



Myanmar currently has a number of coastline ports, with Yangon being the main port city in the country, handling about 85% of Myanmar's import and export volume. Ports also see the development of major processing and manufacturing projects around them and the Government is setting Special Economic Zones (SEZ) along some of them (namely Thilawa, Dawei and Kyaukphyu).

We are a network of leading law and tax advisory firms with offices in Cambodia, Indonesia, Laos, Myanmar and Vietnam.

Our general areas of practice are corporate, finance, licensing and disputes.

Our principal specialized areas of practice are energy, infrastructure, real estate and construction, telecom and taxation.

There are three things you need to know about our approach:

1. We deliver the ultimate in ground connectivity.
2. Our quality is trusted by the most discerning.
3. We never give up.

PORT TERMINAL DEVELOPMENT IN MYANMAR: KEY ISSUES TO CONSIDER

Myanmar currently has a number of coastline ports, with Yangon being the main port city in the country, handling about 85% of Myanmar's import and export volume. Ports also see the development of major processing and manufacturing projects around them and the Government is setting Special Economic Zones (SEZ) along some of them (namely Thilawa, Dawei and Kyaukphyu).

International cargo traffic has grown annually above 10% between 2004 and 2014 (with a 40% increase in container traffic between 2009 and 2014) and the opening of the country to Foreign Direct Investments (FDI) will increase traffic in these infrastructures. Myanmar further benefits from an ideal geographic situation between Eastern Asia, South Asia and the Middle East, which grants Myanmar with potentially numerous transshipment opportunities.

75% of port terminals in Myanmar are developed by the private sector and new concessions should be awarded to the private sector to decongest coastline ports and increase traffic capacity.

Ports in Myanmar are regulated by the Myanmar Port Authority (MPA), an organization under the authority of the Ministry of Transport and Communications. The MPA

Highlights of this note

- ▶ How are international port terminals developed in Myanmar?
- ▶ Are there any foreign ownership restrictions?
- ▶ What is typically in a port concession agreement?
- ▶ Licensing and approval process for a port project
- ▶ How can foreign investors acquire a brownfield port terminal project?

and its activities are governed by the 2015 Myanmar Port Authority Law and the 2016 Myanmar Port Authority Rules, which define the handling of international ports and port services in the country.

How are international port terminals developed in Myanmar?

There are three ways for the private sector to develop an international port terminal in Myanmar:

1. National Development Plan: the MPA has a development plan for the development of new ports and terminals and will eventually decide to tender out the

PROGRESS REPORT 2016 MYANMAR



<https://goo.gl/jfdQ4U>

development of such to private investors.

2. Unsolicited proposals: the private sector may identify a port project and submit an unsolicited proposal to the MPA. Depending on the quality of the proposal, the MPA may decide to appoint the investor directly or to tender the project out, after approval from the Union Government has been secured for the project.
3. Private ports: an investor may develop a private port for its own purpose and by securing its own land. This will still require to obtain MPA licensing as international port services are under MPA jurisdiction and royalty fees to the MPA will be due.

Are there any foreign ownership restrictions?

Investment regulations do not contain any restriction on foreign ownership in port terminal activities and it is possible to develop ports in Myanmar as 100% foreign investments. For instance, Myanmar International Terminals Thilawa and Myanmar Port Limited Services – both around 25 km from Yangon – are wholly foreign-owned project companies developing international ports since respectively 1997 and 1998.

However, many port terminals are still developed by local companies in Myanmar or by joint ventures (JV) between local and foreign investors.

What is typically in a port concession agreement?

There are four different management models for port development:

- **Private sector ports:** the entire port is owned and operated by the private sector – the number of ports operating under this scheme is limited;
- **Public service ports:** the entire port is owned and operated by the public sector – it is the traditional (but declining) port model in developing countries;
- **Tool ports:** the ports is owned, developed and maintained by the public sector while their operation is either undertaken by the public sector or the private sector;
- **Landlord ports:** the port is leased to the private sector for it to operate the port services, for which it invests capital – generally through a concession.

Most ports in Myanmar are developed on a build-operate-transfer (BOT) basis as landlord ports. The MPA continues to own the basic infrastructure (i.e. the land) while the private investor rents the basic infrastructure and is in charge of the construction of the superstructure as well as the management of the port terminal through a dedicated project company. The allocation of responsibilities is as such:

Functions	Regulatory	Infrastructure management	Operations
Responsibility	Public sector	Private sector	Private sector
Tasks	<ol style="list-style-type: none"> 1. Customs, quarantine and immigration; 2. Harbor master (traffic management); 3. Policing and security. 	<ol style="list-style-type: none"> 1. Breakwaters, harbor walls and shore protection; 2. Jetties, piers, quays, wharfs and berths; 3. Terminals; and 4. Ship loading facilities. 	<ol style="list-style-type: none"> 1. Land side (storage, warehousing and logistics); 2. Stevedoring (handling of cargo service, loading and unloading); and 3. Marine side (pilotage, towage and mooring).

A BOT contract is executed between the MPA and the project company, providing for the following:

Construction and operation of the facility

The private operator is usually in charge of the design and construction of the port facility based on a number of criteria approved by the MPA. Construction period depending on port size is usually within 15 to 30 months after the execution of the BOT agreement and MPA will typically request an on-demand construction bond. After commissioning of the facilities, the private operator is in charge of handling of cargos, including berthing and unberthing, storage and delivery of cargos and related services. Ancillary commercial services (i.e. not related to the operation of the port itself) are usually also provided, such as manufacturing and processing.

Rent and annual fees

A nominal upfront land premium fee will usually be due to the MPA based on the size of the land and an annual rental fee will typically be paid quarterly based on a percentage of revenues generated by the terminal (based on an audit performed



by the MPA). A separate lease agreement is executed in parallel with the MPA (or another Government agency owning the land).

Tariffs

Tariffs are set out by the MPA and the private developer will be in charge of collecting such port dues from the port users, either in Myanmar Kyats or US dollars.

Handover to MPA

At the end of the term of the project (e.g. 25 years) the investor shall handover the facility free of all encumbrances to the MPA.

Termination

Termination payments shall be set out in case of early termination of the BOT contract, detailing different payments based on different termination cases. The Attorney General Office has however seemed reluctant to agree to termination payments for concessionaire default, despite international best practice and private sector recommendations.

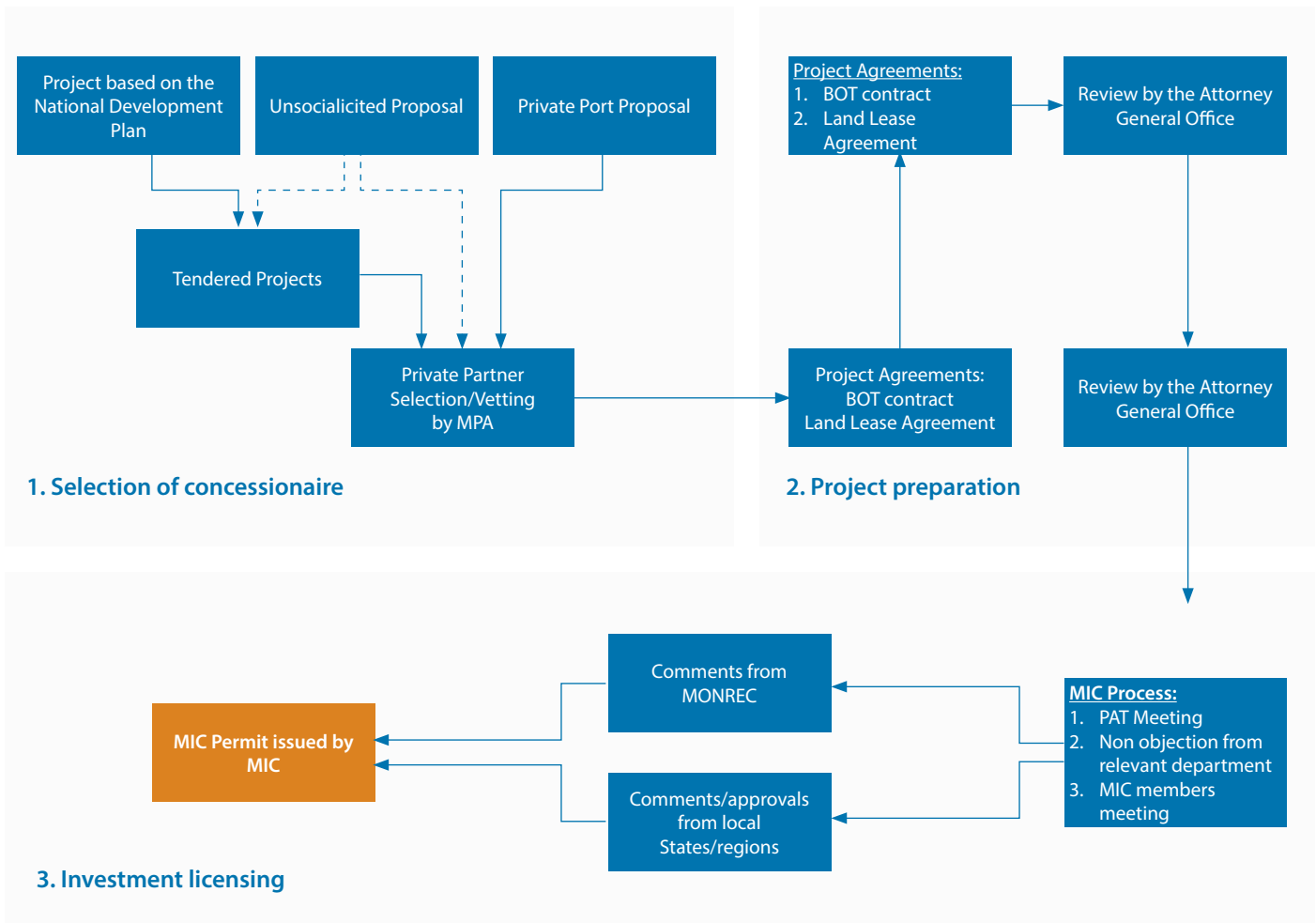
Licensing and approval process for a port project

Investments in Myanmar are still centralized to a large extent and most investments go through a licensing process via the Myanmar Investment Commission (MIC). Such licensing will grant an investor various land use rights as well as tax exemptions.

The newly enacted 2016 Myanmar Investment Law (MIL) provides for two distinct investment licenses: (i) a full MIC 'Permit' for major projects and certain strategic investments and (ii) a simpler MIC 'Approval Order' for smaller projects.

Despite the lack of implementing regulations under the MIL, we expect that port terminal projects will require a full MIC Permit as well as an Initial Environmental Examination (IEE) or an Environmental Impact Assessment (EIA) depending on project size that will need to be approved by the Ministry of Natural Resources and Environmental Conservation (MONREC).

The general licensing and approval process for a port terminal project can be summarized as follows:



How can foreign investors acquire a brownfield port terminal project?

In projects we have seen so far, it has proven feasible for foreign investors to acquire projects that have already been secured by a local company. In this situation, the MPA has concluded a non-assignable BOT agreement with a local company for the development of a port terminal.

Despite recent developments, a straightforward acquisition of the project company through the purchase of shares in the project company is administratively practically impossible as companies in Myanmar are still strictly segregated between locally-owned companies and foreign-owned companies (which are foreign-owned even if a foreigner owns only one share). A new Companies Act including the possibility for foreigners to acquire shares in local companies is expected later this year, but we cannot yet confirm under which conditions.

There are two structures under which the foreign investor may currently secure rights under the project: (i) the assignment of the project by the local partner or (ii) the execution of an O&M agreement with the local partner who continues to be the developer.

Under both structures, it will be necessary to set up a JV company (JVCo.) between the foreign investor and the local partner.

Structure 1: assignment of the project rights

In this structure, the local partner will assign the rights under the BOT agreement and the lease agreement directly to the JVCo. (or, alternatively, the MPA will sign a new BOT agreement with the JVCo. in order to novate the rights for the project).

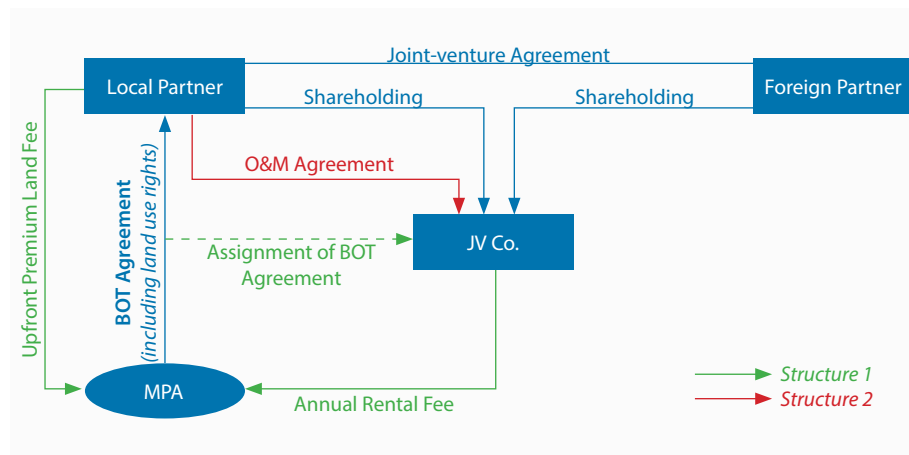
As the JVCo. has therefore taken over all of the local partner's rights and obligations, including ownership over the superstructure of the facility for the term of the project, the JVCo. will have stronger rights over the project and will be able to raise more affordable financing on the external debt market, if necessary.

In this situation, the rights under the BOT will be brought by the local partner to the JVCo. against a fee or a

mixture of a fee and capital-in-kind (typically, the upfront premium land fee already paid by the local partner would be considered as a capital contribution to the JVCO).

Should the assignment be pecuniary, such an assignment will be subject to capital gains tax in Myanmar of 10% if there are any gains realized by the local partner.

Furthermore, any assignment under the BOT contract will require consent from the MPA, which consent may be discretionarily withheld. Lengthy negotiations will be required with the MPA and an appraisal of the foreign investor will be necessary.



Structure 2: execution of an O&M agreement with the local partner

Given the burdensome process and the tax implications of assigning the rights under a BOT contract, the execution of an O&M agreement between the local partner and the JVCo. is often the chosen structure.

In this structure, the local partner is still the developer but the JVCo. is in charge of providing O&M services for the operation of the terminal.

Construction could be provided by the JVCo. through a separate construction agreement or, alternatively, be undertaken by the local partner itself, with financing provided by the foreign investor if required. Offshore debt financing to either the local partner or the JVCo. would however require approval from the Central Bank of Myanmar.





This Structure 2 is generally easy to set up and will not require MPA involvement or consent. However, some complications might arise in the implementation of this Structure 2.

- First, it will prove more difficult for the JVCo. to be granted MIC

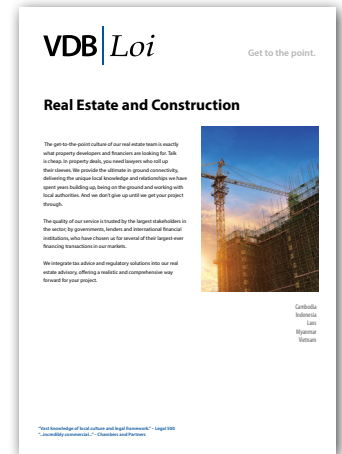
licensing. Despite the lack of implementing rules under the 2016 MIL detailing the criteria to obtain such licensing, it is the policy of the Government to reserve tax exemptions to strategic investments that include technology transfer and/or job creation. It is therefore unclear whether the JVCo., as a mere service provider, will benefit from incentives under the MIL.

- Second, the foreign investor will have less control over the project as the local partner will still be the developer. In addition, cross-shareholding between the local partner as developer and as member of the JVCo. may beget issues in case of a contractual breach by the developer towards the JVCo. There is a risk that the local partner takes negative steps against an action by the JVCo. to vindicate its contractual rights. The drafting of the joint venture agreements will need to take these issues into account.

RELATED VDB LOI PUBLICATIONS

- ▶ *Client Alert: MOHT suspends the issuance of hotel licenses in 5 Myanmar cities*
- ▶ *Construction materials market opened to foreign distributors*

DOWNLOAD OUR EXPERIENCE HERE



<https://goo.gl/5VLI7t>

CONTACT



Edwin Vanderbruggen
Senior Partner, VDB-Loi
edwin@vdb-loi.com

Edwin is one of Myanmar's most prominent foreign legal advisers. He has assisted with some of the largest mixed use real estate projects in Yangon and hospitality projects throughout the country. He helped negotiate government leases and BOTs for many of Yangon's major property development projects, and advised on the construction of three residential towers by an EU multinational. Edwin and his team have assisted to secure MIC permits, drafted upstream and downstream property agreements and structured the transfer of land use rights.

YANGON

Level 8, Centrepoint Towers
No. 65 Sule Pagoda Road & Merchant Street, Kyauktada Township
T: +95 137 1902 / +95 137 1635
F: +95 124 1238

INFRASTRUCTURE, REAL ESTATE AND CONSTRUCTION TEAM

VDB Loi has created a practice team to support the partners comprising foreign and locally qualified lawyers and regulatory advisers work exclusively on Infrastructure, Real Estate and Construction matters.



Daw Nar Wah
Team Leader
narwah@vdb-loi.com

The Infrastructure, Real Estate and Construction team is led by Daw Nar War. She is a qualified attorney in Myanmar with a wealth of corporate and commercial experience overseas. She has an accounting and finance background. She often advises foreign clients in a wide range of industries on corporate, commercial and land related legal matters in Myanmar. She is a senior member of the team advising the Government in the context of the privatization of state owned enterprises.

NAY PYI TAW

No. S-204, Tha Pyay Kone Ward,
Zabu Thiri Township
T: +95 678 108 091
F: +95 678 108 092