



LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

To:

[...] Law Offices

Attn.: Mr. [...]

[...]

Kunming Yunnan

China

Yangon, 19th June 2018

Legal opinion on a proposed investment in an SEZ in Shan State

Dear Mr. [...],

We understand that [...], a Chinese [...] enterprise, intends to set up a special economic zone (SEZ) in Muse, Shan State, Myanmar (“**Muse SEZ**”), and requests a legal opinion on the approval process and formalities in respect of the investment in and construction and operation of the SEZ in Myanmar. The legal opinion shall specify the approval item (i.e. name of permit, certificate or approval), responsible governmental agency, required documents for application as well as approval timeline and government fees.

1. Regulatory framework

Myanmar only has two pieces of legislation covering the investment in and construction and operation of an SEZ:

- (1) Myanmar Special Economic Zone Law (Pyidaungsu Hluttaw Law No. 1/2014 dated 23 January 2014 - English translation: <https://tinyurl.com/ydb7tnze>) - “**SEZ Law**”; and
- (2) Myanmar Special Economic Zone Rules (Ministry of National Planning and Economic Development Notification No. 1/2015 dated 27 August 2015 - English translation: <https://tinyurl.com/y9675hof>) - “**SEZ Rules**”.

Both pieces of legislation only cover certain aspects of the establishment and operation of an SEZ and provide only a high-level framework within which an “**SEZ Management Committee**” is to establish the actual procedures. As no SEZ Management Committee has been created for a Muse SEZ yet,¹ our explanations in this legal opinion necessarily lack detail as we cannot consult with the SEZ Management Committee.

¹ There are some press reports according to which “an SEZ is being developed in Muse” (<https://tinyurl.com/y9v3vjnv>), but this is clearly an exaggeration as the reported land area of 288 acres falls far



LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

2. Administrative framework

Myanmar currently has three SEZs: (i) Thilawa (operational), (ii) Dawei (preparatory stage), and (iii) Kyaukphyu (preparatory stage). According to the SEZ Law, these three SEZs are - and any future SEZ will be - overseen and administered by a three tiers governance structure: The (i) Central Body, (ii) the Central Working Body and (iii) a specific Management Committee for the respective SEZ.

The **Central Body** is the highest supervisory body for all SEZs. It is, in fact, not a government agency, but a committee set up by the Union Government that meets twice a year. It is chaired by Vice President-2 of the Republic of the Union of Myanmar (currently, Mr. Henry Van Thio - NLD) and composed of 15 members, among them several Union ministers.

The **Central Working Body** is a committee set up by the Central Body with the approval of the Union Government. It is in charge of, among others, pre-screening applications to develop an SEZ that were submitted by an investor to the respective SEZ Management Committee. The Central Working Body is composed of 15 members (Union Ministers and senior civil servants) and chaired by the Union Minister of Commerce (currently, Dr. Than Myint - NLD).

The office work of the Central Body and the Central Working Body is handled by the Union Ministry of Commerce. The Union Ministry of Commerce would, in addition to the State Government of Shan State, also be the first address that an investor wishing to establish an SEZ in Muse would want to approach.

An **SEZ Management Committee** is established for each SEZ by the Central Body. It is composed of senior officers from Union Ministries, at least one representative of the State Government and, possibly, external experts. The SEZ Management Committee is charged with the direct oversight and administration of an SEZ. It proposes the development of the SEZ (after having received an application from a developer), coordinates with the Ministry of Home Affairs to acquire the required land and leases the land to the developer. Once the SEZ is established, the Management Committee in particular demarcates the “free zones” and the “promotion zones” and makes rules for the operation of the SEZ and the businesses established in the SEZ.

As an investor can submit an application to develop an SEZ only after (i) the Union Parliament has approved the establishment of an SEZ at the proposed location, (ii) the investor has been selected by the Central Body as developer and (iii) the SEZ Management Committee for the

short of the minimum land area of an SEZ according to the SEZ Rules (2,471.05 acres) and the description of the project suggests an ordinary city development project under Myanmar’s ordinary investment laws, not the SEZ Law.



LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

specific SEZ has been set up, the investor's first task is to lobby the government to achieve these results.

3. Procedure for developing an SEZ

Roughly speaking, the procedure for developing an SEZ would be as follows:

- (a) The developer finds a suitable area in which he wants to establish the SEZ.
- (b) The developer lobbies the State and the Union Governments (starting point: the Office of the State Chief Minister and the Union Ministry of Commerce) to support the project.
- (c) The Central Body establishes the SEZ with the approval of the Union Government (cabinet) and the Union Parliament (Pyidaungsu Hluttaw) and sets up the SEZ Management Committee.
- (d) The Central Body selects the developer (based on a tender or on the experience of the candidate).
- (e) The developer conducts an environmental and social impact assessment.
- (f) The developer submits the proposal to develop the SEZ to the SEZ Management Committee.
- (g) The SEZ Management Committee passes on the proposal to the Central Body through the Central Working Body. If the Central Body approves, the SEZ Management Committee issues an investment permit to the developer.
- (h) The SEZ Management Committee coordinates with the Ministry of Home Affairs concerning land acquisition: The Ministry of Home Affairs purchases and/or confiscates the land with compensation from its current owners and/or occupants (the necessary funds have to be provided by the developer) and transfers the land to the SEZ Management Committee.
- (i) The SEZ Management Committee concludes a lease agreement with the developer.

Specified procedures only exist for (e), (f) and (g). Given that there are not many specified procedures concerning the establishment of an SEZ, and that so far only three SEZs have been established, it is not possible to give accurate timelines. Furthermore, while the above list shows a broad sequence of events, it is not possible with certainty to establish at this point the exact order in which things have to be done. It may, e.g., be advisable to do a preliminary



LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

environmental and social impact assessment already as part of the developer's lobbying efforts, i.e., prior to obtaining the Union Parliament's approval to set up the SEZ.

Developers have to be flexible and make things up as they go along.

That said, a rough sequence of events would be as follows:

(a) Finding a suitable land area

The land area has to comprise at least 1,000 hectares (2,471.05 acres), but not more than 20,500 hectares (50,656.60 acres) (Rule 39 SEZ Rules). Furthermore, the land should meet all of the following criteria (section 12 SEZ Law - the law does not further define these criteria):

- (1) Having international gateways such as a port or an airport, or being otherwise suitable for easy transport to an international border or to domestic markets;
- (2) being an area that has been designated for regional development by the Union Government;
- (3) having infrastructure in place or having the prospect for its implementation;
- (4) availability of water resources and electric power;
- (5) having a sufficiently large land area to establish industries and investment businesses;
- (6) availability of skilled workers, semi-skilled workers and trainable workers;
- (7) possibility to arrange training courses for the recruitment of required skilled workers;
- (8) being a "strategic area" or land that allows transport or linkage to markets in the country.

If not all of the above areas (1)-(8) are met, an SEZ may nevertheless be established if the establishment is judged (ultimately, by the Union Parliament) to be "beneficial for the country and its people" (section 13 SEZ Law).

All three SEZs established so far use land that was owned, acquired and/or confiscated by the government and (ii) subsequently made available to the SEZ developer.



LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

According to the SEZ Rules, it should, however, also be possible to build an SEZ on privately owned land. As foreign investors are prohibited from owning land (section 4 Transfer of Immovable Property Restriction Law 1987), a foreign investor wishing to build an SEZ on privately owned land would need a Myanmar business partner who would be willing to (i) buy up the land from its current owners and (ii) lease it to the foreign developer.

(b) Lobbying the State and the Union Governments

All three SEZs in the country so far seem to have been established with the help of intense lobbying through diplomatic channels from Japan, Thailand and China respectively, and we suppose that this is also a model for the establishment of future SEZs.

If no lobbying efforts have been undertaken so far, the first step would probably be to make the Chief Minister of Shan State and the Union Ministry of Commerce aware of the benefits of the project for the country.

It is possible to arrange first meetings by simply sending a letter to the Chief Minister's Office and the Union Ministry of Commerce, but clearly - especially for a project the size of an SEZ - it is better to be introduced by someone important. Initial contact with regard to the development of an SEZ should in our opinion be made through diplomatic channels from the developer's home country.

A short power point presentation in English and Myanmar (including items such as experience and financial strength of the developer, location and land area, potential of the project to develop the economy of Myanmar and create job opportunities, suitability of the land, willingness to pay compensation to current land owners, etc.) always comes in handy.

If successful, the participants at the first meetings from the government side will make suggestions as to whom to visit next and what steps to undertake next.

We suppose that one of the next steps would be the undertaking of a feasibility study.

(c) Central Body establishes the SEZ with the approval of the Union Government (cabinet) and the Union Parliament (Pyidaungsu Hluttaw) and sets up the SEZ Management Committee

The SEZ Law and the SEZ Rules are very brief in this respect and only provide that the Central Body (i) establishes the SEZ with the approval of the Union Government and the



LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

Pyidaungsu Hluttaw (section 12 SEZ Law) and (ii) forms the SEZ Management Committee within 30 days after the establishment of the SEZ was approved (Rule 3 SEZ Rules).

(d) Selection of the developer by the Central Body

According to section 14 SEZ Law, the “Central Body may:

- (1) select the developer by calling a tender according to international procedures;
- (2) select the developer, as another way of selection, by giving priority to those who have managerial experience with special economic zones, taking into consideration the benefits for the country and the citizens, favourable conditions for speedy implementation of the project, participation of the people, and transparency.”

Unfortunately, no further details are provided in the SEZ Law and the SEZ Rules.

(e) Environmental and social impact assessment

The developer has to prepare an environmental and social impact assessment report, but it is not entirely clear at what stage. Our suggestion is to start preparation once the developer has been selected by the Central Body, but it may be recommendable to have at least a preliminary report in place earlier as part of the developer’s lobbying efforts.

The environmental and social impact assessment has to be conducted by a service provider recognised by the Department of Environmental Conservation under the Ministry of Natural Resources and Environmental Conservation. The Department used to have a list of approved service providers on its website, but this page seems to have been deleted.

(f) Submission of the proposal to develop the SEZ to the SEZ Management Committee by the developer

According to Rule 24 (a) SEZ Rules, the selected developer shall submit details of the development project creating the SEZ on a specified form (“form A”) to the SEZ Management Committee within 6 months from the date of nomination.

Form A is too lengthy to replicate here, but it requires the developer to provide in particular the following information and documents:

- (1) Corporate details and contact details;



LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

- (2) location of the SEZ; distance from the nearest seaport, airport, railroad connection or road connection; area in hectares; land ownership documents, lease agreement or activities already undertaken to acquire the land;
- (3) costs and quality of the land;
- (4) costs of creating the infrastructure (land development; boundary walls, road, drainage, water supply, electricity; factory buildings; port; airport; etc.);
- (5) total investment in USD; debt : equity ratio; sources of funds;
- (6) proposed area for the “development” [*Lincoln: we suppose that this means “proposed area for infrastructure”*]; for a free zone; for a promotion zone; for production;
- (7) development activities to be undertaken (site development; demarcation; construction of roads; installation of water supply, waste water treatment and sewage systems; power distribution system; telecom facilities; construction of factory buildings and warehouses; other required activities);
- (8) facilities proposed to be established in the promotion zone (residential housing; commercial complex; recreation facilities; corporate social responsibility facilities; others);
- (9) export volume during the first five years;
- (10) project report; economic and commercial feasibility study.

(g) Further course of the project proposal; issuance of the investment permit

According to the SEZ Rules,

- (1) the SEZ Management Committee shall submit the project proposal to the Central Working Body within 15 days after having received it from the developer (Rule 24 (b) SEZ Rules);
- (2) the Central Working Body shall review the proposal and submit it to the Central Body within 30 days (Rule 24 (c) SEZ Rules);
- (3) the Central Body shall decide within 30 days whether to approve or reject the proposal (Rule 24 (d) SEZ Rules);



LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

- (4) If the Central Body has approved the proposal, the SEZ Management Committee shall issue an investment permit with terms and conditions to the developer (Rule 25 SEZ Rules - a sample permit is provided in the SEZ Rules).

(h) Land acquisition

Land acquisition is carried out by the Ministry of Home Affairs, section 82 SEZ Law (in practice so far, by the District General Administration Department under the Ministry of Home Affairs according to the directions of the SEZ Management Committee).

The developer would probably have to draw up a resettlement plan (which would in particular specify the amount of compensation payable to the land owner or occupant according to the type and the quality of the land, and/or specify what replacement land is to be made available to the owner or occupant) and have it approved by the SEZ Management Committee.

Costs of the resettlement have to be borne by the developer (section 80 (a) SEZ Law).

The Ministry of Home Affairs may, according to the Land Acquisition Act 1884, confiscate land whose owners or occupants do not voluntarily relocate (however, adequate compensation has to be paid).

(i) Lease Agreement

The Ministry of Home Affairs then transfers the land to the SEZ Management Committee. The SEZ Management Committee leases the land to the developer for 50 years (a renewal for 25 years is possible); section 79 SEZ Law.

Later, the developer divides the land into plots and sub-leases the plots to investors in the SEZ; section 39 (a) SEZ Law.

4. Construction of the SEZ infrastructure

The SEZ Law and the SEZ Rules do not contain many specifics with regard to the construction of the SEZ infrastructure. The SEZ Management Committee is supposed to set up a one-stop service centre (OSSC) which would also be in charge of issuing construction permits and related permits (Rule 20 SEZ Rule). The developer may subcontract construction work to engineering and construction companies.



LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

5. Operation of the SEZ

The SEZ Law and the SEZ Rules provide a high-level framework for the operation of the SEZ. The SEZ Management Committee would have to issue notifications, orders, directives and procedures to flesh it out (section 95 (b) SEZ Law).

The SEZ Management Committee shall in particular

- (a) demarcate free zones (to be fenced by the developer) for export-oriented businesses and promotion zones for other businesses (Chapter IV SEZ Rules); and
- (b) set up an OSSC (section 20 SEZ Law) in particular for customs procedures, tax payments, company incorporation, construction permits, registration of Myanmar workers and foreign workers and industrial licenses.

Investment proposals (i.e., proposals to establish a business in the SEZ such as a factory) must be submitted to the SEZ Management Committee on a specified form and with specified attachments (Rule 47 SEZ Rules). If the SEZ Management Committee approves the proposal, it shall issue an investment permit with terms and conditions on a specified form (Rule 50 SEZ Rules). The investor shall sign a sub-lease agreement with the developer after the SEZ Management Committee has issued the investment permit (Rule 55 (a) SEZ Rules).

Please do not hesitate to contact us should you have any questions.

Yours faithfully

[...]