Changes and Challenges: Acquisitions and Investments in Myanmar

Kelvin Chia Yangon Ltd.

Our Background

- Established in 1995: the oldest and largest foreign legal consultancy firm based in Yangon
- A full services corporate legal consultancy, with 18 years of experience in Myanmar
- Part of the regional network of Kelvin Chia Partnership
- Local expertise with international know-how
Today's Roadmap
Changes and Challenges: Acquiring and Investing in a Business in Myanmar

1. Investment Conditions at a Glance
2. Market Entry and Foreign Investment
3. Land Matters
4. Other Challenges for the Foreign Investor
5. Myanmar Special Economic Zone Law

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Investment Conditions at a Glance
Country Overview

AN INVESTMENT HOTBED ATTRACTING SOPHISTICATED INVESTORS DOING COMPLEX TRANSACTIONS
Population of 52.8 Million (2012): Largest and least explored land mass on mainland South East Asia, with total land area of 678,500 sq. km; substantial unexploited resources; strategic geographical location

CONTRASTED WITH A BAREBONES LEGISLATIVE INFRASTRUCTURE
• Descended from English common law (codified laws designed for colonial India). Precedent and Indian rulings are considered persuasive.
• Statutory laws have been frozen in time and have no bearing to commercial reality.
• New laws are passed by the Union Parliament and approved by the President.
• Speed versus debate and efficacy.
• Broad principles to be followed by implementing regulations.
• Interim reliance on administrative interpretation.
• Criticisms of lack of transparency and certainty – are these justified?

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Available business structures under the MFIL (2012)

- 100% Foreign-owned
- JV with Local Partner
- BOT
- BTO

Contractual Arrangements

MIC Companies
- MIC-Permit companies

CRO Companies
- Private limited company registered with the DICA

Investment Conditions at a Glance
Foreign Investment Framework

Meeting the MIC Threshold

- The Myanmar Foreign Investment Law (2012) ("FIL") was enacted on 2 November 2012 and updated the previous Myanmar Foreign Investment Law (1988).

- Foreign Investment Rules and MIC Notification issued on 31 January 2013 implementing the FIL 2012.

- MIC Notification sets out the conditions and restrictions for FDI

- MIC Companies are sometimes preferred because of tax incentives or other assurances conferred – tax holidays, land rights, import rights and repatriation benefits

- Non-MIC companies are sometimes opted for because of shorter timeframe for establishment, absence of evaluation process (as contrasted with no-objections procedures), lower capitalization, but do not enjoy the same safeguards as MIC Companies.
Investment Conditions at a Glance
Meeting the MIC Threshold

• Some projects can only go through the MIC route – sensitive sectors generally reserved to the state, manufacturing/industrial, land related projects

• Some projects will not make the MIC threshold and can’t go through the MIC route; the clarity of the conditions and restrictions continue to be “tested” through interactions between foreign investors and the authorities

• A raising of the bar for certain businesses (example service businesses) may exclude certain worthwhile investments. The company that is excluded suffers from various disadvantages – imports, land holding restrictions and foreign exchange assurances

• An updated version of the MIC Notification with clarifications on the FDI conditions and restrictions is expected to be published in early 2014.

Market Entry & Foreign Investment
Methods of Entry

• Foreign investors may enter Myanmar through:
  – Greenfield projects
  – Joint ventures coupled with acquisitions (transfer of businesses) of ongoing businesses

• Share transfers are not common
  – The Myanmar Companies Act (1914) implies the ability for foreigners to purchase shares in existing wholly owned Myanmar companies.
  – Directorate of Investment and Company Administration (“DICA”) have not allowed the registration of any such share transfers.
  – Previously, the same approach was adopted by the Myanmar Investment Commission (“MIC”)
  – In recent times, the Myanmar Citizen’s Investment Law (2013) allows wholly owned Myanmar companies registered under the law to transfer shares to foreigners upon approval of the Myanmar Investment Commission (“MIC”)

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Market Entry & Foreign Investment
Entry by Leveraging on Existing Business

• Business transfers made difficult by the costs of transactions and difficulties in the transfer processes and timing for completion.

• Share transfers made difficult by lack of compliance/legacy issues and land issues and lack of implementing regulations.

• Challenges in the due diligence exercise.

Market Entry & Foreign Investment
Due Diligence

• Complexity of due diligence exercises
  – Public searches are not available in Myanmar, including, searches relating to corporate matters, litigation and land.
  – Reliance must be made on documents provided by the target.
  – Documents are usually in the Myanmar language.
  – Documents provided by the target may not be complete, and there is no strong record-keeping culture, both on the part of the target or the government.

• Targets and regulators may not have an immediate grasp of otherwise standard concepts in foreign investment, corporate finance and structuring.
Market Entry & Foreign Investment
Entry Through Greenfield Projects

• Identification and securing of land is critical to the investment approval process. How does an investor hold down the land, pending a lengthy approval process?

• In the case of a joint venture, local partners may only be able to contribute land in kind, but they incur an adverse tax impact.

• If project is substantial, then it may be difficult to maintain desired share capital ratio because of prospective thin capitalization rules.

• Pre-investment funding is frequently necessary, but is problematic.

Dealings with Land
General Legal Framework

<table>
<thead>
<tr>
<th>Constitution</th>
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<td>Laws</td>
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<table>
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<tr>
<th>Rights and Title</th>
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<tbody>
<tr>
<td>URBAN - Freehold/Grant Land</td>
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<table>
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<tr>
<th>Restricted to Specific Uses</th>
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<tr>
<td>Commercial/ Industrial/ Residential</td>
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Dealings with Land
Restrictions Affecting Foreigners

**General Restriction**
- Transfer of Immovable Property Restriction Law (TIPRL)
- No dealings of land where a foreign party is involved

**Exceptions to the Restriction**
- Leases of less than 1 year
- Does not apply to “companies or organizations formed under common interest with the State”

**Myanmar Foreign Investment Law (2012)**
- May lease land where necessary for the investor’s business
- Period of 50+10+10 years; Longer period for those who invest in a less developed and inaccessible location
- This permission is extended through the issue of the MIC Permit

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**Dealings with Land**
Some Important Guidelines

- Land must be identified for any land related project – not possible to seek approval for a business which is land related except with a project/land in hand
- Land lease contract has to be submitted.
- Land required must not be excessive to the needs.
- Land must be capable of being used for the purposes intended – difficulties in the conversion process.
Dealings with Land
Impact of Restrictions

- Companies operating without an MIC Permit are not able to lease land beyond a year.

- Companies with a MIC Permit are not able to lease land beyond 50 years, placing them on an uneven playing field.

- Disposals are restricted, for investors which want a ready exit.

- Foreign companies and individuals without an MIC Permit may not buy commercial or residential properties. New Condo Laws to be passed.

- Foreign banks do not have capacity to accept mortgages of land (in addition restrictions under the Financial Institutions of Myanmar Law).

Other Challenges
For the Foreign Investor

- Repatriation issues for companies that are not operating under an MIC Permit

- Import procedures and conditions may inhibit cross border sale and purchase transactions

- Importation for the purposes of resale – what exactly constitutes trading

- Changing rules and landscape for urbanization, building and construction
The Myanmar Special Economic Zone Law ("SEZ Law") was recently enacted on 23 January 2014.

Currently, there are three Special Economic Zones ("SEZ") being set up in Myanmar:
- Thilawa SEZ
- Dawei SEZ
- Kyauk Phyu SEZ

Additional SEZs may be established in accordance with the SEZ Law.

Background

- The administrative process for investors in the SEZ is streamlined.
  - "one-stop centers" will be set-up to provide for single points of contact for permit issuance, registration, and other regulatory matters

- Management Committees will evaluate investment proposals and revert with a decision within 30 days.

- Categorization of activities within the SEZ into:
  - export-focused "Exemption Zones"
  - domestically-focused "Promotion Zones."

Salient Provisions
# Myanmar Special Economic Zone Law

## Salient Provisions

<table>
<thead>
<tr>
<th>Developers</th>
<th>Investors</th>
</tr>
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<tbody>
<tr>
<td><strong>Full Income Tax Exemption</strong></td>
<td><strong>Exemption Zone</strong></td>
</tr>
<tr>
<td>First 8 years</td>
<td>First 7 years</td>
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<tr>
<th><strong>Additional Tax Incentives</strong></th>
<th><strong>The following 5 years:</strong></th>
<th><strong>The next 5 years:</strong></th>
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<tbody>
<tr>
<td>50% relief from the general applicable tax rate</td>
<td>50% relief from the general applicable tax rate on the amount of reinvestment from the profits</td>
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## Myanmar Special Economic Zone Law

### The Thilawa Special Economic Zone Project

- G-to-G cooperation agreement signed between Myanmar and Japan
- Development to be undertaken by a Myanmar-Japanese joint venture, Myanmar Japan Thilawa Development Ltd.
- The Thilawa Class A Project comprises about 400 hectares which is located in the Thilawa Special Economic Zone.
• Groundbreaking ceremonies held on 30 November 2013.

• The Project is expected to be completed in 2015.

• The Myanmar-side of the joint venture company is comprised by the Myanmar government and a Myanmar public company.

• Shares in the Myanmar public company to be offered to Myanmar citizens.

Thank you for participating!

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