*In Myanmar, market access to foreign companies in petroleum products sector has dramatically changed with the introduction of the new Myanmar Investment Law and the release of MIC Notification 15/2017, while a new practice of the Directorate of Investment and Company Administration ("DICA") makes it possible for foreigners to directly buy into existing Myanmar companies in the sector.*

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# WHAT ARE THE STRUCTURING OPTIONS FOR MID- AND DOWNSTREAM PETROLEUM ACQUISITIONS?

In Myanmar, market access to foreign companies in petroleum products sector has dramatically changed with the introduction of the new Myanmar Investment Law and the release of MIC Notification 15/2017, while a new practice of the Directorate of Investment and Company Administration ("DICA") makes it possible for foreigners to directly buy into existing Myanmar companies in the sector.

Foreign investment in this sector has been liberalized as compared to the situation 10 years ago where only state-owned enterprises were allowed to import and distribute petroleum products. This was relaxed in 2008, when the first privately owned companies were allowed to import fuel. Subsequently, with the release of notification 49 in 2014 the scope for foreign investments in transportation, storage or distribution of petroleum products were curtailed requiring an exclusive joint venture with the Ministry of Energy, now known as Ministry of Electricity and Energy ("MOEE"). By April 2016, the import of fuel was essentially liberalized to all wholly Myanmar owned companies. With the introduction of the new Myanmar Investment Law 2016 and notification 15/2017 foreign investors can invest in the market to import or distribute petroleum products in Myanmar.

### Highlights of this note

- Foreign ownership restrictions in the petroleum sector as they stand today
- Land sites for petroleum projects
- Structuring options
- MIC process
- The new Petroleum Product Law 2017
- Tax implications

**Foreign ownership restrictions in the petroleum sector as they stand today**

Remarkably, the policy on foreign ownership in business activities such as importation, distribution, storage, transportation and terminal is not written down, and still in flux. The MIC has and is licensing joint ventures for these activities, but it is unclear if a 100% foreign owned project will also be permitted. Before the MOEE practice creates a rule against this opportunity we recommend that investors seize the window of opportunity. Besides regulatory restrictions, it may become difficult for a foreigner when it comes to finding a suitable land for the project without a local partner.

Further to this, the recent DICA announcement allows conversion of Myanmar companies into foreign companies. It is possible for foreign companies to buy shares in a Myanmar national company now. All these recent modifications in the legal framework adds new dimensions to structuring options of foreign oil companies who are interested in investing in midstream and downstream businesses.

### Land sites for petroleum projects

In order to decide the structuring option for a petroleum products project, the land issues are crucial.

There are essentially two situations:

1. Private land- where land rights are given to private individuals by the Government on a perpetual basis. This could be "grant land" or "farm land".
2. Government land- which is often administered by the Myanmar Port Authority ("MPA").

Most land adjacent to navigable waterways is managed by MPA. Mostly, the petroleum projects are built on land managed by MPA. It is the authority which has oversight over every port, i.e. a site which accepts goods from overseas. A foreign investor seeking to operate a terminal of any kind of petroleum products inevitably needs approval from the MPA. In addition to this if the cabinet declares any site as a Port then that site also comes under MPA. It implies that prior approval will be required for mooring of vessels, registration of vendors, workers working on site, etc. This also means that the foreign investors will need to pay royalty or port terminal fees to MPA. While obtaining land from MPA, usually there are two options either a concession agreement for the port or a land lease.

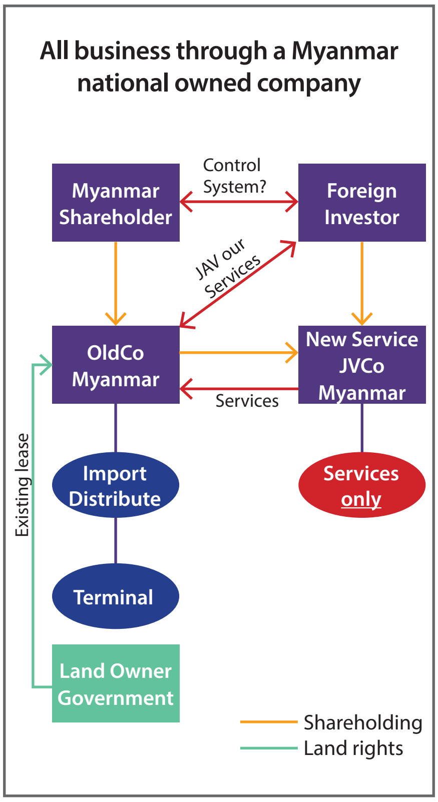
On the other hand, the private land is basically the farmland which is owned by private individuals. In order to use these lands for purposes other than cultivation the foreign investor needs to obtain prior approval of the Government.

### Structuring options

There are five structuring options available to the foreign investors to structure a terminal/storage/distribution project:

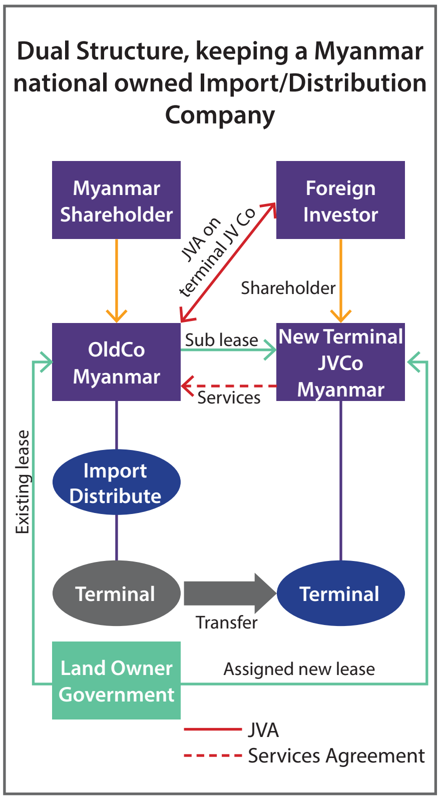
**1. All business through a Myanmar national owned company**

In this structure the Myanmar national company, a local partner ("LP"), continues with the business. There is an arrangement where a new joint venture company ("JV Co.") is established which only provides services and the existing company continues with the import, distribution and the terminal. The land lease is with the LP and the JV Co. does not take over any of the LP's business or land rights. In this structure the JV Co. will only manage the Myanmar national company's terminal and fuel importation business. Under this type of structure the foreign investor is at a disadvantageous position because the foreign investor has only a service contract and no assets of the JV Co. If any dispute arises between the LP and the foreign investor then apart from actual damages the foreign investor cannot seek any relief. Further, the profit from the business goes to the LP and the foreign investor has to obtain that profit through the service agreement which is very vulnerable and not tax efficient.




**2. Dual Structure, keeping a Myanmar national owned Import/ Distribution Company**

In this structure the new JV Co. undertakes the storage and terminal business activity and import and distribution continues with the LP. In order to transfer the terminal to the new JV Co. either the land has to be sub-leased from the LP to the new JV Co. or the existing lease agreement has to be replaced by a new lease agreement. Typically, under a lease agreement with MPA, sub-leasing is always restricted.



### 3. New JV Co. for both Import/ Distribution and for the terminal

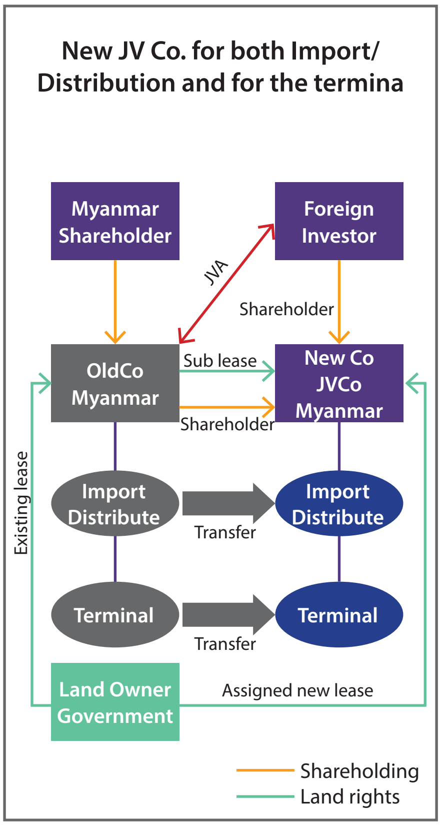
Under this structure the Myanmar national company becomes the Myanmar shareholder of the JV Co. There is a joint venture agreement between the foreign investor and the Myanmar national company. This structure requires a new MIC permit and the Myanmar national company needs to surrender its MIC permit. The import, distribute and terminal business activities are to be undertaken by the new JV Co. and the land for the terminal requires to be sub-leased or assigned to the new JV Co. This is a common issue between structure 2 and 3.

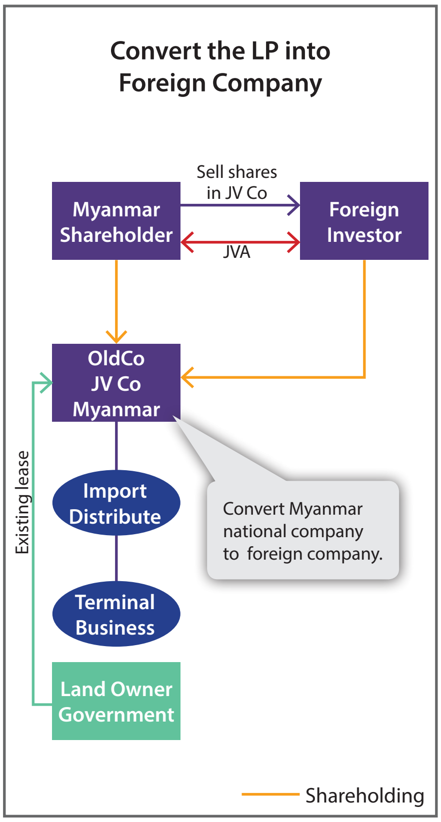
### 4. Convert the LP into Foreign Company

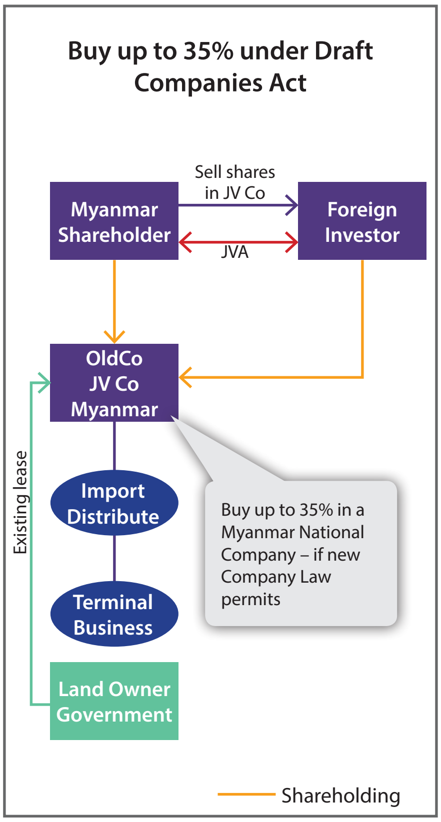
Under this structure we can convert the Myanmar national company that is the LP to foreign company. The foreign investor shareholding is not limited to only 35% but can be up to 100%. There are no specific rules released from MOEE yet. The primary advantage of this structure is that there is no need of any transfer or sub-lease or assignment of the land which will save a lot of time. Also, if the LP has an MIC permit then there is no need to make fresh application for it. Under the Myanmar Investment Rules, this will be considered as an expansion provided 80% of the original project is completed. This structure has no tax implication because the JV Co. has been formed by only issuing of shares to the foreign investor.

### 5. Buy up to 35% under Draft Companies Act

This structure is based on the provision to be introduced under the draft Companies Act, where a Myanmar national company is allowed to have up to 35% foreign shareholding and it will still remain as a Myanmar national company. The JV Co. can be formed by issuing the shares of the Myanmar national company to the foreign investor. The LP here becomes the JV Co. but not a foreign company in DICA parlance. The JV Co. will not be able to obtain a fresh MIC permit if the LP already has an MIC permit but it will be considered as an expansion and the previous MIC permit will sustain. The project will be categorized as an expansion only if 80% of the original project is completed. The major disadvantage of this structure is that the foreign company will be stuck with only 35% of shareholdings and will not be able to increase it.

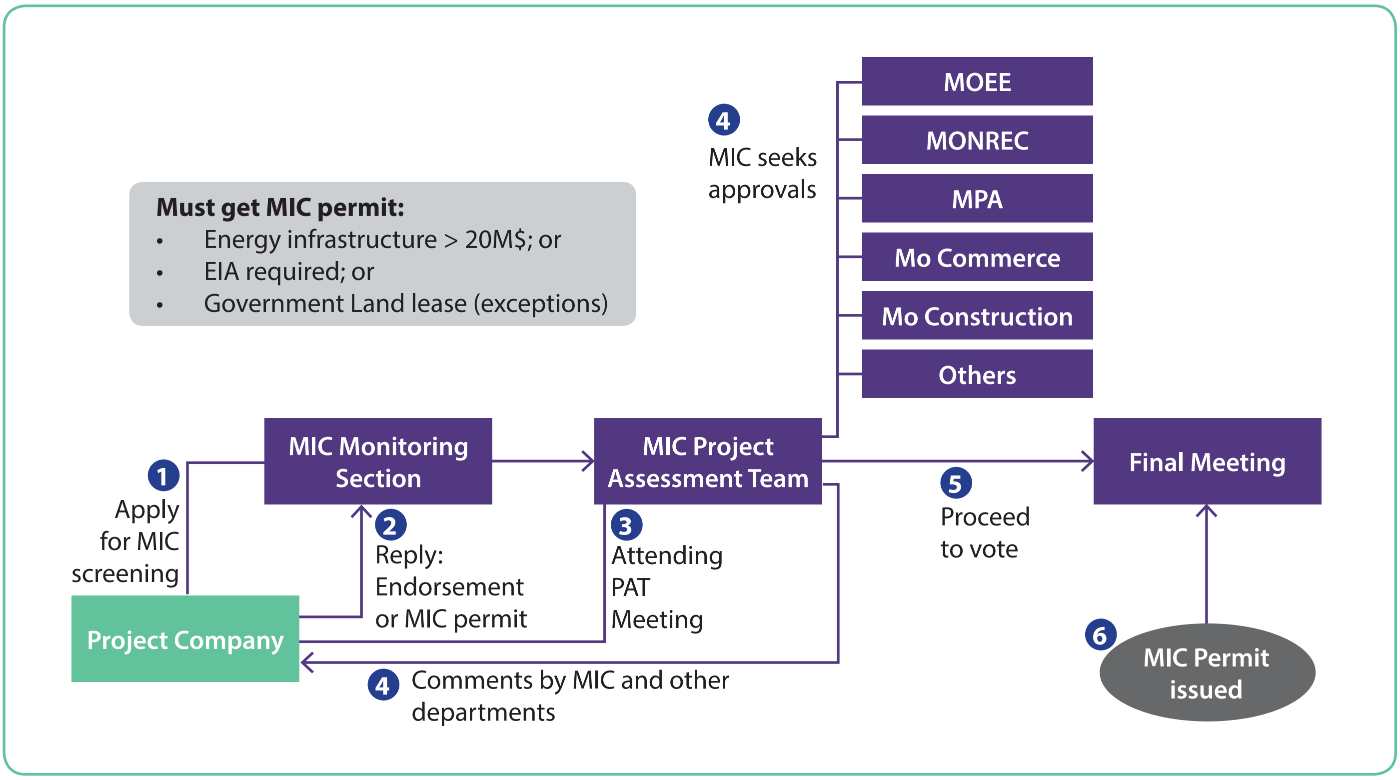



**MIC process**

Depending on the structure and nature of the project, an MIC Permit may be required or desirable. Projects with energy infrastructure of more than $20 million or projects which require an Environmental Impact Assessment ("EIA") or projects with Government lease land needs to obtain an MIC permit. In order to get an MIC permit firstly the project company is supposed to submit an Investment Screening application to MIC for non-binding guidance before officially submitting the investment proposal. After the screening stage, an official proposal is submitted to the MIC which is followed by a Proposal Assessment Team meeting ("PAT") where critical questions are asked to the foreign investor about the investment plan. The MIC then seeks approval from the relevant ministries and after receiving the approval there is a final meeting with the MIC. In this meeting the MIC permit is issued to the foreign investor for the project.




**The New Law and Market Access for Petroleum Products in Myanmar**
18 August 2017, Yangon.

### The new Petroleum Product Law 2017

The new Petroleum Product Law 2017 is more detailed than the old law. It defines the regulatory authorities which are responsible for licensing and intends to establish a Petroleum and Petroleum Product Business Supervisory committee which will have various powers to administer the petroleum and petroleum products business activities. The new law introduces a management plan for the existing operators and petroleum products. In comparison to the old law, new law imposes serious sanctions and punishments for any breach of law. It is a very recent enactment and its implications are yet to be observed. It can be expected that the new law will provide more clarity to the foreign investors. The following table gives an overview of the licenses as per the Petroleum Law 1934 and the Petroleum Products Law 2017:

| | 1934 Law & Notification 100/2013 | 2017 Law | What Changes? |
|---|---|---|---|
| **Import** | Presidents office / MOC | MOC (issues input licenses) | Only MOC has authority |
| **Terminal / Jetty** | MOEE but some licenses require MONREC & MOTC | MOTC | MOTC has clear authority |
| **Storage** | Ministry of Mining | MONREC (licenses the activity) | More detail in the licence content |
| **Refine, process, mix** | Presidents office | MOEE | Only MOEE has authority |
| **Distribute & sale** | Presidents office / MOEE | MOEE | Only MOEE has authority |
| **Transport** | "Relevant departments" | MOTC & MONREC | Detail and split authority now includes MONREC |
| **Pipeline** | No mention | MOEE | Establishes legal authority |
| **Transit** | No mention | MOEE | Establishes legal authority |
| **Export** | No mention | MOC | Establishes legal authority |
| **Dual or combined activities** | No mention | MOEE | New license combination |


**Building Yangon: Property and Urban Infrastructure Market & Legal Update**
04 April 2017, Yangon.

## Tax implications

Under the old investment regime, tax holidays were applicable automatically on receiving the MIC permit. After the commencement of the new Myanmar Investment Law 2016, the situation has changed. The tax holiday is no more automatically available to the MIC permit holder or to the foreign investor with an Endorsement. Investment activities under the Promoted sector, classified under notification 13/2017, are entitled to tax holidays. Tax holidays means exemption from only Corporate Income Tax. It does not apply to any other kind of taxes like Personal Income Tax, Commercial Tax, Withholding Tax, etc.

The tenure of tax holidays depends on the zone or location in which investment is pursued. The tax exemption zones are determined under notification 10/2017. There are three zones namely zone 1 i.e. less developed region, zone 2 i.e. moderate developed region or zone 3 i.e. adequate developed region. The exemptions are for seven years, five years and three years, respectively.

Investment in petroleum products sector also attracts Specific Goods Tax ("SGT"). It applies on kerosene, gasoline, diesel and jet fuel at 5%. Further it also applies to importation of specific goods, producer of specific goods and exporter of specific goods. The input SGT can be offset against output SGT.

### *RELATED VDB LOI PUBLICATIONS*

- *The New Law and Market Access for Petroleum Products in Myanmar*
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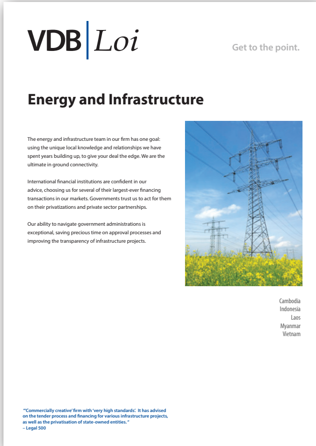
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Edwin Vanderbruggen is one of the most prominent foreign legal advisers in Myanmar, and he is widely recognized for his experience in the energy and infrastructure space in Myanmar. Edwin's experience working with the Myanmar Government is second to none, as he advises the Government on privatization transactions and PPPs in energy, transport and telecommunications. He and his team have uniquely extensive experience in electric power, and were involved in four out of five of the Myanmar gas and renewable projects concluded in March 2016, and he advised the Japanese Government on their investment in the Thilawa SEZ. Edwin worked on the planning, negotiation, documentation and financing for projects of all types of power generation, including gas, coal, hydro, solar, wind and W2E in Myanmar. He also advises four of the 'super majors' on oil and gas interests in Myanmar and on the first LNG terminal in the country. He lives in Yangon.

## ENERGY TEAM

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The Energy team is led by Charles Magdelaine. Charles is a French lawyer qualified to practice in Paris educated in France, the United States and China. He has extensive experience in the documentation, financing and negotiation of energy projects in Southeast Asia, and Myanmar more in particular. Charles focuses on oil and gas, infrastructure, power and other natural resources projects.


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