



**Dear Readers,**

Welcome to a new edition of our newsletter.

### **1. Liquefied natural gas**

We were in Singapore last week and often asked about “the LNG tender.”

As readers will recall, the Ministry of Electricity and Energy solicited expressions of interest for “the bulk import and regasification of LNG” on 6 September 2016 (the text of the invitation can be found here: <http://tinyurl.com/hgw99qa>). The deadline for the submission of the expressions of interest expired on 28 October 2016; apparently, about 80 submissions were received.

So far, no candidates have been shortlisted, and the scope of the project is not clear yet (although it is clear that, if implemented, the project will be massive): Where will the terminal be located? Will it be a fixed terminal or a floating storage regasification unit (FSRU)? Who will operate the pipeline? Will a joint venture with Myanma Oil and Gas Enterprise (MOGE) be required? What capacity are we looking at? Does Myanmar have sufficient foreign currency to pay for so much LNG?

In any case, a number of feasibility studies for LNG facilities have been done already, and Italian-Thai Development and PTT have announced to build two LNG plants in Thanintaryi Region (a good article on the development of Myanmar’s infrastructure can be found here: <http://tinyurl.com/j63au8b>).

We have taken this opportunity to pen down a few thoughts on the legal and tax framework for operating an LNG terminal in Myanmar. Please find our analysis in this newsletter.

### **2. First draft of the Myanmar Investment Rules published**

On 13 January 2017, DICA published the first draft of the Myanmar Investment Rules (one of the by-laws implementing the new Myanmar Investment Law) on its homepage (<http://tinyurl.com/gvtkghm>). Please find an analysis of the draft in this newsletter.

### **3. Draft law to “prevent a rising amount of imports”**

On 12 and 13 January 2017, state-owned newspapers published the draft of a “Law to Prevent a Rising Amount of Imports” for public discussion. The plan is to establish a commission to which domestic producers can complain if they feel that imports cause, or threaten to cause, a severe



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loss to them; the commission can then impose additional tariffs or restrict the import of the product under investigation.

We are presently translating the draft and will publish the translation on our homepage once it is ready.

#### 4. **New Companies Law**

State-owned papers are presently publishing the draft of the new Companies Law in the Myanmar language, so it may actually be discussed in the next parliamentary session (the draft was sent to parliament in the beginning of this month: <http://tinyurl.com/gly5v49>).

An English version of the draft can be found here: <http://tinyurl.com/jm4vu9x>

State-owned press also reports that it will soon be possible to register companies online thanks to Asian Development Bank (ADB) having “technically and financially provided an online licensing system.”

#### 5. **Market access and tenders**

- (a) **Finally - the fourth telco license has been granted:** <http://tinyurl.com/zroqmfj>
- (b) **Generic medicines:** An Indian paper reports that Myanmar is looking to purchase massive quantities of generic medicines through tenders in April 2017: <http://tinyurl.com/z74qrqb>
- (c) **France’s Canal+ and Forever have formed a joint venture to offer pay TV services in Myanmar:** <http://tinyurl.com/zkejgs4>
- (d) **The Central Bank seems to have removed restrictions on foreign participation in the domestic payment industry:** <http://tinyurl.com/h3umwey> - The article says that the Central Bank made this announcement on 11 January 2017 and Visa welcomed the move, but there is no announcement on the Central Bank’s homepage.
- (e) **Myanmar Agribusiness Public Corporation (MAPCO) building agricultural industrial parks in Ayeyarwaddy Region to attract local and foreign investment into agriculture and agri-business:** <http://tinyurl.com/gnf5llz>
- (f) **Tender:** Directorate of Water Resources and Improvement of River Systems: Individual consultant (stakeholder communication officer) for the “Ayeyarwady Integrated River Basin Management Project” (World Bank funded): <http://tinyurl.com/gtin99e>



## **LINCOLN LEGAL SERVICES (MYANMAR) LIMITED**

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We trust that you will find this newsletter useful and hope that you will enjoy reading it.

Sebastian Pawlita  
Managing Director

Nyein Chan Zaw  
Director



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#### Press review (9 - 16 January 2017)

- Myanmar looks to rebrand itself as a destination for foreign tourists: <http://tinyurl.com/zxoym3j>
- Fourth telco license has been granted: <http://tinyurl.com/zroqmfj>
- Myanmar looking to purchase massive quantities of generic medicines in April 2017: <http://tinyurl.com/z74qrgb>
- France's Canal+ and Forever form joint venture to offer pay TV services in Myanmar: <http://tinyurl.com/zkejgs4>
- Central Bank seems to have removed restrictions on foreign participation in the domestic payment industry: <http://tinyurl.com/h3umwey>
- MAPCO building agricultural industrial parks in Ayeyarwaddy Region to attract local and foreign investment into agriculture and agri-business: <http://tinyurl.com/gnf5llz>
- Myanmar border trade to remain paper-based for another year: <http://tinyurl.com/jkdpkvn>
- Central Bank says sugar and machinery oil re-export softens kyat: <http://tinyurl.com/zgccqpa>
- New Companies Law sent to parliament: <http://tinyurl.com/gly5v49>
- Thanintaryi tourism committee to draft master plan: <http://tinyurl.com/znejz9z>
- Garment exports double: <http://tinyurl.com/hr55qpe>



## **Legal and tax framework for the operation of an LNG terminal**

Italian-Thai Development and PTT have announced to build two LNG plants in Thanintaryi Region, and the Ministry of Energy has called for expressions of interest to “implement bulk import and regasification of LNG project(s) in Myanmar.” We take this opportunity to take a look at the legal and tax framework for operating an LNG terminal in Myanmar. Further articles in the future may cover other aspects, such as the LNG supply, the offshore and onshore pipelines, and on-shore electricity production in gas-fired power plants.

### **1. Legal and regulatory requirements for the operation of an LNG terminal, the import of LNG, the export of LNG and LNG supply to the domestic market**

#### **(a) State monopoly**

The “exploration, extraction and sale of petroleum and natural gas and production of products of the same” are state monopolies, but the government may permit any joint venture with the government, any other person or any other organization to engage in this business, subject to conditions (sections 3(c), 4 State-Owned Economic Enterprises Law 1989).

#### **(b) Investment permit**

In order to build and operate an LNG terminal (irrespective of whether this is a fixed terminal onshore or an FSRU), an investment permit from the Myanmar Investment Commission is required (section 36 Myanmar Investment Law 2016), unless the project is located within a special economic zone (SEZ).

So far, the MIC has not issued any new notification specifying which investments require a local joint venture partner, but if MIC Notification 26/2016 is still any guidance, the investor will have to form a joint venture with Myanma Oil and Gas Enterprise (MOGE) (or, possibly, with Myanma Petroleum Products Enterprise, MPPE).

Roughly speaking, an investor should expect the MIC procedure to go through the following main steps:

- Investor negotiates an MoU with MOGE.
- Various state entities provide their comments (e.g. the Ministry of Electricity and Energy, Ministry of Transport and Communication, Ministry of Finance,



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Ministry of Natural Resources and Environmental Conservation, Ministry of Finance, Union Attorney General's Office).

- The MoU is signed.
- Investor conducts a feasibility study and prepares an environmental impact assessment report and a social impact assessment report.
- The foreign investor and MOGE negotiate a joint venture agreement which is submitted to the MIC through MOGE. The MIC obtains comments from various state entities (e.g. Ministry of Natural Resources and Environmental Conservation, Ministry of Transport and Communications, Ministry of Agriculture, Livestock and Irrigation, Chief Minister of the State or Region in which the project is located) and submits the investment proposal to the cabinet.
- If the cabinet approves, the MIC will - possibly (section 46 Myanmar Investment Law 2016) - submit the proposal to parliament.
- If parliament approves, the MIC issues an investment permit, the parties sign the joint venture agreement and the joint venture company is incorporated.

If the project is located in an SEZ, the terminal operator could theoretically be a 100% foreign-invested company. Instead of MIC approval, approval from the SEZ management committee is required.

#### (c) **Other licenses**

Other license requirements are (roughly) outlined in Ministry of Energy Notification 100/2013 (a translation of which can be found after this article):

- (aa) The **import** (and also the **export**) of LNG requires a registration as importer and exporter with the Ministry of Commerce and, for each shipment, an import (or export) license (and, if the importer has an MIC permit, approval from the MIC for each shipment).
- (bb) The **storage** of LNG (and re-gasified gas) requires a storage license from the Mining Department, Ministry of Natural Resources and Environmental Conservation.



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- (cc) The **regasification** of LNG is not specifically mentioned, but one would expect that a specific license for the facility is required, possibly also issued by the Mining Department.
- (dd) Vessels used for the **transport** of LNG have to be registered with the relevant department. This means, among others, that if there is a FSRU, it has to be entered in the ships register.
- (ee) The **distribution** of LNG and of re-gasified LNG requires a distribution license from the Ministry of Electricity and Energy.
- (ff) Furthermore, one would expect that licenses from the Myanma Port Authority are required to operate port facilities, and inspection certificates from the Fire Services Department have to be obtained. As with other buildings, the construction and use of buildings at the LNG terminal requires a building permit and a building completion certificate.

#### (d) **Operation**

Other than (rather broadly worded) Notification 100/2013, there is presently no legal framework for the operation of an LNG terminal. A new Petroleum Law is in the making, but we understand that it concentrates on the distribution of petroleum products and, in any case, has not been made public.

The operation of the LNG terminal will therefore in practice most likely be regulated by whatever contract the investor has with MOGE and the terms and conditions of the MIC or SEZ permit.

Labour relations are regulated by Myanmar's general labour laws, in particular the Factories Act, the Leave and Holidays Act, the Social Security Law and the Employment and Skill Development Law.

#### (e) **Risk management**

As a lot of government departments are involved in the process of obtaining investment approval and the supervision of the operation of an LNG terminal, it is recommended to build a good relation with them from an early stage on.

As with other investments, there is the risk of expropriation by the government, although the Myanmar Investment Law contains provisions protecting investors. This



risk can be mitigated by investing through a country with which Myanmar has concluded an investment protection agreement. Investors through Singapore are, e.g., protected by the ASEAN Comprehensive Investment Agreement.

Both the operation of the terminal and the export/import/domestic sale of gas rely heavily on agreements with the government. These agreements have to be drafted in a way that ensures the bankability of the project. If possible, a financial guarantee from the government should be obtained, in particular against the background that it is unclear if MOGE would have enough USD available to pay for large quantities of LNG.

As there is presently no domestic legal framework to speak of for the handling of LNG, investors are advised to adhere to international best practice.

## **2. Tax environment for the operation of an LNG terminal, the import of LNG, the export of LNG and LNG supply to the domestic market**

### **(a) Corporate income tax**

#### **(aa) Tax rate**

Companies registered in Myanmar are subject to corporate income tax at the rate of 25%. Tax base is the profit/loss as shown in the annual audited financial statements (drawn up according to the Myanmar Accounting Standard which, for all practical purposes, is the same as IFRS). The financial year runs from 1 April to 31 March of the following year.

#### **(bb) Tax incentives**

If the project is located in an SEZ, the company is exempt from corporate income tax for at least five years starting from the beginning of commercial operations. A longer exemption period may be available if the project is located in the "free zone" of an SEZ, but this is a bit doubtful as the LNG business would probably not be export-orientated.

It is presently unknown to what extent corporate income tax incentives are available outside of an SEZ: The new Myanmar Investment Law specifies that investments in (i) notified sectors and (ii) notified areas (categorized as "zone 1," "zone 2," and "zone 3") may, upon application, be exempt from corporate income tax for seven, five or three years, but the MIC has not issued the corresponding notifications yet.



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Certain other, not so important tax incentives are also available with regard to corporate income tax.

**(cc) Withholding tax**

It should be noted that there is no withholding tax on dividends. Withholding tax rates on other types of payments are as follows:

Type of payment	Payment to a resident	Payment to a non-resident
Dividends; distribution of a branch profit	n/a	n/a
Interest	n/a	15% (final tax)
Royalties, license fees	15%	20% (final tax)
Fees for services rendered within the country	2%	3.5% (final tax)
Purchase price for goods sold within the country	2%	3.5% (final tax)

A resident can obtain, after the end of the financial year, a tax credit with regard to taxes withheld. For non-residents, the withholding tax is a final tax.

**(dd) Corporate income tax advance payment of an importer**

An importer (even if he otherwise enjoys corporate income tax holidays) has to pay, upon import, 2% of the purchase price to the tax authorities as an advance payment on its annual corporate income tax liability.

**(ee) Capital gains tax**

The capital gains tax rate is 10% in Myanmar. As an exception, the capital gains tax rate in “the oil and gas sector” is between 40% and 50%. It is our understanding that the higher capital gains tax rate in the oil and gas sector only applies to the sale of interests in a production block. However, this is not clearly stated so in the law (section 27 (a) Union Tax Law 2016), and in order to avoid an unpleasant surprise in case of an exit, an investor in an LNG terminal or an LNG import/export business may wish to do so through a Singapore holding company. Provided that the Singapore holding company has substance, it may shield the investor from Myanmar capital gains tax in excess of 10% by virtue of the Myanmar/Singapore double taxation treaty.



### **(b) Commercial tax**

“Commercial tax” is similar to VAT. Previously, it was often not possible to set off input tax with output tax, but this situation has significantly improved over the last two years.

The usual commercial tax rate is 5% of the turnover (or, as the case may be, landed costs). It applies to:

- (aa) the import of LNG;
- (bb) the domestic sale of imported LNG;
- (cc) the domestic sale of domestically produced LNG; and
- (dd) the provision of services by the LNG terminal operator.

With regard to the construction of the LNG terminal, it should be possible to obtain an exemption from commercial tax on the import of the construction material.

### **(c) Special goods tax**

In addition to commercial tax, a special goods tax (which cannot be set off with the commercial tax) applies as follows:

- (aa) Import of LNG: 8% of the landed costs
- (bb) Domestic sale of domestically produced LNG: 8% of the sales price
- (bb) Export of LNG: 8% of the sales price (can be offset with special goods tax paid when purchasing the LNG domestically)

### **(d) Customs duty**

The import of LNG is subject to customs duty; the tax rate has to be researched.

### **(e) Personal income tax and social security contributions**

Employees of the terminal operator, the importer and other companies involved in the LNG business are subject to Myanmar personal income tax on their salary at a



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progressive rate between 0% and 25% with the highest rate kicking in for taxable salary in excess of Ks. 30,000,000 (presently, approx. USD 22,222) per year.

Non-resident foreigners (i.e., foreigners whose physical presence in Myanmar during a financial year does not exceed 183 days) are not liable to Myanmar personal income tax if their salary is paid by a foreign entity abroad to a bank account abroad.

Myanmar residents can, irrespective of their nationality, deduct certain allowances from their taxable salary; most importantly a general allowance in the amount of 20% of the annual salary (capped at Ks. 10,000,000; presently approx. USD 7,407).

Employers have to withhold their employees' personal income tax from the monthly salary and pay the withheld amount to the tax authorities.

Companies with five or more employees have to register their employees with the Social Security Board. Social security contributions by the employer amount to 3% of the monthly salary (capped at Ks. 9,000; presently approx. USD 6.67); social security contributions by the employee amount to 2% of the monthly salary (capped at Ks. 6,000; presently, approx. USD 4.44).

#### **(f) Stamp duty**

Instruments listed in Schedule I to the Stamp Act are subject to stamp duty. In practice, almost all instruments are subject to stamp duty. Stamp duty rates vary greatly - they may be a nominal, fixed amount; in other cases, they are expressed as a percentage of the value of the contract and can reach very significant proportions. Categorizing instruments correctly in order to find out the applicable duty rate is often difficult as the language of Schedule I is quite outdated and the tax authorities are creative in their interpretation.

In practice, stamp duty usually has to be paid within one month after the instrument is signed. If this is not done in time, the tax authorities insist on payment of a penalty of ten times the unpaid duty amount in addition to the applicable duty.

Please find below a few stamp duty rates:

<b>Instrument</b>	<b>Duty rate</b>
Joint venture agreement, production or profit sharing contract, construction agreement or other similar agreement or contract	Ks. 150,000



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Instrument	Duty rate
Agreement not otherwise provided for	Ks. 300
Lease agreement for immovable property for a term in excess of three years	2% of the average annual rent
Share transfer	0.1% of the purchase price
Loan agreement secured by immovable property	0.5% of the secured amount
Loan agreement secured by movable property	Approx. 0.0065% of the secured amount
Bank guarantee	0.5% of the secured amount

### 3. Land use rights

#### (aa) General

Land use rights are a complicated issue in Myanmar due to archaic and conflicting land laws, a somewhat unreliable registration system and land grabs in the military era. Furthermore, a foreign-invested company (such as the terminal operator, supposing that this company has foreign shareholders) can only lease and not buy land as foreign ownership is prohibited by the 1987 Transfer of Immovable Property Restriction Law.

Generally speaking, the following types of land exist, with some categories overlapping into others:

- State-owned land;
- freehold land;
- grant land;
- farmland;
- vacant, fallow or virgin land;
- religious land;
- town land;
- village land.

If the project is located on farmland, a complicated and lengthy procedure is required to allow it to be used for other purposes than farming; a similar procedure exists for vacant, fallow or virgin land.

Furthermore, it may be necessary to relocate farmers or other settlers.



Religious land is off-limits to foreign investors.

If no government entity (or an SEZ) can provide the land (or no government entity is willing to assist with relocation issues), it may be necessary to team up with a private local entrepreneur who (i) either has sufficient land already or (ii) is willing to buy up connected plots so that they can be leased as a whole by the foreign investor, or contributed by the local partner to a joint venture company.

In any case, it is recommended to conduct a thorough due diligence to verify at least (i) ownership of the land, (ii) that the land was not acquired in a land grab, (iii) that it is legally possible to use the land to construct an LNG terminal, and (iv) if the land is state-owned: that the respective state entity has the right to lease the land to the terminal operator.

### **(bb) Key terms and conditions in land use agreements**

Land use agreements traditionally used by the government are often vague, in themselves contradictory and a burden if financing from foreign banks is sought. However, investors must also be aware that agreements that are not standard agreements have to be reviewed by the Union Attorney General which may slow down the process significantly. Nevertheless, investors should try to get some key clauses in, such as:

- Clauses that aim at ensuring the bankability of the project, i.e. right to assign the rights under the lease agreement as security, right of the lenders to “step into” the lease;
- Clauses by which the lessor guarantees that it is the owner of the land, that the land was not acquired in a land grab and that no third parties have any right to the land;
- Easements and right of way to install pipelines.



**Ministry of Energy Notification 100/2013 on the Import, Storage, Transport and Distribution of Petroleum Products**

*- CONVENIENCE TRANSLATION - ACCURACY NOT GUARANTEED -*

**Government of the Republic of the Union of Myanmar**

**Ministry of Energy**

**Notification No. 100/2013**

**7<sup>th</sup> Waning Day of Warkaung 1375 M.E**

**28<sup>th</sup> August 2013**

In exercising the power conferred by the Union Government, the Ministry of Energy has issued, in accordance with section 4 of the Essential Goods and Services Law, this notification for the systematic performance of the import, storage, transport and distribution of petroleum products.

**Chapter 1**

**Definition**

1. The following expressions contained in this notification shall have the meanings given hereunder:
  - (a) **“Petroleum product”** means a liquid, viscose body, solid body, gas and liquefied gas whose compounds contain inflammable hydrocarbon;
  - (b) **“Committee”** means the Committee for the Control and Supervision of Businesses Importing, Storing, Transporting and Distributing Petroleum Products, formed according to Ministry of Energy Notification No. 88/2011 dated 11<sup>th</sup> October 2011;
  - (c) **“Sub-Committee”** means a Sub-Committee for the Control and Supervision of Businesses Importing, Storing, Transporting and Distributing Petroleum Products, formed for the respective Region or State;
  - (d) **“License”** means a permit issued by the relevant departments to operate businesses that import, store and distribute petroleum products;
  - (e) **“Import”** means the import of a petroleum product into Myanmar territory by sea, air, road or any others means;
  - (f) **“Storage”** means the storage of a petroleum product in any place or in any building. In this expression, the time for transporting the petroleum product is not included;



- (g) **“Transport”** means supplying the transport, from one place to another in the country, the loading and off-loading of a petroleum product;
- (h) **“Distribution”** means the distribution of a petroleum product.

## **Chapter 2**

### **Import**

2. A person desirous to import a petroleum product into the country shall apply for, and acquire, an import license from the Ministry of Commerce in accordance with the prescribed procedures.
3. The import of a petroleum product through a specified port, airport and border crossing shall be done in accordance with the rules, regulations and procedures prescribed by the Port Authority, the Customs Department, the Department for Commerce and Consumer Affairs and *[other]* relevant departments.
4. A petroleum product shall be imported in the prescribed packaging, vehicle or barges in accordance with international standard and norms.
5. An import license holder shall import the qualified petroleum product prescribed by the Ministry of Energy in accordance with international standard and norms.
6. The receipt of a petroleum product at a port from a carrier and the transfer to and receipt by another carrier shall be done with the permission of the relevant Port Authority.
7. Intertanko's Standard Tanker Chartering Questionnaire 88 (Q-88), version 3, from the petroleum product carrier shall be sent in advance to the relevant Port Department and Storage Department for examination and confirmation.
8. A sample of the imported petroleum product shall be tested and examined by an officer authorized by the President and a lab certificate, which is recognized as qualified, shall be included.
9. In connection with the quality of the imported petroleum product, the Ministry of Energy may, if necessary, acquire the sample and test and examine it.



**Chapter 3**

**Storage**

10. A person desirous to store a petroleum product shall construct an underground storage tank, surface storage tank and warehouses in accordance with the prescribed standard, norms and designs and shall apply for, and acquire, a storage license from the Mining Department, Ministry of Mines.
11. A person storing a petroleum product shall strictly comply with the regulations contained in the storage license.

**Chapter 4**

**Transport**

12. A bowser, oil barge, tanker and tank wagon by which a petroleum product is transported shall be registered with, and *[the registration shall be]* validated by, the relevant departments.
13. A bowser, oil barge, tanker and tank wagon by which a petroleum product is transported shall not transport more than the specified quantity.
14. If the owner of a vehicle or barge by which a petroleum product is transported appoints any person, he/she shall be responsible that the employee understands and follows the procedures.
15. In order to avoid, when transporting a petroleum product, unnecessary incidents such as a leakage, fire hazard and explosion, *[the transport]* shall be done in accordance with the prescribed rules, regulations and procedures under the relevant law.

**Chapter 5**

**Distribution**

16. In order to obtain permission to operate a petroleum product distribution business at a petroleum sales shop and storage place, a distribution license shall be applied for and acquired from the Ministry of Energy.
17. The license holder under paragraph 16 shall strictly comply with the regulations contained in the distribution license.



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### Chapter 6

#### Miscellaneous

18. The Committee shall, without interfering in the duties and powers of the relevant ministries under this notification, perform its duties and responsibilities by itself or shall authorize a Sub-Committee.
19. In case of non-compliance with, or a violation of, the provisions of this notification, action shall be taken under the Essential Goods and Services Law.
20. When submitting an application to acquire a license and operating a business under this notification, the Environmental Conservation Law, Foreign Investment Law and any other relevant law, rule, order, etc. shall be complied with.
21. When operating businesses of importing, storing, transporting and distributing petroleum products, necessary accounts, records and vouchers shall be completely compiled and maintained at every stage of the business and shall be submitted for examination when the relevant departments come to examine them.
22. When operating businesses of importing, storing, transporting and distributing petroleum products, the fire safety specifications of the Fire Services Department shall be complied with as prescribed.
23. Whoever transports a petroleum product in transit through the Republic of the Union of Myanmar shall acquire permission from the Ministry of Energy and the charges for the transport in transit shall be paid to the State at the prescribed rates.

Zay Yar Aung

Union Minister

Letter No. 2-11 Energy (1) (4179) 2013

Date: 28<sup>th</sup> August 2013



### First draft of the Myanmar Investment Rules

A new Myanmar Investment Law was enacted on 18 October 2016, merging and replacing the old Foreign Investment Law and the old Citizens Investment Law. On 13 January 2017, DICA published a first draft of the Myanmar Investment Rules (<http://tinyurl.com/gvtkghm>), one of the by-laws implementing the new Myanmar Investment Law.

#### 1. Investment permits

The new Myanmar Investment Law aims at reducing the cases in which an investment permit (colloquially known as MIC permit) is required (section 36). The draft Rules specify that an investment permit is required in the cases listed below. It should be noted that both local and foreign investors have to apply for an investment permit if their investments match the criteria below; previously, it was usually optional for a local investor whether to apply for an investment permit.

##### (a) Investment is strategic for the Union

- The investment in the communications, technology, transport infrastructure, energy infrastructure, urban development infrastructure, extractive/natural resources, agricultural, urban land or media sectors [and has an expected Investment value exceeding \$[20] million];
- the investment is made pursuant to the grant of a concession, agreement or similar authorisation by an Authority [and has an expected Investment value exceeding \$[20] million];
- the investment is made in a border region or conflict affected area [and has an expected Investment value exceeding \$[10] million];
- the investment will be conducted across the national border [and has an expected Investment value exceeding \$[20] million];
- the investment it is made for primarily agriculture-related purposes and includes rights to occupy or use more than [1000] acres of land; or
- the investment is made for primarily non-agricultural purposes and includes rights to occupy or use more than [100] acres of land.



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The thresholds are in brackets in the original which probably indicates that it is still being debated whether to exclude smaller-sized investments from the requirement to obtain an investment permit.

**(b) Investment is large and capital-intensive**

The investment value is expected to exceed \$[100 million].

**(c) Investment has large potential impact on the environment and the local community**

- The investment has been or is likely to be classified as [an EIA Type Project] (*i.e.*, *as a project for which an environmental impact assessment is required*);
- the project is located under a designated protected area or biodiversity area under the Environmental Conservation Law; or
- it includes rights to occupy or use land which:
  - has been is or likely to be acquired through expropriation, compulsory acquisition procedure or by agreement in advance of such expropriation or compulsory acquisition procedure in accordance with the laws of the Union and will either cause the relocation of at least [100] individuals permanently residing on such land or comprise an area of more than [100] acres;
  - comprises an area of more than [100] acres and would be likely to cause involuntary restrictions on land use and access to natural resources to any person having a legal right to such land use or access;
  - comprises an area of more than [100] acres and which is the subject of a pre-existing bona fide claim or dispute by a person regarding rights to occupy or use such land in a way which would conflict with the proposed Investment; or
  - would otherwise adversely impact the legal right of at least [100] individuals occupying such land to continue to occupy such land.

**(d) Investor uses state-owned land and/or buildings**

As an exception, an investor using state-owned land and/or buildings is not required to apply for an investment permit if:



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- the consideration or value of other payments to be made in respect of the acquisition and use of such land rights by the Investor is less than \$[5] million in aggregate and the Investor is leasing or licensing the land or building for a term of 5 years or less (including any option the Investor may have to an extension of such land rights); or
  - the Investor sub-leases or licences such state-owned land or buildings from a person who:
    - has previously obtained the right to use the state-owned land or building from an Authority in accordance with the laws of the Union (including this Law); and
    - is authorised to sub-lease or sub-licence the state-owned land or buildings in accordance with the rights granted from the Authority; and
- the land and buildings are to be used by the Investor in a manner permitted under the lease, agreement or other instrument by which the land rights were granted by the Authority to the person.

### 2. Endorsement

Under the old Foreign Investment Law, foreign investors used to apply for an investment permit (“MIC permit”) because they could otherwise not (i) lease land in excess of one year or (ii) import goods. Furthermore, foreign and local investors alike used to apply for an investment permit as there were otherwise no tax incentives available.

However, under the new Myanmar Investment Law, investment permits are only required - and are only available - if the investment fulfills one of the criteria listed above under 1.

For investors whose investment fulfills none of these criteria, but that still desire to lease land in excess of one year (foreign investors) and/or obtain tax incentives (foreign and local investors), the new Myanmar Investment Law introduces a new “endorsement procedure” (in the Myanmar original: “approval procedure”).

The reason for introducing the endorsement concept was to make things easier by having a faster, simpler procedure in comparison to the full-blown investment procedure. However, judging from the draft Rules, this goal may at least initially not be



achieved as the investment procedure and the endorsement procedure, as provided for in the draft, are exactly the same.

### **3. Applications for the right to lease land in excess of one year and for tax incentives**

Foreign investors desiring to lease land in excess of one year, and local and foreign investors wishing to obtain tax incentives, have to file corresponding, separate applications in addition to the investment application or the endorsement application. However, the separate applications can be filed at the same time.

### **4. Importing goods**

Without investment permit ("MIC permit"), foreign investors cannot register as an importer with the Ministry of Commerce and therefore cannot import goods. This is a problem for those investors that are not eligible for an investment permit as their investment fulfills none of the criteria listed above under 1.

However, it may be possible for such investors to apply for an endorsement and then register as importer as draft rule 76 states: "Without limiting any applicable law, an Investor holding an Endorsement in respect of an Investment may import any equipment, goods or materials relevant to the Investment. Where any licence or other approval is required under an applicable law to proceed with such an import, the Investor will be entitled to apply to the relevant Authority for and receive such a licence."

Time will show whether this solution will work in practice.

### **5. Restricted investments**

The draft Rules do not specify which investments are restricted (i.e. a state monopoly, restricted to foreigners, requiring a joint venture with a citizen or a recommendation from the relevant ministry); we will have to wait for a separate MIC notification in this regard.

If a joint venture with a citizen is required, the local partner must hold at least 20% of the shares of the joint venture company according to the draft Rules (under the old Foreign Investment Law, it was possible to have a lower percentage in many cases).

Interestingly, an investor wishing to make a restricted investment just has to notify the MIC - unless an investment permit is required (see above 1.), no determination or



approval of the MIC is required in order to proceed with a restricted investment (draft rule 51).

### **6. Promoted investments**

The draft Rules do not specify which investments are promoted (i.e. eligible for corporate income tax exemption); we will have to wait for a separate MIC notification in this regard. Furthermore, “zone 1,” “zone 2” and “zone 3” areas (i.e., areas where promoted investments may obtain seven, five or three years of corporate income tax exemption) will be specified in a separate notification.

### **7. Devolution**

The draft Rules provide for the power of the MIC to delegate the authority to issue investment permits and endorsements and grant tax incentives to the regional and state level if the investment amount is less than USD 5 million, and the authority to allow long-term leases of immovable property (i.e., leases with a term in excess of one year) to foreign investors irrespective of the investment amount.

### **8. Investment screening application**

The draft Rules introduce a screening procedure in order to determine certain aspects of the treatment of an investment in advance. An investor may submit an investment screening application to the MIC for non-binding guidance on whether its proposed investment is of the kind:

- where an investment permit (“MIC permit”) is required;
- likely to be submitted to the Pyidaungsu Hluttaw for approval prior to the issue of the investment permit;
- which is a prohibited investment;
- which is a restricted investment; or
- which is a promoted investment.

The investment screening guidance will not express a likelihood of an approval being granted.