

KELVIN CHIA YANGON

LOCAL KNOW-HOW WITH INTERNATIONAL EXPERTISE

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Kelvin Chia Yangon Ltd. (KCY) has been in active operation in Myanmar since 1995, currently with offices in Yangon and Mandalay. KCY is the firm of choice for those seeking to navigate the fast-changing legal and regulatory landscape in Myanmar, where we have gained extensive experiences and expertise across all the fast-changing legal and regulatory landscape in Myanmar areas of commercial practice.

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OVERVIEW AND LATEST UPDATES ON THE MYANMAR INVESTMENT LAW

In an effort to create a more stable and attractive investment framework, the Myanmar government enacted the Myanmar Investment Law on 18 October 2016 (the “MIL”). The MIL governs investments by both Myanmar and foreign investors and expressly repealed the Myanmar Foreign Investment Law (2012) and the Myanmar Citizen’s Investment Law (2013).

The MIL, along with the Myanmar Investment Rules (the “**MIL Rules**”), which were issued on 30 March 2017, establishes conditions and regulations with respect to investments in Myanmar as well as the guarantees and benefits afforded to investors which the investment community has long been waiting for.

What are investments under the MIL?

The MIL applies to all existing and new investments in Myanmar. Investments are deemed to include the following:

- Enterprise, the reference to which covers any legal entity and a branch office
- Movable property, immovable property and related property rights, cash, pledges, mortgages and liens, machinery, equipment, spare-parts, and related tools
- Shares, stocks, and debentures of a company
- Intellectual property rights in accordance with applicable laws, including technical know-how, inventions, industrial designs, and trademarks
- Claims to money and to any performance under contract having financial value
- Rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts
- Assignable rights granted by relevant laws or contract including the rights of exploration, prospecting and extraction of natural resources

What are the different categories of investments under the MIL?

Under the investment framework of the MIL and as supplemented by the provisions of the MIL Rules, investments and/or business activities may be generally categorized into five groups as follows:

MIC Level Activities

Investors shall submit a proposal to and obtain an MIC Permit from the Myanmar Investment Commission.

- Strategic for Myanmar
- Capital intensive ventures
- Projects which have the potential to negatively impact the environment or local communities
- Business activities that will use state-owned land and buildings
- Business activities that are designated by the government to require the submission of a proposal to the commission
- Business activities which may have a significant impact on security, economic conditions, the environment, and national interest of the Union and its citizens, and which has received the approval of the Union Parliament

Prohibited

Under Rule 12 of the MIL Rules, the MIC may issue notifications setting out the list of prohibited investment activities pursuant to Section 41 of the MIL. We note that as of the date of this newsletter, such list has not yet been issued.

- Investment activities which may bring or cause hazardous or poisonous wastes into the Union
- Investment activities which may bring technologies, medicines, flora and fauna and instruments which are still being tested abroad or which have not been obtained approvals for use, planting and cultivation except the investments which made for the purpose of research and development
- Investment activities which may affect the traditional culture and customs of the racial groups within the Union
- Investment activities which may affect the public health
- Investment activities which may cause significant damage to the natural environment and ecosystem
- Investment activities that manufacture goods or provide services that are prohibited in accordance with applicable laws

Restricted

On 17 April 2017, the MIC issued the list of restricted investment activities under Notification No. 15/2017 pursuant to Section 42 of the MIL (the “**Restricted List**”).

- Investment activities allowed to carry out by Government only
- Investment activities restricted to foreign investors
- Investment activities allowed only in form of joint venture with a citizen owned entity or a citizen of Myanmar
- Investment activities permitted with the recommendation of the relevant ministries

Others

Investment activities not covered by the other three categories may be regulated by other applicable laws, regulations and policies.

Figure 1. Types of Investments under the MIL

What are the available investment guarantees and protection under the MIL?

The MIL also provides investor guarantees with respect to their investments in Myanmar aimed at increasing investor confidence and activity in Myanmar. Generally the guarantees apply to all investments, irrespective of its category as described above, but in some instances, are limited to direct investments. Direct investments are defined in the MIL to mean investments in which the investor has the right to control, influence or manage of such assets which are invested by the investor in the country in accordance with the law.

Non-Discrimination

The MIL adopts non-discrimination provisions. Firstly, the MIL adopts the National Treatment, by which the Myanmar government guarantees that in dealing with investors, it will accord foreign investors (and their direct investments) no less favourable than that it accords to Myanmar-citizen investors with respect to expansion, management, operation, and the sale or other disposition of direct investments, unless otherwise stipulated in laws, rules and notifications.¹ Secondly, the MIL also adopts the Most-Favoured Nation Treatment, by which the Myanmar government guarantees that, subject to provision under applicable laws and treaties, in dealing with foreign investors, it will accord foreign investors (and their direct investments) no less favourable than that it accords to other foreign investors, with respect to the establishment, acquisition, expansion, management, operation and the sale or other disposition of direct investments.²

Fair and Equitable Treatment

Other than the foregoing, the Myanmar government also guarantees fair and equitable treatment in respect of the investors' (a) right to obtain relevant information on any measures or decision which has a significant effect on an investor and its direct investment and (b) right to due process and the right to appeal on matters concerning an investor and its direct investment including any changes or similar measures to the terms and conditions under any license or permit and endorsement granted by the government to the investor and its direct investment.³

Investment Protection and Security

The Myanmar government provides investment protection and security in respect of an investors' investment in Myanmar. Specifically, the Myanmar government guarantees not to nationalize any investment carried out in accordance with the MIL. Section 52 of the MIL provides that the government shall not take measures which expropriate, whether directly or indirectly, or result in the termination of an investment except under the following conditions:

- (a) Necessary for the public interest
- (b) In a non-discriminatory manner
- (c) In accordance with applicable laws
- (d) Upon payment of prompt, fair and adequate compensation.⁴

Transfer of Funds

The Myanmar government further guarantees that investors may transfer funds relating to the investments made under the MIL, such as contributions to capital, profits, dividends, proceeds from sale or liquidation, payment, etc., subject, however, to the applicable rules set by the Central Bank of Myanmar.

¹ MIL Section 47(a)

² MIL Section 47(b) and (c)

³ MIL Section 48

⁴ MIL Section 52

Moreover, the MIL limits the instances when the Myanmar government can prevent or delay transfers of funds to the following:

- (a) Insolvency, or the protection of the rights of creditors
- (b) Criminal or penal offences and the recovery of proceeds of crime
- (c) Financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities
- (d) Ensuring compliance with orders or judgments in judicial or administrative proceedings
- (e) Taxation
- (f) Social security, public retirement, or compulsory savings schemes
- (g) Severance entitlements of employees.⁵

Whilst approvals for certain types of remittances are still required under the Foreign Exchange Management Law and Foreign Exchange Management Regulations, such as obtaining offshore loans that require a prior CBM's approval in accordance with Section 48 of the Foreign Exchange Management Regulations, the instances where the approval from the MIC is required are limited to instances involving remittances of proceeds from the sale of a whole or part of an investment or liquidation of an investment, proceeds resulting from any settlement of investment disputes, or proceeds relating to compensation resulting from expropriation of an investment or an asset under the investment.

Finally, the MIC is also allowed to adopt or keep restriction measures on payments or transfers related to investment in accordance with the Foreign Exchange Management Law and other international commitments entered into by Myanmar, in accordance with Section 64 of the MIL.

What are the other benefits provided by the MIL?

In addition to the investment protections granted to investors and investments in Myanmar, MIC Permit holders and other qualified investors may obtain additional benefits and exemptions provided under the MIL. Such benefits and exemptions are granted by the MIC as part of the MIC Permit or in separate endorsements, in the case of non-MIC Permit holders ("**MIC Endorsements**").

Such benefits and exemptions include:

- Land Use Rights - Holders of an MIC Permit or MIC Endorsement therefore have the opportunity to lease and develop land for a period not exceeding 50 years (renewable for 2 terms of 10 years each).
- Exemptions and Reliefs – The MIC shall evaluate and may grant one or more tax exemptions or reliefs if the investor applied for. Such exemptions and reliefs that may be applied for are as follows:
 - **Limited-period income tax exemption** - Exemption from income tax for a designated number of years from the commencement of commercial operations depending on the zone under which the business will be conducted. Pursuant to the MIL, the MIC issued Notification No. 10/2017,⁶ dividing Myanmar into the following three different zones for purposes of identifying the duration of the income tax exemption which may be applied for, which may either be 3, 5 or 7 consecutive years.

The grant of the income tax holiday is however not automatic. Section 75(c) of the MIL states that the "income tax exemptions shall only be granted for sectors which the commission has specified under a notification as sectors for the promotion of investments." On 1 April 2017, the MIC issued Notification No. 13/2017, setting forth a list of promoted sectors qualifying for a grant of income tax holiday.

⁵ MIL Section 62

⁶ 22 February 2017

- **Exemptions and reliefs from customs duties and other internal taxes** - The MIC may grant the following exemptions and reliefs the investors, if applied for:
 - (i) Exemption or relief from customs duties or other internal taxes or both on machineries, equipment, instruments, machinery components, spare parts, construction materials not available locally, and materials used in the business, which are imported as they are actually required, during the construction period or during the preparatory period of the investment business.
 - (ii) Exemption or relief from customs duties or other internal taxes or both on the importation of the raw materials and partially manufactured goods conducted by an export-oriented investment business for the purpose of the manufacture of products for export.
 - (iii) Reimbursement of customs duties or other internal taxes or both on imported raw materials and partially manufactured goods which are used to manufacture products for export.
 - (iv) If the volume of investment is increased with the approval of the MIC and the original investment business is expanded during the permitted period of investment, exemption or relief from the customs duty or other internal taxes or both on machineries, equipment, instruments, machinery components, spare parts, materials used in the business, and construction materials not available locally, which are imported as they are actually required for use in the business which is being expanded as such.
- **Other Exemptions and reliefs** - The MIC may grant the following exemptions and reliefs to the investor, if applied for:
 - (i) Exemption or relief from income tax if the profit obtained from the investment business that has secured a MIC Permit or MIC Endorsement is reinvested in such investment business or in any similar type of investment business within one year.
 - (ii) Right to deduct depreciation for the purpose of income tax assessment, after computing such depreciation from the year of commencement of commercial operation based on a depreciation rate which is less than the stipulated lifetime of the machinery, equipment, building or capital assets used in the investment.
 - (iii) Right to deduct expenses from assessable income, incurred for research and development relating to the investment activities / business which is actually required for the economic development of the Union and carried out within the Union.

What are the provisions for Investment Assistance and Investment Dispute Resolution?

The MIL Rules include provisions for the MIC to form an Investor Assistance Committee to coordinate with other ministries and government organizations in order to effectively implement investments, and deal with grievances related to MIC Permitted Investments, and deal with investment disputes. The Investor Assistance Committee is able to seek information from the investor concerning the dispute or grievance, coordinate with ministries and the investors to address the grievances and reach efficient resolutions in accordance with applicable laws. Furthermore, the Investor Assistance Committee is responsible for setting the compensation payable in direct or indirect expropriation of an investment pursuant to the specific circumstances stated in Section 52 of the MIL (namely for public interest, in a non-discriminatory manner, in accordance with due process of the law, and on payment of prompt, fair and adequate compensation), and to exert efforts to resolve disputes between the various governmental agencies of the Union and the investor.

In the case of grievances and disputes arising from the following circumstances, the investor is required to submit a signed notice in writing, in Myanmar language or in both Myanmar and English, to the Investor Assistance Committee:

- (a) Incorrectly made decision with respect to the investment by a government department or organization,

- (b) Incorrectly refused application for a permit, license registration or approval by a governmental department or organization,
- (c) Rights, protection or approval in accordance with the Law which has not been met.

An investor is required to first submit its notice to the Investor Assistance Committee and attempt to resolve the dispute through taking steps in accordance with the MIL Rules and applicable notifications before initiating a court or arbitral proceeding.

Transitional Provisions

In accordance with the MIL Section 93 and the MIL Rules Section 224, any permit issued in accordance with the Foreign Investment Law 2012, 2013 Myanmar Citizen investment Law, and the 1988 Myanmar Foreign Investment Law remains in effect until the expiration of the permit, and the investor is entitled to continue to enjoy the benefits as stated in the permit.

Section 227 of the MIL Rules also specify that the investor who is conducting an investment in the sectors only allowed to be carried out by the Union, sectors not allowed to be carried out by foreign investment, sectors which are only allowed to be carried out by foreign investors in the form of a joint-venture with a citizen or citizen owned entity, or sectors which require the approval of the relevant ministries (all as stated in Section 42 of the MIL), and investors who does not hold an investment permit, including the investment permits under the 1988 Myanmar Foreign Investment Law and the 2012 Foreign investment Law or the 2013 Myanmar Citizen Investment Law, are required to ensure that they are in compliance with the provisions under the MIL and the MIL Rules. In the case of joint-ventures between Myanmar citizens and foreign investors in the restricted sectors which are required to submit a notice to the MIC, such requirement is only applicable to the foreign investor, in accordance with Section 227 (b) of the MIL Rules.



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