Myanmar’s Foreign Investment Law, Company Forms, Trading, Equity and Real Estate

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Myanmar Profile

Facts & Figures

- Founded in 1995
- One of the oldest foreign legal and tax firms
- 15 local and foreign advisers
- 2 offices
Examples of significant current or past engagements:

- Major energy joint venture, established more than 15 years ago
- Mandalay Airport Financing
- Restructuring and on-going regulatory problems of a hotel and resort complex
- Contracts involving an existing hard minerals project, established nearly twenty years ago
- Aircraft lease involving multiple aircraft
- IFI financings
- Restructuring a cellular telecommunications project
- Myanmar portion of a multi-nation satellite services project
- Ongoing regulatory work for a major pharmaceutical and medical care company
- Solving regulatory problems for a large agriculture project
- USD 180M manufacturing JVA
- USD 500 M IPP (Gas)
Myanmar Profile

Market perception

- 2013 Myanmar Law Firm of the Year (IFLR)
- 2013 IFLR Tier 1 for Financial & Corporate
- 2012, 2011, 2011 Chambers Tier 1 for General Business Law
DFDL’s Latest Publications

THE TAX POCKET GUIDE TO INVESTING IN MYANMAR
2013 EDITION

REAL ESTATE INVESTMENT GUIDE
BANGLADESH | CAMBODIA | INDONESIA | LAO PDR | MYANMAR | SINGAPORE | THAILAND | VIETNAM
2013 EDITION
I. Update new Myanmar Foreign Investment Law. (1-14)
II. Company Structure (15-18)
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V. Critical aspects of land lease requirements (19)
I. FIL

Myanmar’s New Foreign Investment Law (FIL) was passed on November 2, 2012. It replaces the MFIL of 1988.

Background: Generally the FIL is optional except in the case of a) major infrastructure deals b) manufacturing and c) State Owned Enterprise Law of 1989 (SOE Law). With FIL approval comes notification issued under the SOE Law to grant an exemption.

here the FIL is optional, the reason investors use the FIL is to get the benefits, like the tax holiday, discussed later.
Attributes of FIL

- Government guarantee against expropriation.
- Foreign exchange benefits (guaranteed remittance of profits; remittance upon exiting the investment)
Real Estate Leasing, 1987 Law:

New law depending on the type of enterprise and investment amount the MIC would allow investors to enter into a lease up to 50 years + 10 + 10 Tax

Tax holiday—five years

Timing

The MFI Law introduces new rules relating to timing as the MIC is required to evaluate proposals for completeness and accept/reject these within 15 days of submission of the application, and will thereafter issue (or deny) an investment permit within 90 days.
MIC may nominate some investments that are not eligible for tax holiday.

Oil & gas and Mining and other large-investment projects—upfront costs (e.g. exploration and drilling) must be borne by the foreign party (same as present PSCs) Profits are then shared. Cost recovery, now allowed under PSCs, still allowed.

All MFIL investors must now form companies. What about PSCs in oil & gas. MIC says if MOGE okays, it’s fine.
Labor

For skilled positions, the MFI Law provides an obligation to increase the use of local Myanmar staff over time. The investor is to achieve:

- At least **25%** of its workforce to be Myanmar nationals during the first two years,
- At least **50%** during the second two years; and
- At least **75%** during the third two years.
5-year tax holiday can be extended

Thereafter exemption for re-invested profits

Accelerated depreciation on capital assets

Relief on income tax up to 50% on profits from exports

Deductions for R & D

Exemption from customs duties on capital assets to be used in the business imported during construction period

Exemption from customs duties on raw materials imported during first three years’ of production

Can pay and deduct expat salaries at normal rates.
Relief on customs duties on imports for expansion of the business

Exemption from commercial tax for exports
Rules

There are a few prohibitions in the rules, notably [Really 80-20]

- Drilling oil and gas hand-dug wells up to 1,000 feet in depth
- Small and medium mineral production
- **Electricity generation under 10 megawatts** [all above—schedule 1]
- Small farming
- Small livestock breeding[above, schedule 2]
- Fishing [schedule 3]
Investors must submit a progress report to the MIC every 90 days [Rule 51]

If an extension is needed for the construction period, the investor must apply to the MIC at least 60 days before expiration of the construction period. [Rule 57]

Investor can sub-lease or mortgage the long lease on application to the MIC

Shares in an FIL-approved company, whether owned by a foreigner or a Myanmar, may be transferred to a foreigner or a Myanmar with MIC approval [Rule 65] [IV. Equity—Compare to outside of FIL]
The investor must submit a *schedule of investment* if the proposal provides that the investment will be brought in over a period of time. [Rule 135]

Disputes must be settled using the laws of Myanmar, namely the Arbitration Act *1944* and the Protocol and Conventions Act *1939*. [Rule 170]

The Rules are not applicable to trading. [Rule180] [III. Discuss Trading outside of FIL]
Notification

Category 1. Prohibited by Foreign Investors

- Production of arms and explosives for defense
- Prospecting, exploration and production of jade and gemstones
- Small and medium scale production of minerals

Category 2. Only Joint ventures Not necessarily 80-20 as set forth in rule 20. Can be any amount unless limited elsewhere, for example in Category 3, below.

Important examples:
- Large scale production of minerals
- Construction of buildings, infrastructure projects
- Tourism businesses
Category 3. Businesses permitted to be carried out under conditions specifically provided

Important examples

- Saw mills—maximum 25% for foreign investor.
- Mining—limits on exploration feasibility study, can be extended; production 15 year production period, 5-year extensions.
- Casinos—Myanmar people can’t play.
- Hotels—100% foreign ownership allowed in 3-stars and above hotels. All others must be joint ventures.

Category 4. Environmental Impact Assessments

Important examples:

- Hard minerals
- Oil & Gas
- Hydroelectric power deals
I. Company

formed under Myanmar Companies Act [JV with government (SOE Law) Special Companies Act]


b. Limitation of liability—foreign jurisdictions.
II. Branch

a. Local office of a foreign company.

b. No local ownership. No limitation of liability, but practice is parent company is a holding company.

c. Often used to begin operations in Myanmar because can have an office, stay (work) permit and local employees.

d. DICA—decides if branch allowed. Depends on objectives.
II. Representative Office

a. Only for banks or insurance companies. As of today, no other choice.

b. Very similar to branch and application procedures are same.

c. Recommendation from line ministry. In case of banks, representative license must be obtained before we submit the application documentation to the DICA.

d. No banking and insurance activities—just liaison.

e. For banks, the Central Bank has announced that in the next month or so, joint ventures would be allowed.
What this means: If you’re operating as a liaison office here with no profits—go with a branch because there are no corporate formalities like AGM and you’re not expected to show a profit. If the entity will have profits go with the company because outside the FIL the taxes are lower.

Under the New FIL, companies are mandatory. Despite this, MIC will accept branches if MOGE recommends.
V. Critical Aspects of Land Lease Requirements

As a general rule, a foreign individual or a foreign company cannot own land in Myanmar and the only type of transfer that is allowed is by way of a “lease”, which however shall not exceed a 1 year period at a time. [1987 Restriction on Transfer of Immovable Property Law]

But certain exceptions exist:

1. Obtaining a long-term lease of fifty (50) years, renewable for two (2) consecutive periods of ten (10) years each, by implementing an approved investment project under the umbrella of the Foreign Investment Law (2012);

2. Having a “beneficial relationship with the State”, which may be understood in relation:
   - Embassies or diplomatic missions, United Nations’ organizations, or any other accredited organizations of individuals – no timeframe limit, or
   - Investments for the economic development of the State – thirty (30) years [Directive 3 1990];

3. Obtaining a long-term lease of thirty (30) years, renewable for two (2) consecutive periods, the duration of which relies on the scale of the project itself, by being established in an Industrial Zone or a Special Economic Zone;

4. Obtaining a long-term lease of thirty (30) years or even unlimited, as long as there is no breach of the terms and conditions under which such lease was granted, by investing in the agricultural sector in connection with perennial plantations such as rubber, oil palm and cashew nut plantations, or seasonal plantations such as pulses, maize and oilseeds, respectively;
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