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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

Highlights of this note

- ▶ Key changes
- ▶ Which projects can no longer receive a Permit?
- ▶ Do these thresholds make sense?
- ▶ Construction Period extension remains too rigid
- ▶ The indirect offshore transfer of shares now also needs MIC permission
- ▶ How does the Endorsement procedure work?
- ▶ Land Right Authorizations better outlined
- ▶ New investor responsibilities
- ▶ The list of required insurance policies has been modernized
- ▶ Some final practical and logistical issues

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

PROGRESS REPORT 2016 MYANMAR



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

(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.

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;

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

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.

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 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.



Government Guarantees for PPP Projects in Myanmar
March 31, 2017, Nay Pyi Taw.

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.

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

Sr.	Service	Myanmar Kyat	Myanmar Kyat (Small Company)
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

- 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.

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