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ACQUIRING A PORT TERMINAL PROJECT IN MYANMAR

What are the assets of a Target in the port sector?

Although others forms also exist, most port terminals with private interests in Myanmar are “Landlord Ports”. That is to say, the port is leased to the private sector (“**the Target**”) 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 Myanmar Port Authority (“**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 “**Project**”).

Such project, deploying the infrastructure, normally requires obtaining an investment license from the Myanmar Investment Commission (the “**MIC**”). Operating certain elements of the business plan will usually trigger the need for licenses, permits and approvals from a wide range of Government departments. For example, if the Target also provides fuel storage services, a license must be obtained from the Ministry of Electricity and Energy (“**MOEE**”). If the Target operates a jetty, a permit must be secured from the Ministry

Highlights of this note

- ▶ What are the assets of a Target in the port sector?
- ▶ Are there any foreign ownership restrictions?
- ▶ Typical terms of a Myanmar port concession agreement
- ▶ Structuring options: which are the possible acquisition structures?
- ▶ Offshore shareholding structure: Use Singapore as a holding jurisdiction?

of Transport and Communication. In all cases, environmental approvals are required from the Ministry of Natural Resources and Environmental Conservation (“**MONREC**”).

So, we can say that the typical Target looks like this:

1. Myanmar-registered company with Myanmar/foreign shareholders;
2. Port terminal concession with MPA;
3. Land lease with MPA (can be in same document as 2.);
4. MIC Permit;
5. Other permits, approvals as applicable from MOEE/MONREC/others;
6. Existing construction (if any).

CORPORATE M&A MYANMAR UPDATE



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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.

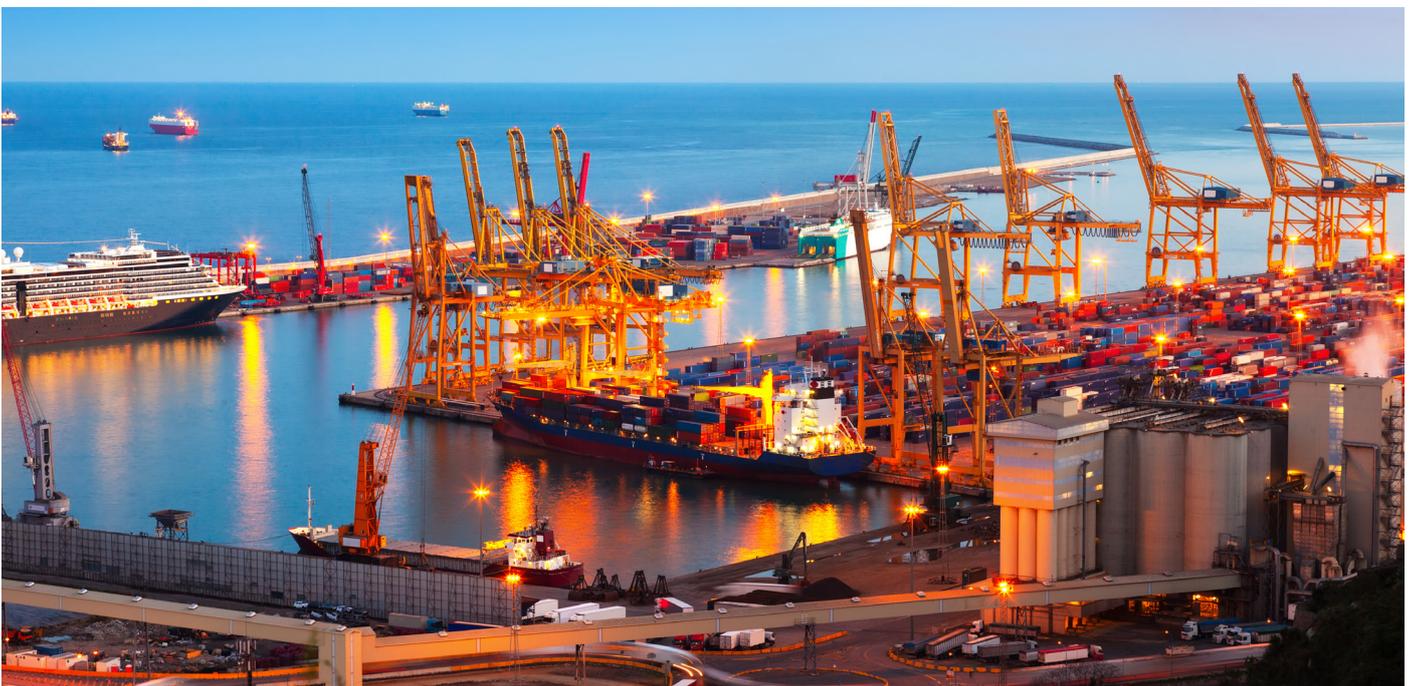
Typical terms of a Myanmar port concession agreement

A BOT contract between the MPA and the Target (MPA Concession), often provides for the following: (Note: VDB Loi has been engaged by IFC to help produce a new Model Port Concession Agreement for Myanmar, a project which is ongoing).

1. 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.



2. Operation: 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.
3. Ancillary commercial services (i.e. not related to the operation of the port itself) are usually also provided, such as manufacturing and processing.
4. 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).
5. A separate lease agreement is executed in parallel with the MPA (or another Government agency owning the land).
6. 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.
7. 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.
8. 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.



Structuring options: which are the possible acquisition structures?

We have identified at least 4 possible acquisition scenarios. We assume in the below that there is a joint venture partner for illustration purposes, although this is not strictly required except where the Project will also import and resell goods:

1. The assets stay within Target, new JVCo will provide services only

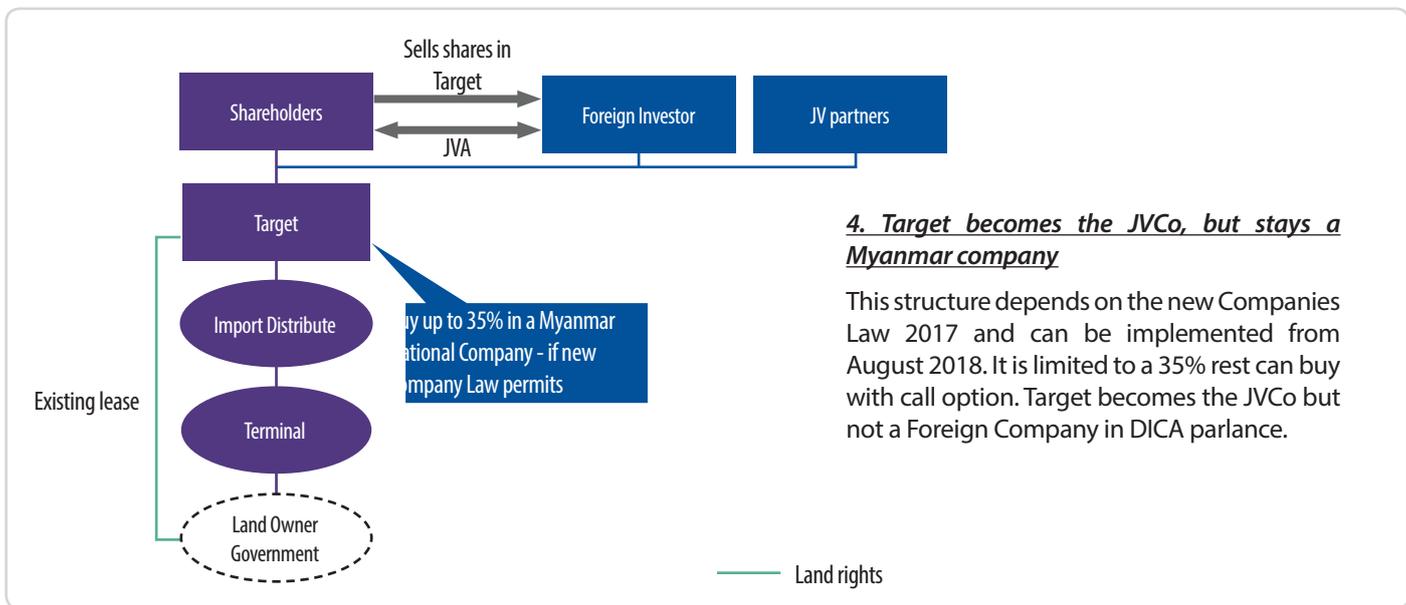
All assets and business stay in the Target and a JVCo setup by the investor and its JV partners will provide management services. In this case, the investor holds no leverage over equity or assets, although it may be possible to put in place a share pledge over Target shares and assets.

2. Assets are transferred to a new JVCo

The Target becomes the Myanmar shareholder of the JVCO. In this case, there is an “onshore” JVA (that is, the JVCo is a Myanmar entity). An offshore JVA is also possible, in theory.

3. Convert the Target into the JVCo

Used to be impossible, but we achieved the first one since last year (Note: VDB Loi succeeded in the first ever conversion of a Myanmar company into a foreign company without the creation of a new entity). This is not limited to 35%, in theory can be up to 100%. Target becomes the JVCo and a “Foreign Company” in DICA parlance.



4. Target becomes the JVCo, but stays a Myanmar company

This structure depends on the new Companies Law 2017 and can be implemented from August 2018. It is limited to a 35% rest can buy with call option. Target becomes the JVCo but not a Foreign Company in DICA parlance.

The big differentiator in all these structures is the need to assign or sublease the MPA Concession. In structures 1, 3 and 4, the MPA Concession stays where it is. No need to obtain MPA's approval for the transfer from Target to Newco or JVCo. In structure 2, though legally perhaps the cleanest, the MPA must approve the transfer or sublease if the structure is to proceed.

Offshore shareholding structure: Use Singapore as a holding jurisdiction?

An investor from China, Japan, Europe or India may consider structuring its shareholding in a Myanmar port project through an interposed Singapore holding structure. The Double Taxation Agreement between Myanmar and Singapore (the "Myanmar-Singapore DTA") provides in a number of benefits, particularly when it comes to capital gains, which are not available in any other double taxation agreements. That, in combination with Singapore's facilities as a regional financing centre, results in Singapore being chosen frequently as a base to hold shares in Myanmar companies.

1. Capital gain taxation

Capital assets include land, buildings and their rooms, vehicles, and work-related capital assets. The expression also includes shares, bonds, securities and similar instruments. Capital gains tax ("CGT") is applicable to both resident and non-resident taxpayers deriving a profit from the sale, exchange or transfer of capital assets in Myanmar.

The CGT rate for all taxpayers (except

in the oil and gas sectors) is 10% and is imposed in either MMK or a foreign currency.

Under Article 13 of the Myanmar-Singapore DTA, Myanmar can tax capital gains realized by a Singapore resident only under three scenarios:

- (i.) Direct and indirect transfer of immovable property;
- (ii.) Transfer of a permanent establishment or fixed base; and
- (iii.) Transfer of shares in a local subsidiary in which the selling company owns at least 35 per cent and sells at least 20 per cent of its shares during any fiscal year.

We note that the lease of the port terminal could qualify as an immovable

property right under the internal laws of Myanmar and hence also under the Myanmar-Singapore DTA (Art. 6 (2) Myanmar-Singapore DTA). Therefore, in case where the property of JVCo consists principally of the lease right, any capital gain realized on the transfer of shares in JVCo would be subject to 10% CGT in Myanmar because qualifying as an indirect transfer of immovable property.

In all the other cases, the gain (if any) is only taxable in Singapore provided that the selling entity owns less than 35% shareholding in JVCo or transfers less than 20% during the fiscal year.

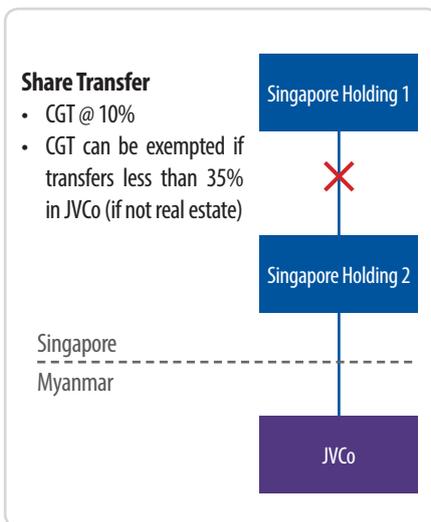
2. Double layer structure

The CGT provisions under Myanmar Tax Law are very broad and there is



uncertainty whether the Myanmar CGT also applies to indirect offshore transfer of capital assets. We are aware that at the highest level of the tax authorities, some senior officials are of the view that Myanmar CGT can be applied to any realization of gain on a Myanmar asset, regardless of some offshore entity is interposed. This has also been the view of tax authorities in China, India and Indonesia, so we believe that caution is of the essence in this respect.

If indeed CGT applies to an indirect offshore transfer, it will be useful or even crucial to be able to invoke tax treaty protection. For the investor to invoke treaty protection, the selling entity disposing of the shares that indirectly hold the Myanmar asset needs to be a tax resident of Singapore for tax purposes in the sense of Article 4 of the Myanmar-Singapore DTA.

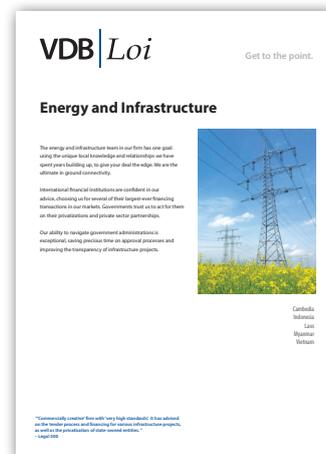


To apply for benefits under the Myanmar-Singapore DTA, the tax authorities require a certificate of residence of the Singapore entity. We note that a shelf company without substance may not qualify as a tax resident of Singapore.

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The Energy and Infrastructure team is led by Philipp Troesch. Philipp is a Swiss qualified lawyer with 15 years of experience in corporate and commercial law. He leads our Energy and Infrastructure team, assisting clients with joint ventures, acquisitions and large greenfield foreign investment.

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