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Overview of Rules and Investment Framework for Foreign Investors in Myanmar

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Investment Framework for Foreign Investors in Myanmar

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1 **Investment Framework in Myanmar**

2 **Important Recent Developments**

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1 **Investment in Myanmar**

2 **Important Recent Developments**

Myanmar Profile

Snapshot

- WTO accession: 1995
- Population: 53 million
- GDP Growth (World Bank): 8.5% (2014)
- Inflation (World Bank): 5.5% (2014)
- New NLD-led government with Aung San Suu Kyi
- Planned economy (Large State)
- Common law, Socialist (Military) influence
- Key FDI sources: PRC, Thailand, Singapore, Korea & Japan

Various Myanmar Investment Laws

- Myanmar Companies Act of 1914 (**MCA**)
- Foreign Investment Law of 2012 implemented on 2 November 2012 (**FIL**)
- Myanmar Citizens Investment Law of 2013 (**MCIL**)
- Myanmar Special Economic Zone Law of 2014 (**MSEZL**)
- Myanmar Special Economic Zone Rules of 2015 (**MSEZR**)

FIL Industry Categories

Rule 1: Prohibited

- No foreign investment
- Defence, media, exploration/production of jade/gems & small/medium scale mining

Rule 2: Restricted

- JV with Myanmar citizen/company (up to 80%)
- Small and medium scale production of electricity, condominiums & commercial buildings, airlines

Rule 3: Special Conditions

- Prior approval/recommendation of Govt/Ministries often required
- Private hospitals, foreign language newspapers, dockyards
- JV with State required for oil and gas services, e-lottery, manufacturing of cigarettes

Rule 4: Conditional

- Other mandatory conditions/authorisations (ESIA)
- Hard minerals, oil & gas & hydro

Various FIL Industry Highlights

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- Transfers of shares under FIL/MCIL requires approval from Myanmar Investment Commission (**MIC**)
- 100% foreign ownership possible, unless provided otherwise under FIL or 'reserved' by State policy, such as trading/distribution (other than JV with MIC permit) and import/export (without MIC permit)
- Current and capital account transfers possible (sometimes difficult and capital accounts require approval from Central Bank of Myanmar)
- Secured debt financing limited, yet achievable (subleasing & mortgage of long-term lease possible under FIL)
- Under FIL, skilled labour requirements (local ratio: 25% 2Y, 50% 4Y, 75% 6Y)

1 Investment in Myanmar

2 **Important Recent Developments**

FIL Notifications

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MIC issued Notification 26/2016 ("**Notification 26/2016**")

- Lists sectors and types of business permitted under the FIL, many of which are subject to restrictions and conditions.
  - Replaces a Notification from 2014 with minor changes.
  - Activities not described in any of the lists may be carried out via 100% foreign investment.

MIC issued Notification 50/2014 ("**Notification 50/2014**")

- Lists sectors and types of business permitted under the FIL which require an Environmental Impact Assessment (**EIA**).
  - e.g. mining and mineral processing, manufacturing of pharmaceuticals, chemicals and pesticide, large scale wood-based industry, etc.

Joint-venture trading companies

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- Ministry of Commerce issued Notification 96/2015 on 11 November 2015 ("**Notification 96/2015**")

- A JV company must be formed by a Myanmar company and a foreign company to be able to import and trade specified goods. 100% foreign owned companies are still not allowed to be involved in trading.

- Under Notification 96/2015, JV companies can import mentioned goods and trade (distribute and sell retail) them.

- Notification 96/2015 allows foreign owned companies in joint venture with Myanmar companies to import the following goods using foreign currencies:
  - Fertilizer
  - Insemination seeds
  - Pesticides
  - Hospital equipment

Condominium Law

- **Condominium** – a building constructed according to the Condominium Law of 2016 ("**CL**") as collectively owned high-rise apartment building with six floors or more on collectively owned registered land.
- Foreigners can buy up to 40% of apartments in a condominium. Foreign currency to purchase an apartment needs to be transferred from abroad.
- Condominiums can be built on land classified as "residential area"; must be of the type that allows transfer of ownership; and have an area of 20,000 square feet or more.
- Pre-existing condominiums or those in process of being constructed can be registered under the CL.

New Electricity Law

- The Electricity Law, 2014 ("**EL**") opens the entire power sector to private participation and repeals the former 1984 Electricity Law.
- Allows for corporatization and privatization of Ministry of Electric Power ("**MOEP**") departments responsible for transmission and distribution.
- Is the BOT approach still preferred?
  - Not explicitly, but suggests transfer of electricity related businesses appropriate upon permit term expiration.
- Permits are required to engage in any electricity-related business.
- Selling electricity into the national grid requires a permit.

New Electricity Law: Main challenges

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- No standards or procedures for issuing permits.
- No indication as to duration of permit terms.
- Less than optimal regulation of tariffs.
  - MOEP determines tariffs which must be approved by Union Government
  - MOEP's authority appears to be limited to retail tariffs.
  - Electricity rates should be "*reflective of modern times*".
  - EL does not provide any process or procedures by which tariff applications will be processed and tariffs determined.

Major Open issues affecting true project finance in Myanmar

- Ministry of Planning and Finance ("**MOPF**") not keen in providing payment guarantees.
  - Lenders/sponsors need to be creative and come up with alternative solutions.
  - Viable alternative: MOEP guarantee OR undertaking through BOT Agreement.
- Sponsors need to obtain numerous authorizations, licenses, permits, etc.
  - Impact on the satisfaction of CPs and loan disbursements by lenders.
- Registration of lease-related security documents at the Office of Registration of Deeds ("**ORD**") technically possible, however ORD shows resistance.
  - Precedent available: PAMEL.
- Ministry of Electricity and Energy ("**MOEE**") not keen in entering into direct agreements ("**DAs**").
  - DAs facilitate/outline step-in rights of lenders (if necessary).

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Environmental Impact Assessment Procedures (Notification 616/2015)

- Includes a schedule of types of projects which must provide an EIA. “Types” include characteristics of a project (i.e., one that has multiple pollution sources) as well as specific outputs (i.e. coal-fired power plants with installed capacity greater than 10 MW)
- Issued at the same time were the National Environmental Quality (Emission) Guidelines, which categories standards for emissions.

Amended Mining Law

- **Large scale production** means the commercial production of minerals with the permission to produce **from 15 to 50 years** and which requires substantial investment or special technical know-how and technologies. This type of permit is issued by the Ministry of Natural Resources and Environmental Conservation (“**MNREC”**) with the approval of the Cabinet.
- **Medium scale production** means the commercial production of minerals with the permission to produce **up to 15 years** and which requires moderate amount of investment or limited technologies.
- **Small scale production** means the commercial production of minerals with the permission to produce **up to 10 years** and which requires small investments.
- **Permits for small and medium production** are issued by the Directorate of Mines with the approval of the MNREC.

Amended Mining Law (Cont.)

- A holder of any of mining permit must pay a royalty and other fees either by cash or via the mineral proportion.
- If cash, the royalty must be contributed in Myanmar currency.
- An operator's sold produced mineral must pay the royalty according to the below rates:

Mineral	Rate
Gold, platinum, uranium and other precious mineral	5%
Silver, copper, nickel, molybdenum, iridium, osmium, palladium, etc.	4%
Iron, zinc, chromium, cobalt, manganese, magnesium, etc.	3%
Industrial minerals or stones	2%

- "Sold" means sold for funds, because assessment of the amount of royalty payable is based on a copy of sales invoice.

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Securities Business Supervisory Commission issued Notification 1/2015 ("**Notification 1/2015**").

- Develops Section 7(a) of the Securities Transaction Law of 2013.
- Sets forth the requirements for a securities business license in the Yangon Stock Exchange.
  - Specific requirements in terms of corporate vehicle (i.e., LLC), minimum paid-up capital, directors' experience and background, etc.
  - Paid up capital to be contributed shall derive from a disclosed source of income, which has been legally subject to taxation.

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Financial Institutions Law 2016 (the "Law")

- Sets out the powers of the Central Bank in relation to monitoring and control of financial institutions (these powers are very broad and can include the revocation of banking licenses for a wide range of reasons).
- Minimum paid-up capital:
  - Myanmar bank: 20 billion kyat
  - Foreign bank: 75 million USD (approximately 92.5 billion kyat)

Banking (Cont.)

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Financial Institutions Law 2016 cont.

- The Law designates a large number of matters to be detailed in Rules (rules have not yet been published) such as E-Money, E-Banking and Mobile banking regulations.
- The Law also delegates a large amount of responsibility to the Central Bank to establish, for example:
  - Minimum assets to be maintained by different classes of bank
  - Clearing Houses
  - Central Credit Bureau

Banking (Cont.)

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Central Bank Directive 16 and 17/2015 and letter

- Restricts all persons and companies from withdrawing sums over USD 5,000, withdrawals limited to twice a week.
- Calls for all monetary agreements with a Myanmar resident to be denominated in MMK.
- Does not appear to limit transactions between financial institutions.

Retailing, Export and Import

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Ministry of Commerce Notification 20/2015

- Allows foreign car companies to establish a joint venture company under the Myanmar Companies Act with its local partner.
- No minimum shareholding requirements have been set for local partners.
- The JVCo can import and distribute in retail automobiles through a showroom which is owned and operated by the JVCo itself.
- The JVCo cannot carry out wholesale sales of new cars.
- Up to 300 vehicles may be imported in one consignment.
- If cars are not sold within 2 years, they must be sent back to their country of origin.

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Shopping Malls and Retail Space

- Notification 26/2016 does not provide for any explicit restrictions on trading activities, such as invest in shopping centers.
- According to Section 2 of this notification, retail trade and investment into shopping centers can be carried out by a 100% foreign owned company. Landmark development is an example of such a project.

Minimum Wage

The **National Minimum Wage Committee** released **Notification 1/2015** on a minimum wage proposal on 29 June 2015.

- The proposed minimum wage, regardless of place and type of work, is set at 3,600 kyat (~US$2.80) for an eight-hour day as a basis for all workers across the country.
- The proposed minimum wage is therefore 450 kyat (~US$0.35) per hour.
- However, the proposed minimum wage does not apply to small businesses that have 15 workers or fewer and family businesses.
- This rate was finally approved by the above Committee on 28 August 2015.

Execution of employment contracts

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The Ministry of Labor, Employment and Social Security issued **Notification 1/2015** on 31 August 2015.

- Employees and employers to enter into written employment contracts commencing from September 2015.
- Salary payments shall be recorded in the relevant books.
- Written contracts shall be signed also by employees working in small businesses (15 workers or fewer) and family businesses although not subject to the minimum wage. Contract shall include salary agreed.
- A standard employment contract ("**SEC**") has been released. Ministry of Labor prescribed to sign contracts in the form of the SEC.
- The SEC refers to all employees (Myanmar and foreigners).

Execution of employment contracts

- Employment contracts shall be registered with the relevant Township Labor Office.
- In case parties decide to amend the SEC it is advisable to submit the contract to the relevant Township Labor Office for prior approval.
- Poses a problem to employers and employees who are wanting to offer more sophisticated working arrangements than are set out in the SEC.

Severance Payments

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Under **Notification 84/2015 of the Ministry of Labour**, employers are obliged to make the severance payments upon terminating permanent employees without cause as below:

Time of service	Severance (Month's salary)
≤6 months <1 year	½
≤1 year <2 years	1
≤2 years <3 years	1½
≤3 years <4 years	3
≤4 years <6 years	4
≤6 years <8 years	5
≤8 years <10 years	6
≤10 years <20 years	8
≤20 years <25 years	10
≥25 years	13

Money laundering

The Ministry of Home Affairs issued Notification 1201/2015 referred to Anti money laundering rules on 11 September 2015.

- It sets out the rules for investigating money laundering.
- Duties of the Central Board, the Financial Investigation Board and the committees involved in the anti-money laundering activities.
- Provides power to check bank accounts, cash flows and sources of financing.

Anti-Corruption Rules

- **The Anti-Corruption Rules 2016** sets out in detail the powers and functions of the investigation board and Anti-Corruption Commission. In particular the seizure powers of these bodies. Anti-Corruption Law was passed in 2014, rules set out the mechanism for the operation of the law.

- The Rules outline obligations of banks in response to an investigation, but do not create an obligation for proactive reporting of corruption suspicion.

Television and broadcasting

Television and broadcasting law (Law 53/2015) was issued on 28 August 2015.

- Liberalization of the television and broadcasting sector to private participation.
- Foreign ownership allowed in joint venture with Myanmar citizens (30% foreigner and 70% Myanmar citizen).
- Transmissions shall commence within one year after the obtainment of the license.
- Terms of licenses:
  - Generally radio licenses last for 7 years while television licenses for 10 years
  - Broadcasting program distribution service business 15 years

Competition

Presidential **Notification 69/2015** dated 2 December 2015 declared the **Competition Law of 2015** to be effective on 24 February 2017.
Competition Law:

- Basic framework of competition policy.
- Covers mergers, abuses of dominant position, anti-competitive agreements and unfair trade practices.
- Strong penalties such as imprisonment potentially applicable.
- Businesses should commence to audit their conduct early to determine potential infringements of the law.
- Relevant rules will be issued to assure the effective implementation of the law.

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Myanmar SEZ Rules of 2015

- According to Section 20, a One-Stop Service Department shall be formed with the intent to approve and give permits for investments in SEZs, incorporate companies, issue entry visas, issue the relevant certificates of origin, collect taxes and duties, approve employment permits and/or permissions, give permissions for factory construction and other investments.
- Section 57 provides the minimum requirements for certain businesses which can be carried out within SEZs. As an example and amongst other requirements, the manufacturing businesses shall export minimum 75% of the total value of the manufactured goods. In this case, the minimum investment must be equal to USD 750,000.

One Stop Service Center

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- **Special Economic Zone Rules (SEZ Rules)** were passed on 27th August 2015 by Ministry of National Planning and Economic Development with Notification No.1/2015.
- **One Stop Service Center** will be formed including various government departments and the following matters can be carried out;
  - Investment permit
  - Company registration
  - Export/Import licence
  - Labour
  - Permit on factory establishment
  - Tax
  - Entry visa, stay permit for foreigners
  - Other necessary permit/ licence for the business

SEZ Establishment and Land Use Right

SEZ Establishment

- The selected developer shall submit the detail development plan of SEZ establishment to the Management Committee within 6 months from the selected date.
- The Management Committee will issue the permit if the development plan is accepted. It will take about 2 and half months to get the permit.
- The developer can apply for the renewal of the permitted term. The developer have to report the development plan quarterly to the Committee.

Land Use Right

- The area of SEZ must be at least 1,000 hectare to maximum 20,500 hectare.

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Arbitration Law 2016

- Largely adopts the “New York Convention” Model rules.
- Foreign arbitral awards implemented by way of court decree under Myanmar’s Civil Code of Procedure – this must be accomplished within 90 days of the issuance of the foreign award.
- A party who is applying for the enforcement of a foreign arbitral award shall do so before the court and produce the following documents: (i) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; (ii) the original agreement for arbitration or a duly certified copy thereof, and (iii) such evidence as may be necessary to prove that the award is a foreign award. If the foreign arbitral award is not made in English, a certified translation will have to be produced too.

Easing of US Sanctions

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- On May 23, 2012, the U.S. State Department issued final "Responsible Investment Reporting Requirements" for Myanmar.
- U.S. persons will be required to submit:
  - detailed annual reports for new investment in Myanmar exceeding USD 5,000,000 (threshold was raised in May 2016, previously – USD 500,000); and
  - investment notification for any new investment with Myanma Oil and Gas Enterprise (MOGE) pursuant to an agreement or exercise of rights under such an agreement.
- U.S. businesses and individuals investing directly in Myanmar or indirectly via funds, joint ventures or participation in companies will need to monitor the flow of their capital into Myanmar to identify when reports to the State Department are required.

Easing of US Sanctions (Cont.)

- Unless otherwise authorized or exempt, transactions by US persons, or in or involving the US, are prohibited if they involve transferring, paying, exporting, withdrawing, or otherwise dealing in the property or interests in property of an entity or individual listed on the Specially Designated Nationals and Blocked Persons ("SDN") List.
- The importation into the US of any jadeite or rubies mined or extracted from Myanmar and any articles of jewelry containing jadeite or rubies mined or extracted from Myanmar is prohibited.

Thank you

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