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MYANMAR UPDATE

CONTENTS

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TOUGH CUTS TO TAX HOLIDAYS FOR EXPANSION AND REINVESTMENT IN 2017 INVESTMENT RULES

The Myanmar regime of investment-related tax incentives has been updated by the new "Investment Rules", officially known as Notification 35/2017 ("Rules 2017"). One of the key issues for investors is the tax exemption for expansion of projects that already received an MIC permit under the Foreign Investment Law 2012 (FIL). Under the Foreign Investment Law 2012, all expansions received import tax exemptions, and there were no conditions or limitations for such an expansion. The Rules 2017 introduce some surprising and restrictive conditions for expansions, including the expansions of projects with an existing MIC Permit. Another unforeseen problem for investors with projects already in place are the new and severe limitations to the income tax exemption for reinvested profit.

The most publicized and eye-catching of the new restrictions, already known since the Myanmar Investment Law 2016 (MIL) was issued, regard the income tax holiday. Previously available to every investor with an MIC Permit regardless of industry sector or location, an income tax holiday under the MIL is only granted if the project's activity features on the "Promoted Sector List", and located in one of the three zones.

The Rules 2017 also stipulate penalties for those who have benefited from them undeservedly.

The Rules 2017 replace the Investment Rules of Notification 11/2013 under the previous Foreign Investment Law. They were released just before the Myanmar New Year break.

In this note we explain the practical effects of the tax provisions in the Rules 2017 on both existing and new investment projects.

		2012 FIL	2016 IL	Notes
1	Corporate income tax holiday	The MIC had no choice but to give every foreign investor a 5 year tax holiday	The MIC may or may not grant an income tax holiday. The holiday period can be 3, 5 or 7 years depending on location. Myanmar is divided in 3 zones for that purpose.	Myanmar citizen investors may receive more favourable incentives than foreign ones, the 2016 IL states.
2	Reinvestment	Profit which is reinvested within one year is exempt from income tax		Reinvestment of profit is allowed for other similar type of business under 2016 IL whereas reinvestment is allowed only in the same business under 2012 FIL
3	Depreciation	Right to depreciate at a rate set by the state.	Accelerated depreciation equal to 1.5 times of the original depreciation can be allowed. (Accelerated depreciation is allowed to start from the date of commercial operation under 2016 IL)	Clarified
4	Export income tax rate	Reduction of income tax to 50% of rate for export	No such rule	Abolished
5	Equal income tax rate	Right to pay tax at rate for Myanmar citizens.	Law states that income tax on foreigners shall be the same as on citizens.	Clarified, made into a general rule rather than a right.

		2012 FIL	2016 IL	Notes
6	R&D deduction	Right to deduct from assessable income	No change.	
7	Loss carry forward	Up to three consecutive years from the year the loss is sustained in respect of such loss sustained within two years immediately following the exemption	No such rule	The 2012 FIL, following the 1987 FIL on this matter, contained this confusing rule on losses, which actually is less advantageous than the general income tax law rule which applies to everyone
8	Imported machinery, equipment, materials	Exemption from customs duty and Commercial Tax during the construction period of the project.	No change	
9	Raw materials	Exempt from customs duty and Commercial Tax for first three year.	Exempt from customs duty and Commercial Tax if at least 80% of income is expected to be from export. Exemption from customs duty and Commercial Tax is given for "materials used in the business" if imported during construction period.	Incentive restricted. If the raw materials are imported during construction period, exemptions may be available. Semi-finished goods added to scope by 2016 IL
10	Refund of tax and duty in case of export	No such rule	When goods are exported, duty and tax paid on the import of the raw materials materials and semi-finished goods of those goods can be refunded	New incentive
11	Expansion of the project	Exempt from customs duty and Commercial Tax on imported plant and equipment.	No change	
12	Commercial Tax for export	Exemption	No such rule	Deleted. Apart from electricity (CT @ 8%) and crude oil (CT @ 5%), CT is zero rated for other export goods

Surprising new conditions for project expansion import tax exemption

When an investor adds a phase or otherwise enlarges the original project, we call that an expansion. Under 77 (d) MIL, customs duty and Commercial Tax exemptions are available for such an expansion. It is uncontroversial in the region that Governments should at least exempt import duties for capital goods of new investment coming in. Yet, the Rules 2017 add new and perhaps unnecessary conditions limiting the application of this exemption. Rule 104 states, somewhat cryptically, that "where an investor increases the volume of Investment or expands the original investment business subject to 77 (d) MIL, it shall be deemed that the volume of Investment is expanded only after 80% of the originally proposed investment has been made".

What does this mean? It could mean that you cannot receive tax exemptions for an expansion until after you have completed at least 80% of your original project. One wonders why it is necessary to have such limitation. After all, if investors want to expand, why not let them? If they decide they can go into phase 2 even before phase 1 is entirely finished (which must have been unforeseen or else phase 2 would have been part of the original project), all the better.

Alternatively, Rule 104 could mean that any expansion should be at least 80% of the value of the original, which seems like an unreasonable and arbitrary restriction. Either way, we do not see why expansions have to be limited. Investors who do not complete the construction of their projects on time are already sanctioned by forfeiting their Permit under Rule 144.

Rule 105 adds another problem for expansions, now providing that regardless of how long the expansion might take, the investor has only 2 years to import all materials. The construction period of original projects is not explicitly limited in the Rules, and we wonder why an expansion would be any different.

It is not entirely clear if existing projects with existing Permits are subject to all of the new tax conditions set out in the Rules 2017. The MIL just states that "any Permit under the [FIL, MCIL] shall continue to be effective till the end of such Permit" (s. 93 MIL). The Rules 2017 add that "the Investor shall be entitled to continue carrying out the investment and enjoy the benefits in accord with the terms of the Permit". What does "the terms of the Permit" mean? Does that include the tax rules on expansion, which are not mentioned in the Permit but set out for all Permits in the Rules 2013?

The Rules 2017 also state that "where a Permit is granted under a previous investment law, to the extent that the Investor wishes to benefit from any additional or discretionary incentives under this Law, the Investor shall apply for such incentives in accordance with this Law" (Rule 225). Presumably, based on Rule 225, when an investor applies for an expansion of a project with an existing Permit, the Rules 2017 with their new restrictions in Rules 104 and 105, will indeed apply.

Furthermore, an investment or an expansion must exceed the absolute threshold of US $300,000 in terms of "additional funds or application of further capital", or else no tax exemptions will be granted.

New projects: Promoted Sector List and Zones

Tax incentives are not automatic in Myanmar. They need to be requested and approved. Even under the Foreign Investment Law 2012 only the 5 year income tax incentive was mandatory. It was always quite clear what the discretionary tax incentives were under the Foreign Investment Law, but it remained largely unorganized exactly how and when these were granted in the previous system. The Rules 2017 now offer more hard and fast criteria in that regard, and an explicit confirmation that a tax incentive can be applied for at the same time as the Endorsement or the Permit.

Although Rule 91 cites other, less tangible conditions as well, the main ones, which are described as being "mandatory", come down to this:

1. The income tax incentive of 3, 5 or 7 year is only available for "Promoted Activity" as listed in Notification 13/2017. So, there is a long list of activities which the MIC will provide tax holidays. Other activities, it seems, will not receive a tax holiday;
2. If the activity is on the Promoted list, the tax holiday period will be determined based on whether the investment will be located in Zone 1, 2 and/or 3, as defined in Notification 10/2017.
3. At least US $300,000 in expenses or additional capital is involved;

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In addition, there are conditions set out for specific tax incentives, as discussed below.

Commercial Date of Operation

Under the FIL, an income tax holiday can be triggered by informing the start of the commercial operation date to the MIC during or at the end of the construction period. MIC will issue a letter that states the Commercial Date of Operation ("COD") and this will trigger the start date of the tax holiday period. In other words, this will mean the end of the construction period and customs duty and other tax exemptions during the construction period will also end.

However, under the new MIL, an income tax holiday can be triggered during the construction period as well if the company is generating any assessable income. Alternatively, the COD can be triggered within 90 days from the end of construction period. The income tax holiday will commence from the COD approved by the MIC. The difference is the trigger of the COD during the construction period will not affect tax exemptions granted during the construction period.

Reinvestment income tax incentive becomes strict and risky

Besides the 3, 5 or 7 year income tax holiday, the MIC might agree to exempt your income from tax under 77 (a) MIL. This is the re-investment tax incentive. The idea is that you will be spared the income tax on your profit in the year you earned it, if you reinvest that profit in the Myanmar project. This possibility also existed under the FIL but was in practice hardly used.

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The Rules 2017 are not entirely clear whether this re-investment incentive is also subject to the conditions of the Promoted Sector List and zone location. The MIL does not suggest so, but Rule 92 states that subparagraphs (a) to (f) of Rule 91 are "mandatory to "the Tax Incentive" (not defined). The requirement "for income tax exemption, all investments are made in a Promoted Sector" is (c), and "in the case of income tax exemption, the Investment is being made in a place designated …as Zone 1, 2 or 3…" is (f), so within the mandatory requirements, provided we are talking about "income tax exemption". Was this meant to include the income tax exemption for reinvested profit, which is certainly some kind of an income tax exemption? Rule 99, specifically on the re-investment, does not refer to the "mandatory conditions of Rule 91 (a) to (f).

Furthermore, the Rules 2017 now add a few frankly dangerous conditions which arguably void the incentive of its purpose. Most importantly, Rule 99 now provides that the exemption is not permitted unless "all income tax and other taxes due in respect of the assessment year … have been paid". Although this sounds good in theory, in practice there are always differences of view between the taxpayer and the Internal Revenue Department, and adjustments for unpaid taxes are unavoidable. Any such adjustment after a tax audit would jeopardize, retroactively, the entire tax exemption. Another problem is the penalty for missing a reinvestment year. There are many acceptable reasons why a good faith taxpayer may miss the "next year" deadline. Rather than just charging interest, which would have been reasonable, the Rules exact the disproportionate penalty of losing all re-investment tax exemptions for all time.

Export-related tax incentive requires 80% export

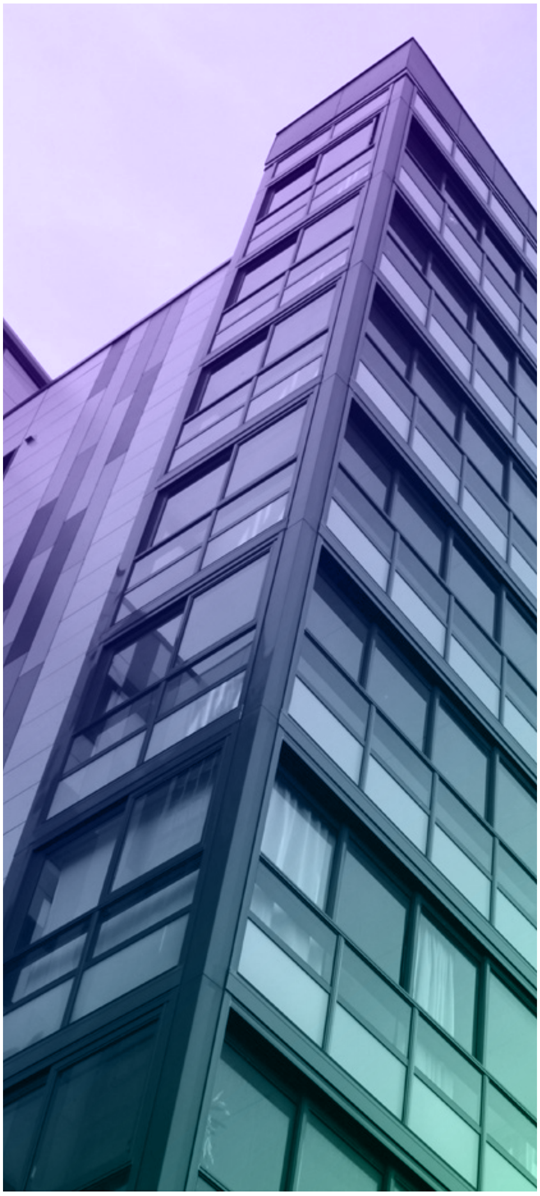
Under 77 (b) MIL, the MIC can also grant a permanent customs duty and Commercial Tax exemption for an export focused project. The MIL does not state when one can be considered to be "export oriented", as in, how much of the revenue should be derived from export. The Rules 2017 provides that missing information, and sets the requirement at 80%. Rule 97 also adds an additional complication, which is hard to imagine being implemented in practice, stating that the exemption may be granted on a pro-rata basis on the percentage of income in excess of this amount.

Retroactive penalties?

Rule 115 in the Rules 2017 provides that the MIC may revoke tax exemptions retroactively if in its reasonable opinion, the project was not carried out substantially in accordance with the application made to the MIC. In case the investor intended to mislead or defraud the MIC, this is wholly warranted. But in reality, there is no project that unfolds entirely as planned, and there can be serious disagreements on what variations can be deemed "substantial" (which could have been connected to a percentage of capital contribution). More importantly, there is no carve-out for projects that were amended based on economic reasons. One cannot fault an investor for a turn in economic climate, or for a change in its own financial circumstances. Is it the intention to claim a refund of all taxes saved if an investor had to cut the size of the project because, despite his good faith and best efforts, he is unable to raise enough resources?

One wonders if this rule is really needed. If an investor with a Permit does not complete the construction of the project by the end of the (extended) construction period, he already loses his Permit. Remarkably, this sanction does not seem to exist for the Endorsement.

Along the same lines, Rule 94, states that the MIC may refuse to grant tax incentives in case the investor has in the previous 3 year "discontinued or significantly reduced a prior investment".



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- Chambers and Partners

APPLYING FOR AN MIC PERMIT UNDER MYANMAR'S NEW INVESTMENT RULES

The Investment Rules implementing the Myanmar Investment Law of 2016 ("MIL"), also known as Notification 35/2017, have addressed some of the long standing MIC application process issues. In this note, the important things you need to know about this key piece of regulation.

Key changes

A fairly big portion of new investment projects in Myanmar will no longer receive an actual MIC Permit in accordance with the old, often time consuming procedure. Instead, there is the lighter "Endorsement" procedure for those who need land approvals or who qualify for tax incentives. This does not involve meetings with the MIC (such as the sometimes time consuming PAT-meeting) and the submission for an Endorsement is (somewhat) less extensive compared to the submission for a Permit.

For projects above 100M$, or, for some sectors 20M$, or meeting some other criteria or thresholds not much will change in terms of MIC process. These will still go through the "full" MIC process the main steps of which were first created under the now replaced Foreign Investment Law 2012.

One of the main practical reasons for the MIL 2016 was to reduce the burden on the MIC. The objective was that the MIC would not have to deal extensively with each and every investment project, even small ones. That is hopefully the effect of the implementing rules of the Myanmar Investment Law 2016, known as Notification 35/2017 ("Rules 2017").

In this note, we look into how the new Rules 2017 regulate the investment approval process.

Which projects can no longer receive a Permit?

Investment projects in Myanmar can be implemented in one of three ways: (i) with an MIC Permit, which is required if the project meets certain conditions or exceeds certain thresholds (see below); (ii) with an Endorsement (also translated as "Approval Order", kind of a mini-MIC Permit, only available in case the investor needs to use land under a contract exceeding 1 year or in case the project features on the "Promoted Sector List" which is granted tax incentives; or (iii) without either one, just by setting up a company and obtaining operating permits and licenses, if any.

The Rules 2017 make clear what the conditions and thresholds are for a project to be obligated to obtain an MIC Permit, something that is set out in s. 36 MIL.

The conditions mainly concern capital investment amount and the sector, the land size or if the project is based on a contract or concession with the Government. In addition, any project can be required to apply for an MIC permit based on its environmental or social aspects. So, the below thresholds are alternatives. Hitting any one threshold will mean one is required to apply for the MIC Permit.

s. 36 Myanmar Investment Law 2016

36. The investor shall submit a proposal to the Commission and invest after receiving the Permit for the following businesses stipulated in the rules;

- investment businesses that are essential to the Union strategy;
- large capital intensive investment projects;
- projects which are likely to cause a large impact on the environment and the local community;
- investment businesses which use state-owned land and building ;
- investment businesses which are designated by the government to require the submission of a proposal to the Commission.

Investment amount: 100M$ or 20M$

When we only take into account the investment amount, any project is required to apply for an MIC Permit if the investment value exceeds 100M$. This threshold is lowered to 20M$ if the project is based on an agreement with (such as a Joint Venture Agreement) or a concession (such as a Port Terminal Concession agreement) from the Government.

The threshold is also lowered to 20M$ in case the project is in one of the following sectors:

- Technology (information, communication, medical, bio or similar technologies)

- Transport infrastructure
- Energy infrastructure
- Building urban development infrastructure, new cities
- Extractive/natural resource industries
- Media

Investment site: Government land or exceeding 100 acre

A project that needs land for over one year (at a time) must obtain Government approval for that land use in Myanmar.
If the land for the project exceeds a size of 100 acres, an MIC Permit is needed, or, for agriculture, 1,000 acres. For other sizes, an Endorsement will do.

If the project intends to lease land from the Government, of any size, an MIC Permit is required. However, there are an exceptions to this rule for leases not exceeding 5 year and for subleases.

Note also that if the project is conducted across the national border or across states or regions, the Permit would be required.

Environmental and social impact: EIA or affecting rights of 100 people

The third alternative way how a project will be required to obtain an MIC permit is through its likely environmental or social impact. Any project that under Myanmar environmental laws and regulations must have an EIA, will need to obtain the MIC permit. This is also the case if the project is located in a protected or reserved area.

If the land rights which are planned for the project impacts "the legal right of at least 100 persons

THE MINISTRY OF INDUSTRY CONTINUES ITS RECENT SPREE OF PRIVATIZATIONS WITH TWO NEW TENDERS

The No. 1 and No. 2 Heavy Industry Enterprises under the Ministry of Industry announced, on October 28th, 2016, two new Invitations for Expression of Interest ("IEOI"). The MOI has recently been moving to privatize a number of existing state-owned factories and this is a continuation of that trend. IEOIs are open to both foreign and local companies.

The first IEOI, release by the No. 2 Heavy Industries Enterprise, is for a solar and LED manufacturing factory located in Dagon. The factory is currently in operation and the IEOI is due no later 3 PM on November 22nd, 2016.

The second IEOI, released by the No. 1 Heavy Industries Enterprise, is for the Htauk Kyant city bus manufacturing plant.

Both EOI's require the following documents to be submitted to the Ministry of Industry:

1. Valid Certificate of Incorporation
2. Memorandum of Association and Articles of Association
3. Name of the Company's technical "cooperator"

Should you like additional information or require assistance submitting an EOI please contact Edwin@VDB-Loi.com occupying such land", an MIC permit is required. That is also the case if that land land (of at least 100 acres) needs to be obtained through a compulsory acquisition such as an expropriation by the Government, relocating at least 100 persons, an MIC permit is required. It seems no protection is built in for illegal occupation of the land site.

Do these thresholds make sense?

Basically, the MIC has set the threshold for Permits at 20M$ for most projects, except manufacturing and all types of service activities. In fact, the MIC simply could have relegated all manufacturing activity to the Endorsement procedure and that would have taken 46 out of 66 projects out of the Permits column (statistics of Financial Year 2016-2017, up to 31/10/2017). In that same period, approximately 3.8B$ was committed by 66 projects, but the 46 manufacturing projects only featured on average 15M$ investment cost. Well below the 20M$ now set as the threshold. Few garment or shoe manufacturers commit to over 20M$ investment value, and that was exactly the idea. The case load of the Proposal Assessment Team or PAT will by the thresholds on investment amount be reduced to maximum one third of what it is now, we expect. So, objective achieved.

Or, not quite. The criterion on the use of Government land, quite common, will add projects back into the Permit column even though there are actually quite small. Even a project worth less than 1M$ could find itself in front of the PAT again just because of this circumstance.

Construction Period extension remains too rigid

The inflexibility of the Rules 2013 with respect to the Construction Period, sadly, remains. Both in the 2017 and in the 2013 version of the Rules, the "construction process" of the project must be completed within the time period estimated by the investor. This is in reality very hard to estimate, and it negates situations where the construction process never really ends. According to the Rules, that period may be extended upon request, only twice, and only for a maximum of 50% of the original period. But failure to finish the construction within the (extended) period will result in losing the Permit, with the sole exceptions being natural disasters, strife or war (Rule 142).

One improvement is the starting period of the period, which is in the Rules 2017 set at the issuing of the permit by the relevant department to commence construction.

The indirect offshore transfer of shares now also needs MIC permission?

A transfer or a series of transfers, except a transfer to a "Related Body" of the Investor, requires MIC approval if this concerns "a majority of ownership or control of the Investor" or more than 50% of the assets of the Investor (Rule 191) (our emphasis).

The Rules 2013's archaic and difficult to understand conditions for a share transfer, such as "whether or not the reason for wishing to transfer and sell all the shares is legitimate", are gone. Reference to "whether or not the transfer and sale of all shares may be detrimental to the interests of the State and its citizens", has essentially stayed (now in Rule 194).

The notion that a change in majority control is now also targeted brings into play indirect offshore share transfers. This was not, at least not explicitly, the case

in the Rules 2013, and there is no reference to "control" in s. 72 MIL, the statutory provision which is the basis for Rule 191. Despite the Rules 2017 stating about itself in general that "these provisions do not seek to derogate from [obligations pursuant to the laws of the Union] nor impose additional obligations" (Rule 204), we wonder if Rule 191's reference to control can really be seen as part of the MIL statute.

It has not been the prevailing current practice to ask the MIC for permission when a foreign holding company of the Investor is transferred, although there has been one or two instances where an indirect offshore transfer was also submitted for approval. There is now less room left to argue that an indirect offshore transfer can be done without MIC approval.

How does the Endorsement procedure work?

The investor or the Myanmar subsidiary files and Endorsement Application with the requisite Land Rights Authorization form and the Tax Incentive form.

The fee is paid (for the moment set at MMK50,000) and the MIC screens it for up to 30 days. If approved, in another 10 days the Endorsement should be issued.

Land Right Authorizations better outlined

The Rules 2017 mostly confirm the existing prevailing practice of the MIC when it comes to applying and granting land use approvals. Rules 119 to 122 set some reply and evaluation time frames, which is helpful. The MIC has, for instance, 30 days to screen an application, or may reject it within 15 days if the information criteria are not met.

Rule 126 states that a land use application may be approved pending and subject to additional procedures being completed, such as a change of use approval. This may lead to the unenviable situation where the investor has obtained an MIC approval for the land, but fails to obtain the change of use approval from another authority. Rule 133 confirms the existing practice that if the land is under a land grant application procedure, evidence of the same shall be submitted, and is usually accepted.

New investor responsibilities

We already commented in an earlier briefing note on the new investor obligations in terms of labour. A set of employer obligations is mentioned in Chapter 16 MIL which were not mentioned in the 2012 FIL:

1. Investors can only cease or close their business after compensating workers (s. 68 i) of the 2016 IL;
2. Workers need to be paid during a temporary closure of an enterprise (s. 68 j) of the 2016 IL; and
3. Investors must pay compensation owed for workplace injury, sickness, death or loss of limbs (s. 68 k) of the 2016 IL.

The Rules 2017 enlarge the width and depth of the reporting obligations to the MIC in an Annual Report. New items the investor is supposed to report to the MIC include the estimated value of enjoyed tax benefits and a report whether there is a need to recalculate the same. A report on material operating permits and approvals is also compulsory, and, for those with a Permit, a report on the "responsible and sustainable manner" the investment is being carried out. In addition, an operating report is required on a quarterly basis.

The list of required insurance policies has been modernized

The Rules 2013 introduced a list of insurance policies which were, judging by the text, all required by an investor, whether that made sense or not. The Rules 2017 remedy that, stipulating that the investor must take out "the relevant insurance" from the (amended) list. Life insurance, for example, and natural disaster insurance, were removed from that list. "Workman Compensation Insurance" and "Property and Business Interruption Insurance" was added in the 2017 list.

	Rules 2013	Rules 2017
a	Machinery insurance	Property and business interruption insurance
b	Fire insurance	Engineering insurance
c	Marine insurance	Professional liability insurance
d	Personal accident insurance	Professional accident insurance
e	Natural disaster insurance	Marine insurance
f	Life insurance	Workmen compensation insurance

Some final practical and logistical issues

The Rules 2017 make a great number of logistical and practical changes. Here are some of the ones we noted:

- There is now an investment screening phase. An investor can submit a Screening Application, and this is in fact the new first step for each application. The MIC will reply whether this activity requires a Permit or an AO, whether this is promoted activity or not, etc. The guidance is not binding;
- A summary of the investment project must now also be submitted in Myanmar language;

- There are now various fees applicable such as for submission, amendment, etc.
- Rule 51 now allows approval of proposal subject to a bond;
- The time period under which the MIC has to complete the process, previously 90 days without possible suspensions, has been fixed to allow such suspensions for delays on the investor side in replying MIC questions, or may be extended because of complexity (Rule 55).
- There is a new notice procedure for an investment in a restricted sector (without Permit or AO). Unless if the investor is a Small Company as defined in the Rules 2017, a notification must be made to the MIC and the relevant state or region;
- A land right authorization and a tax incentive application may be applied simultaneous with the proposal.
- When the project will acquire a sublease to Government land, an MIC Permit is no longer needed.

Myanmar Investment Commission
Schedule of Applications and Services Fees

Sr.	Service	Myanmar Kyat	Myanmar Kyat (Small Company)
1	Investment Screening Application	15,000	5,000
2	Proposal – Total Investment value under USD 1,000,000	100,000	50,000
3	Proposal – Total Investment value between USD 1,000,000 and USD 20,000,000	200,000	100,000
4	Proposal – Total Investment value between USD 1,000,000 and USD 100,000,000	300,000	300,000
5	Proposal – Total Investment value above USD 100,000,000	500,000	500,000
6	Endorsement Application	50,000	-
7	Tax Incentive Application – Total investment value under USD 10,000,000	100,000	50,000
8	Tax Incentive Application – Total investment value USD 10,000,000 and above	200,000	100,000
9	Land Rights Authorisation Application	100,000	50,000
10	Share or Business Transfer Application – Total investment value under USD 1,000,000	50,000	25,000
11	Share or Business Transfer Application – Total investment value USD 1,000,000 and above	100,000	50,000
12	Share or Business Transfer Application – Total investment value USD 20,000,000 and above	200,000	100,000
13	Share or Business Transfer Application – Total investment value USD 100,000,000 and above	300,000	150,000
14	Request for an explanation of a decision under section 48(b) of the Myanmar Investment Law	80,000	40,000
15	Permit Amendment	100,000	50,000
16	Endorsement Amendment	50,000	25,000
17	Tax Incentive Amendment	100,000	50,000
18	Land Right Authorisation Amendment	100,000	50,000
19	Foreign Staff and Management Expert Work Permit Application	5,000	2,500

"Edwin is the leading international lawyer in Burma. He assisted on two of my projects in Myanmar and has been first rate"

- IFLR1000

MYANMAR DRAMATICALLY CUTS LIST OF 92 ACTIVITIES REQUIRING A LOCAL PARTNER DOWN TO 22

Big Winners are Retail, Petroleum Products, Real Estate, Media and Healthcare

In a move to expand the potential opportunities for foreign investors, the list of activities a foreign investor is allowed to carry out in Myanmar only under a joint venture ("JV") with a Myanmar citizen or company, has been cut significantly. From 92 activities listed in Notification 26/2016 ("Notification 26)" requiring a JV, the new Notification 15/2017 ("Notification 15"), which replaces Notification 26, only lists 22 such activities.

The big beneficiaries are, in no particular order, foreign retailers who now get to open large outlets (exceeding 10,000 square feet), petroleum product suppliers and private clinics (both no longer need a JV). Also benefitting from increased access is real estate development of commercial space and offices, print and broadcasting media, and various manufacturing activities and agriculture.

The Myanmar Investment Commission ("MIC") has done this significant reduction of JV requirements essentially by convincing the line ministries and the Cabinet to go back to the way things were in 2013, and once again remove the JV requirement for all activities which merely require approval from the line Ministry. That was indeed the situation under Notification 1/2013, the very first version of the list of foreign ownership restricted activities. In 2014, a general JV requirement was added for each and every activity that required approval by a line ministry through Notification 49/2014, adding dramatically to the number of activities requiring a JV for foreigners.

Notification 15 implements Section 42 of the Myanmar Investment Law of 2016 by setting out which activities may be carried out by foreign investors, possibly with a local JV partner.

A new feature is the inclusion of "industry codes" such as "CPC" ("Central Product Classification"), or to "ISIC" ("International Standard Industrial Classification of All Economic Activities"). We have analyzed the effect of these code references at the end of this note.

Myanmar Opens Up for Big Retail. Again.

Notification 15, sadly, does not say in a straightforward manner that foreign investment in large retail is now permitted. But it does say that "mini-markets and convenience stores" are not allowed for foreign investment (not even with a JV) if these are smaller than 10,000 square feet or the corresponding 929 square meters. The implication is that sizes in excess of this surface are allowed for foreign investment. There is no mention of a requirement for a JV, but it is stated in Notification 15 that the Ministry of Commerce ("MoCm") will need to approve retail and wholesale investment.

The first thing to notice is the modest size requirement, which seems to have been designed solely to protect small convenience stores. The 929m2 requirement of Notification 15 is a little bigger than two basketball courts. That is a big retail outlet, certainly, if you need to fill it with, for example, toys, but it is nothing close to megamall sizes.

Some of us, of course, have already seen this once before. In Notification1/2013, the very first list of restricted activity, promised foreign retailers they could enter as well. Section 19 of that list, entitled "Retail business" stated at that time that "Foreign investment in small-sized retail businesses is not permitted under this category. However, supermarkets, department stores, and shopping centers are permitted. In this category, the enterprise may not be situated nearby areas with local businesses. The enterprise is required to retail mostly local products. In the case of a JV, the local partner needs to have a minimum shareholding of 40%". However, in reality the MOCm never issued any permissions and the whole notion was swept away when roughly a year later Notification 49/2014 came along, wiping out reference to retail of any kind.

The original reference to large retail in 2013 was a lot more explicit than the current version in Notification 15. It still leaves quite a number of unanswered questions. None of those questions is more fundamental than the object and purpose of the retail exception created by Notification 15. Does it refer only to convenience stores, as the released translation suggests, or to retail of anything at all? Is this good news for Carrefour only or also for Adidas, ToysRus, Marks & Spencer and Kinokuniya?

Based on how Notification 15 reads now, we think it is good news for all retailers, regardless of what they sell. The reference to "CPC 62", which is glued to the retail exception in Notification 15 is highly suggestive of that interpretation. Assuming MIC had the CPC 1.1. or 2.1. version in mind and not the Provisional Version, CPC 62 stands for general retail trading, of all and any goods, whether foods or anything else. By that reasoning any foreign retailer, whether a supermarket, of a retailer of toys, books, fashion, sporting goods, home appliances, audio-visual, ICT or anything else, would be able to invest in Myanmar to carry on a retail business, by, presumably, importing their goods and reselling them in retail outlets he owns. Provided the outlet is a little larger than two basketball courts.

There is however nothing to go on in Notification 15 in terms of regulation, and it is stated quite clearly that the MOCm will need to regulate this activity. We will have to see if, when and how the MOCm will actually implement the licensing of foreign owned retail outlets. Will there be limitations in terms of number of outlets? Or in the nature of the goods sold? Notification 15 does not mention any JV requirements, but it these are not unusual in retail.

Real Estate: No More JV for Commercial or Office Developments

There used to be four categories of real estate development activity which require a joint venture with a Myanmar citizen. With their reference numbers of Notification 26's List B, these are: 21-Development, sales and lease of residential apartments/ condominiums; 22- Development and sales of office/

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commercial buildings; 23-Development, sales and lease of residential apartments in areas related to industrial zones; and 24- Development of affordable housing.

Only one of those four categories remains in Notification 15 as requiring a JV, the one referring to "development, sale and lease of residential apartments/condominiums". The other three activities are no longer mentioned on in Notification 15's list of activities requiring a JV. Thus, the "development of affordable housing", "development, sales, and leasing of residential apartments in industrial zones" and "development of commercial buildings" will now only require approval from the Ministry of Construction ("MOC"). These activities are no longer included in the list of activities requiring a joint venture. However, the development, sale and lease of residential buildings and condominiums will still require a joint venture.

So there is now a local ownership requirement depending on the purpose of the development. This will be difficult to administer in projects which are, as is very often the case, a mix of residential, commercial and office portions.

In addition, development of new towns will require a joint venture with a government organization along with the approval from the Ministry of Construction ("MOC), while urban and regional development that is 100 acres and above will only require approval from the MOC. Specifically, urban redevelopment projects (over 4 acres) in Nay Pyi Taw, Yangon and Mandalay also require MOC approval.

Also noteworthy, as is discussed in more detail below, large scale retail, with a selling area of more than 10,000 square feet or 929 square meters is allowed as a joint venture for foreign investors, although mini-markets and convenience stores remain prohibited to foreign investors.

The construction of roads, expressways, tunnels, underpasses, overpasses, flyovers, and bridges (over 180 feet), as well as the manufacturing and distribution of their related materials now only requires approval from the MOC.

No More JV with MOEE for Petroleum Product Businesses

In the energy sector, the JV requirements introduced by Notification 49/2014 to support the Government's privatization program of a number of state-owned assets, are reversed by Notification 15. As per the new regulation under the Myanmar Investment Law, these activities no longer require a joint venture with the MOEE, or with any other a local partner, but instead only require MOEE approval.

In 2014, the storage, transport, pipeline, jetty or terminal and distribution of all petroleum products was, since Notification 49/2014, was suddenly decreed to be only permitted to foreign investors under a JV with the MOEE. As we pointed out at the time (see here), this move was made to support the previous Government's initiative to find foreign JV partners for a number of state owned assets. The JV between the Government and Puma Aviation for the nationwide distribution of aviation fuel was concluded under this program.

The tide has been in favor of abolishing these foreign ownership requirements for a while. Indeed, most foreign investors will not tie up with MOEE just because a regulation says so. No one starts a business with a local partner one does not wish to have. Instead, investors just wait until the market is opened up. And, by the same token, those foreign investors

who are happy to tie up with MOEE would do so anyway, whether the regulation says so or not.

These foreign ownership restrictions have been abolished, and are replaced with a general requirement of obtaining MOEE approval for the investment project. Reasonably speaking, cancelling an existing restriction means that the activity is now open without such restriction. A foreign oil products company would now, in principle, allowed to carry out the business activity of importing, storing, transporting and in general distributing petroleum products.

However, it remains to be seen if the MOEE will, in fact, grant such approval to foreign investors, and if so, subject to which conditions. Notification 15 does not even require any local partner for this activity. It does not seem logical for the previously heavily regulated petroleum sector to be thrown open entirely overnight, and to go from years of a JV requirement with the Government itself, straight to allowing 100% foreign ownership. Current MOEE regulations on a number of petroleum product business activities, such as importing fuel, distributing LPG, or transporting petroleum products are not comprehensive. The MOEE might come up with additional restrictions or conditions as it produces appropriate regulation for the sector, or even on a case-by-case basis. We believe the MOEE is currently working on their own requirements for approval of foreign invested petroleum product projects. But, Notification 15 is at the very least a major stepping stone in opening the petroleum sector up to foreign investment.

In addition to cancelling the midstream restrictions, Notification 15 has cancelled the upstream oil and gas related restrictions which were also introduced by Notification 49/2014. This was for "import, production, construction and installing" of pipelines and facilities for offshore drilling. Both were, as for was the case for the midstream activities, introduced as a support for a Government JV program. In fact, the MOGE only very recently invited EOI's for the pipeline project.

Finally, construction and operation of offshore supply bases and petrochemical plants also no longer need the MOEE as a local joint venture partner.

Pharma and Healthcare: No More JV Needed for Clinics

There are three principle expansions under the now permissible activities in the pharma and healthcare sector. Firstly, the manufacturing of pharmaceutical raw materials no longer requires a joint venture. Secondly, manufacturing of vaccines and distribution of narcotic drugs, no longer requires a joint venture partner, however the activity is subject to the approval from the Ministry of Industry. Thirdly, activities related to private health care services, private nursing homes, and private hospitals no longer required a joint venture, subject to the approval of the Ministry of Health and Sport. However, a "Transportation Agency for patients to overseas hospitals", an entirely new business line in the health sector, may be carried out as a JV only.

Opining up clinics to 100% foreign ownership is the eye-catcher in the health sector. Several hospitals and clinics have been approved in recent years under the JV requirement as per Notification 26 and its predecessors. This was always a difficult requirement. There is a lack of substantial private health care businesses in Myanmar, which made finding a partner who can economically contribute at least 20% of the investment quite a challenge. The previous JV requirement was meant to foster business

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combinations between foreign and local providers, but it ended up being one more obstacle to investing in Myanmar's healthcare sector. This change marks a sizable expansion in the number of health services a foreign investor may engage in.

However, the same does not apply to veterinary clinics, which are from now on only permitted under a JV with a Myanmar citizen. Previously these could be 100% foreign owned.

The "transportation agency" activity JV requirement raises a number of new concerns. These activities are now often performed by branches in Myanmar of foreign hospitals. Presumably, such activity can continue. But new investments by foreign hospitals in Myanmar, almost certainly subsidiaries of hospitals overseas, will of course also refer patients to them. Would they then need to have a local JV partner? That seems illogical and easily avoidable in the structure. The interpretation of the "transportation agency" is also unclear. It refers to CPC 93121, but this class of activity is not about transportation at all. It is the general category under Class: 9312 - Medical and dental services, "Subclass: 93121 - General medical services". This covers services "consisting of the prevention, diagnosis and treatment by doctors of medicine of physical and/or mental diseases of a general nature, such as consultations, physical check-ups, etc." according to the UN's commentary.

Foreign Investment in Print and Broadcasting Media without JV

Under Notification 26, most media activities within the purview of the Ministry of Information ("MOI") required a JV with a Myanmar citizen:

- Publishing of periodical newspapers in foreign languages (or) publishing newspapers in foreign languages
- FM radio programmes
- Business of broadcasting industry Direct to Home (DTH) system
- Business of broadcasting industry using DVB-T2 system
- Business of broadcasting industry using Cable TV system
- Business of movies production
- Cinema business

In Notification 15, none of these activities requires a JV. For all of these activities, approval from the MOI is required, except for cinema business which has been taken out of the regulated activities altogether. This is a significant opening of the broadcasting sector covering (foreign language) print, radio and television.

Nothing new here, but Notification 15 now confirms that, manufacturing and domestic distribution of mobile handsets and equipment's related to satellite communications, radar, radio communications, is also permitted without a JV. Distribution of handsets which are manufactured in Myanmar was already open for 100% foreign investment under the existing practice. Notification 15 likely, as is the case already, only allows distribution of handsets which are manufactured by the seller in Myanmar.

Manufacturing: Packaging and Pharma No More JV, But Cosmetics and Soaps Now Needs JV

Four types of manufacturing activity have been removed from the JV list:

- Manufacturing and marketing of ropes;
- Packaging;
- Manufacturing of pharmaceutical raw materials; and
- Manufacturing of seasoning powder.

In addition, the restrictions on cigarette manufacturers which existed under Notification 26 (mostly in connection with use of local tobacco and requirement of export) seem to have been removed, at least for future projects.

However, a few activities which previously did not require a JV, have been added on to the list in Notification 15:

- Manufacturing of cosmetics
- Manufacturing of soaps
- Rearing, breeding and selling of pets (insofar that is not out of place here)

Agriculture: Cap of 49% on Foreigners for Certain Activity Removed

Notification 26 did not contain a straightforward JV rule for agriculture activities. It did state that "distribution in local market and exporting crops after cultivating and producing using imported necessary input materials", was "permitted only for production of value added products with foreigner shareholding up to 49 percent". That notion of "49 percent" has been removed in Notification 15, but the activity continues to feature on the JV list. In actual practice, there appear to have been only very limited circumstances where the 49% was thought to apply anyway.

Notable for prospective investors is that 100% foreign ownership is now permissible for production and distribution of seeds and hybrid seeds, crops, new plant varieties, pesticides, fertilizers, hormone, weed killer and other agriculture related services and research. Approval from the Ministry of Agriculture, Livestock and Irrigation is still required, however previously these activities strictly required a joint venture with a local partner.

New Use of Industrial Sector Classifications: How to Interpret?

New to Myanmar (Vietnam has done this for many years) is the use of some type of industrial or services activity classification codes in an apparent attempt to make is clearer which activities are meant. Notification 15 refers sometimes to "CPC", which stands for "Central Product Classification", covering all goods and services, also used as a tool for the WTO's General Agreement on Trade in Services ("GATS"). There are several versions of the CPC, the most common ones being the CPC 1.1. and the CPC Prov, used in many GATS Schedules. There is also a more recent CPC 2.1. version, which we think is the one used by Notification 15. In other instances, Notification 15 refers to "ISIC", which stands for "International Standard Industrial Classification of All Economic Activities", produced by the United Nations Statistics Division since 1958.

So, now there are essentially two columns of activity, one in language (both in Myanmar language and published by the MIC in English) and one new column with an industry code. They are almost never identical. Sometimes, the code is much, much wider than the textual description of the activity. So, which one prevails? The one in language or the one in code?

We think the codes are added to, in some cases, provide extra clarity or context for one or more aspects of the activity. The codes do not replace, or are not equivalent to the text activity itself. They are to be taken into account for a better understanding, but within reason and within the textual description of the activity.

To illustrate our reasoning on this issue, lets take a look at the reference to "Construction and implementation of storage tank, loading port, pipe line, related machineries and equipment and construction of building for importing, transporting, storage, distribution and selling of oil, gas and petroleum products". All this comes with a simple reference to "ISIC 2512" in the code column. Now, ISIC 2512 is merely "manufacturing of steel tanks" only, and not the business activity of owning or operating petroleum storage or pipelines, or any of the other activities mentioned in the text column of this activity. So, what Notification 15 is saying here, is merely that someone might be constructing such steel tanks to carry out the wider activity of storing petroleum products. Similarly, the reference in Notification 15 to "Deep sea ports", where we find a code reference of ISIC 4290. This however refers to construction activity alone and not to the activity of owning or operating such port. As such it does little to help our understanding of "foreign investment in deep sea ports".

Another example is the reference to "transportation agency to overseas hospitals clinics", which connects with CPC 93121. However, CPC 93121 is not about transportation at all, but about general medical services. The code is meant to convey that the purpose of that transportation must be those general medical services. The code does not mean to replace the text.

The use of industry codes is a helpful idea, but it can lead to mixed or even wrong results. One needs to keep in mind the limited functional role they appear to play in the interpretation of Notification 15, as additional context for one or more aspects of the activity referred to in the text.


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FIRST EVER TRANSFER OF SHARES FROM A MYANMAR COMPANY TO A FOREIGNER

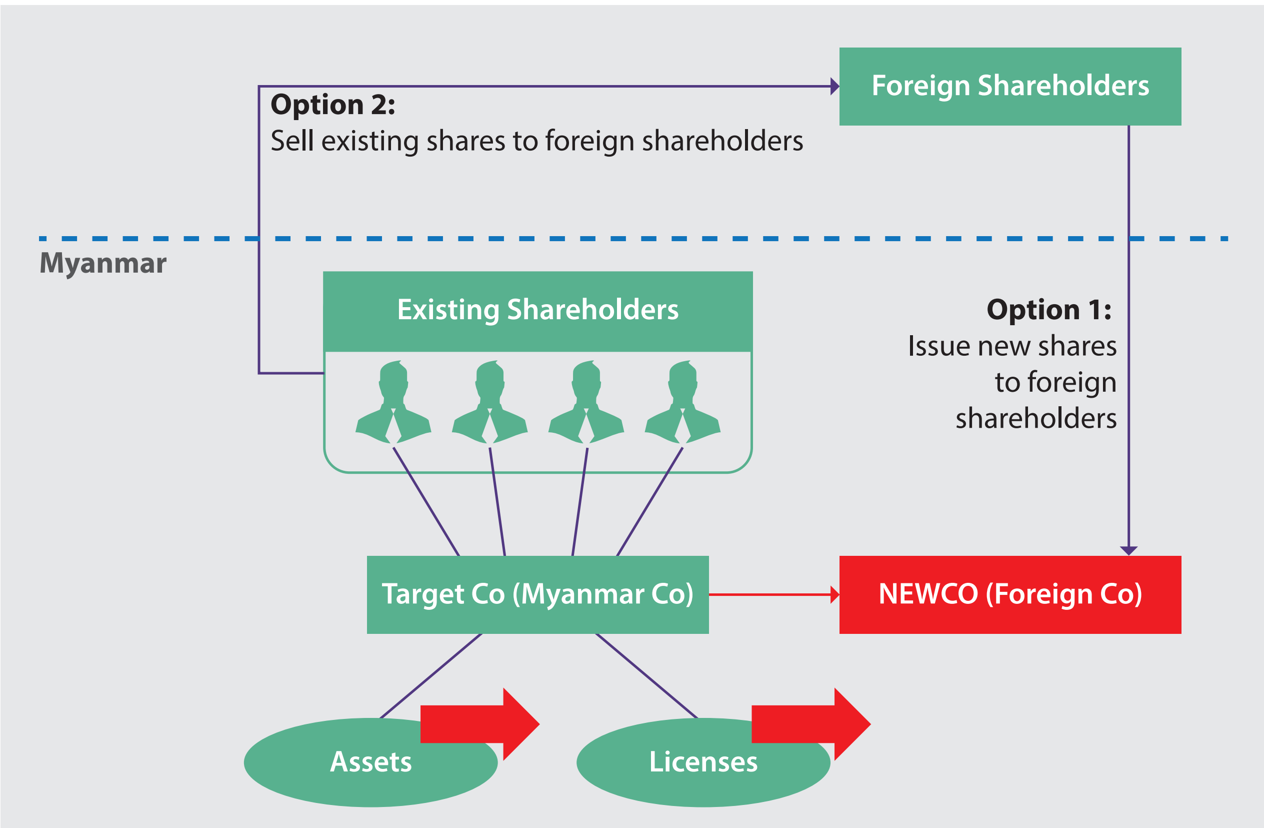
Myanmar's Directorate of Investment and Company Administration ("DICA") has for the first time implemented a transfer of shares in a company wholly owned by Myanmar citizens and registered as a Myanmar company to a foreigner. This is a promising news for a wide-range of business owners and foreign investors in Myanmar, given that attracting a foreign investor was extremely challenging in many situations as shares from Myanmar companies could not be transferred to foreigners.

On March 7 2017, VDB Loi organized an exclusive client briefing session in Yangon on this development. In this client briefing note, we explain some of the key observations from our client briefing session and analyze what exactly has changed after the first ever transfer of shares.

What was the earlier situation?

Until DICA implemented the first transfer of shares, conversions from a Myanmar company to foreign company required the establishment of a separate legal entity. In other words, this required the establishment of a joint venture created in Myanmar (by setting up a new foreign company) since the 1987 Foreign Investment Law.

Although a new Foreign Investment Law was passed on 2 November 2012 in Myanmar, rules and restrictions pertaining to conversion from a Myanmar company to a foreign company remained the same. It was administratively impossible for foreigners to acquire shares in a Myanmar company – one that was established and owned exclusively by Myanmar citizens – except through the creation of a new legal entity which was incorporated as a foreign company. Not only was this process time-consuming due to transfer of licenses, assets and employees etc. from the old company to the new, it was also expensive and filled with uncertainties, with all the tax consequences and formalities. Moreover, Myanmar Companies were unable to access funding such as venture capital or private equity in a straightforward manner.



What has changed?

Taking into account the numerous challenges it posed to both local businesses and foreign investors in Myanmar, VDB Loi initiated the solution to this issue with DICA, suggesting how to make the process suitable and working with the authorities to implement this remedy.

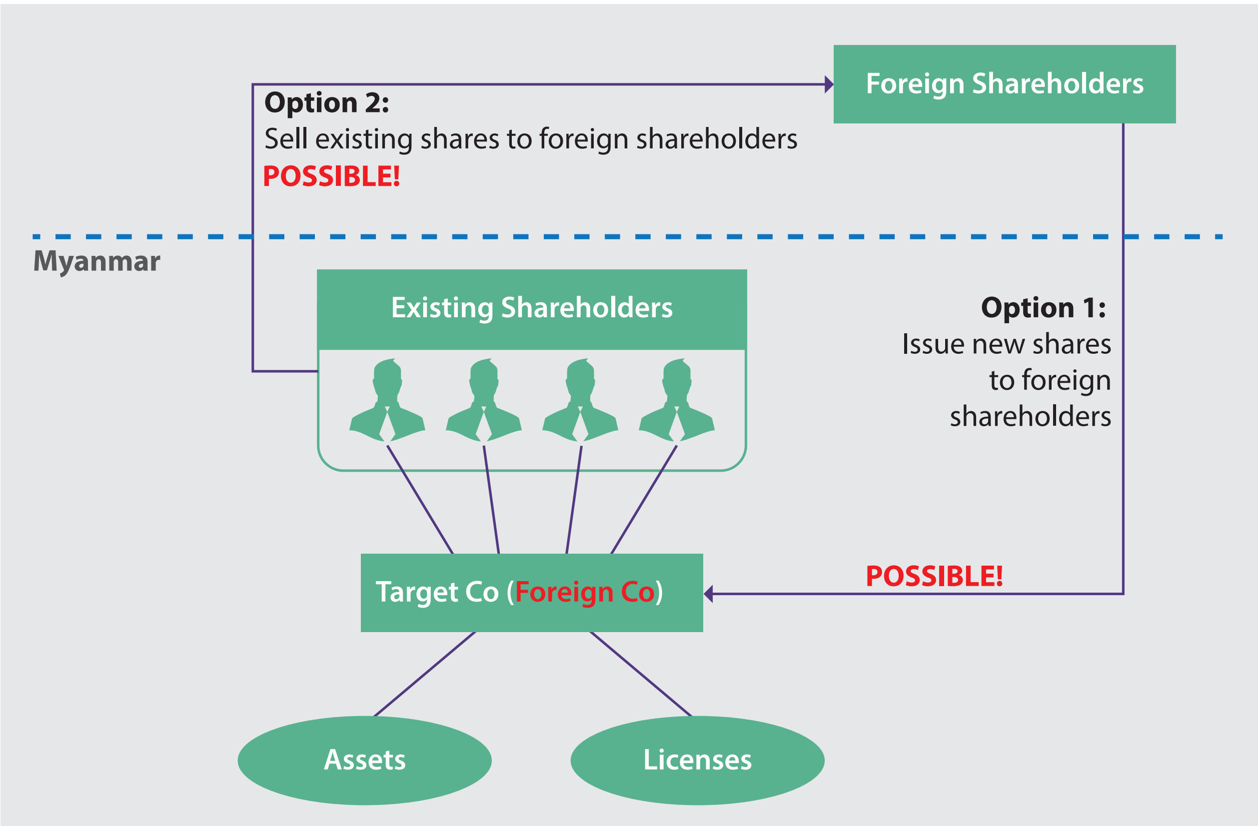
The most important development is that, foreigners in Myanmar can now acquire shares in wholly Myanmar-owned companies, subject to case by case approval and conditions which apply to this "conversion with continuing legal personality". In other words, investors no longer need resort to beneficial ownership or other solutions using intermediaries or agents.

As for Myanmar companies, this development makes it easier for them to attract foreign investors as they no longer have to set up a new legal entity or experience uncertainties and administrative challenges – such as the need to renew and obtain licenses or assign assets and liabilities – that previously made it impossible for foreigners to acquire shares in a company established and owned exclusively by Myanmar citizens. After conversion, however, a Myanmar company must end activities which foreign companies are not allowed to carry out in Myanmar, such as ownership of immovable properties, most forms of trading and in sectors where foreign investment is not allowed such as banking, insurance and certain types of broadcasting. In addition, the process does not make foreigners in a Myanmar Company. Instead, it allows the Myanmar company to continue its legal existence as a foreign company, with at least some foreign shareholders.

How to do this?

Transferring shares from a Myanmar company to a foreigner is a much simpler process compared to the creation of a new corporate entity, which was incorporated as a foreign company. The process begins with drafting of key documents, which include Board of Director's resolution and shareholders resolution for transfer of shares.

Step-2 involves submission of documents to the authorities, such as submission of share transfer form to DICA within 21 days from date of creation. Once documents have been submitted, companies must begin the registration of a foreign company, which would include various documents needed for a share issue, a share transfer, application to incorporate a foreign company and an MOA change etc.



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