lack of progress, in later 2015, in reforming the 1994 Myanmar Mines Law.

Hesitancy to take reform of the 1994 Myanmar Mines Law too far, in a time of fundamental political transformation for Myanmar, is the most likely explanation for the underwhelming scope of the 2015 MML Amendments. In this regard, it is probably the case that both the Mines Department and the Myanmar Parliament do understand, only too well, the difference between good foreign investment and bad foreign investment as well the imperative of encouraging the former and discouraging the latter if Myanmar and its people are to reap the maximum benefit from the development of the local mining industry. Accordingly, the 2015 MML Amendments should really be seen as the intended starting point rather than as the intended finishing point for the reform process in respect of the 1994 Myanmar Mines Law.

In the meantime, Indonesia and Myanmar's other mineral rich neighbors have received something of a reprieve in terms of a longer than expected period to bring their own mining regulatory regimes into line with the minimum needs of foreign investors at a very low point in the mineral commodities price cycle.

****

[This article has been contributed by Bill Sullivan, Licensed Foreign Advocate with Christian Teo & Partners. Christian Teo & Partners is a Jakarta based, Indonesian law firm and a leader in Indonesian mining law and regulatory practice. Christian Teo & Partners operates in association with international law firm Stephenson Harwood LLP which has nine offices across Asia, Europe and the Middle East: Beijing, Dubai, Hong Kong, London, Paris, Piraeus, Seoul, Shanghai and Singapore. Readers may contact the author at email: *bsullivan@cteolaw.com*; office: 62 21 5150280; mobile: 62 815 85060978]