October 2006

Introduction To Doing Business in Myanmar

Alec Christie
Phillips Fox, Sydney

The following article outlines the legal environment in Myanmar applying to a foreign investor wishing to invest in Myanmar through a locally incorporated limited liability company.[1]

I. Why Invest in Myanmar?

For several reasons Myanmar is a place worthy of consideration for investment:

- a population of approximately 45 million (approx. 4.5 million in Yangon)
- vast and virtually untapped natural resources
- a relatively educated labour force and low wages
- its strategic location in the region
- sea and air links within the Asia region and beyond
- as a developing nation Myanmar's goods benefit from the Generalised System of Preferences in trade with most developed nations (*i.e.*, lower import duties and not subject to quotas)
- 100 percent foreign-owned enterprises are permitted
- familiar business structures and commercial laws (based on the British law codes of the pre-independence India Statutes)
- English is widely spoken and normally used when dealing with foreigners
- significant incentives under the Foreign Investment Law for larger investments
- membership of ASEAN.

II. Available Business Structures

The following common entities are recognised and available for foreign investment/trade in Myanmar:

A. 100 percent Foreign Equity

A foreign investor may:

- incorporate in Myanmar a 100 percent foreign-owned company
- establish and operate as a registered branch of a company incorporated outside of Myanmar
- if an individual, establish and operate as a sole proprietor
- establish and operate as a 100 percent foreign owned partnership.

In all of these cases, 100 percent of the foreign capital for the enterprise must be provided by the foreign investor.

B. Joint Venture

A foreign investor may:

- incorporate in Myanmar a joint venture company
- establish and operate under a contractual/unincorporated joint venture (*i.e.*, a partnership).

All proposed joint ventures involving a State owned enterprise/the Government must be submitted to the Myanmar Investment Commission ("MIC") and approved under the Foreign Investment Law ("FIL"). In all joint ventures approved under the FIL, the greater of 35 percent of the equity capital or U.S.$500,000 must be contributed by the foreign investor.

C. 100 percent Local Equity

A foreign entity may:

- appoint a business representative/enter into an agency arrangement with a Myanmar citizen or 100 percent Myanmar owned company
- sell to or buy from a Myanmar citizen/company.

For large scale projects, serious thought should be given to investing under the FIL which provides significant tax and other incentives. However, such investments must comply with a rigorous set of criteria and may be subject to significant conditions. For smaller investments or the foreign investor who does not wish to go through the FIL procedures there is an alternative way of doing business in Myanmar, under the Myanmar Companies Act and Regulations ("the Companies Act").

III. Investing Under Myanmar's Foreign Investment Law

Although not always possible or advisable to obtain a permit ("FIL Permit") under the FIL, the benefits attaching to investments under an FIL Permit can be substantial.

In addition, for those foreign investors who do invest under the FIL, an FIL Permit application and relevant documents addressing all areas appropriate to the proposed operations in Myanmar (including all other necessary approvals) can effectively provide a "one stop" approval process only dreamt about in many other countries in the region.

IV. The FIL Permit

A foreign investor wishing to invest in Myanmar under the FIL must apply to the MIC in the prescribed form and obtain an FIL Permit, being its permission to undertake the proposed investment. The Government's main foreign investment policy objectives, which will be considered when appraising an FIL Permit application, are:

- adoption of a market oriented system for the allocation of resources
- encouragement of private investment and entrepreneurial activity
- opening up Myanmar's economy to foreign trade and investment which includes:
  - promotion and expansion of exports;
  - exploitation of natural resources which require heavy investment;
  - acquisition of high technology;
  - developing production and services industries involving large capital;
  - creating local employment opportunities;
  - developing of works which would save energy consumption; and
  - regional development.

In order to provide more specific guidance to potential foreign investors, some 85 types of activities have been specified as open to foreign investors. The foreign investor may still apply for and obtain an FIL Permit for an economic activity not specified, provided the foreign investor can explain how the activity would be mutually beneficial to Myanmar and the foreign investor.

The FIL Permit application and documentation submitted to and negotiations with the MIC should cover all of the foreign investor's needs (in terms of incentives to be sought), structural constraints to be addressed (land "holding" and foreign exchange issues, for example) and all additional approvals and permits relevant to/required by the foreign investor for the full implementation of the investment. An FIL Permit will not alleviate the need to discuss the proposed investment with the appropriate Ministries or other approval authorities, but the issue of an FIL Permit which addresses the other permits/approvals necessary should (given that the grant of the FIL Permit must be approved by Cabinet) ensure that the issue of such other permits/approvals is a mere formality.

V. FIL Incentives

Currently, a foreign investor (whether investing through a joint venture or a 100 percent owned entity) manufacturing goods or providing services in Myanmar under an FIL Permit *will* be granted an exemption from income tax for three consecutive years, inclusive of the year of commencement, and the investment is "guaranteed" against nationalisation. The FIL also guarantees the right to repatriate "the rightful entitlement of the foreign investor" in foreign currency after the termination of the business and entitles foreign employees of the company resident in Myanmar to repatriate their savings.

In addition, any one or more of the following incentives may be granted by the MIC to the foreign investor which invests and operates under an FIL Permit:

- exemption or relief from income tax on the profits of the business kept in a reserve fund and reinvested in the business within one year after the reserve is made
- accelerated depreciation in respect of machinery, equipment, building or other capital assets used in the business, at the rate approved by the MIC

- relief from tax on up to 50 percent of the profits accrued from the export of goods produced in Myanmar
- the right to pay foreign employees' income tax and deduct such payments from assessable income
- the right to deduct from assessable income expenses incurred in respect of necessary research and development carried out within Myanmar
- the ability to carry forward and set off losses up to three (3) consecutive years after the year in which the loss is sustained
- exemption or relief from customs duty, licensing requirements and internal taxes on the import of machinery, and components, equipment, instruments, spare parts and materials used in the business and deemed required by the MIC during the initial period/period of construction
- exemption or relief from customs duty, licensing requirements and internal taxes on the import of raw materials imported within the first three years' of commercial production following start up/the completion of construction.

The incentives actually granted by the MIC to the foreign investor are specified in the FIL Permit when issued.

In addition to tax incentives, foreign investors holding an FIL Permit are entitled to "lease" land for up to 30 years from the Government at reasonable rates (see discussion below under "Investor Concerns") and are exempted from obtaining an import licence from the Ministry of Trade for certain capital investment items and raw materials.

VI. FIL Requirements

The foreign investor operating under an FIL Permit must effect the appropriate prescribed classes of insurance with Myanma Insurance at the level which Myanma Insurance determines. Currently, the "prescribed" insurances are:

- Machinery
- Fire
- Marine
- Personal Accident (*i.e.*, Public Liability).

In addition, the MIC may issue the FIL Permit subject to specific conditions as to the carrying on of the business.

VII. Carrying on Business Under the Myanmar Companies Act

The Companies Act governs the activities of both locally and foreign incorporated companies wishing to carry on business in Myanmar and is in a form similar to early Australian and English company law codes which were the foundation of the current company law in those countries.

VIII. The Permit to Trade

Any "Foreign Company" seeking to do business in Myanmar (even if approved under the FIL) must obtain a 'Permit to Trade' ("CA Permit") from the Ministry of National Planning and Economic Development through the Companies Registration Office prior to commencing business in Myanmar. A "Foreign Company" includes companies incorporated in Myanmar which have at least one shareholder who is not a Myanmar citizen, but does not include any company in which the Government or a State-owned economic enterprise is a shareholder.

Currently, the application for a CA Permit is submitted, along with the application for incorporation of the Foreign Company, to the Registrar of the Companies Registration Office. Where an FIL Permit is being applied for, the CA Permit application and company incorporation steps are to be followed only after issuance of the FIL Permit.

A CA Permit is valid for two years from the date of issue and is renewable.

A. Capital Requirements

Every Foreign Company granted a CA Permit is required to bring into Myanmar in foreign currency exchangeable at the official rate 'Issued and Paid Up Capital' ("Capital") in the amount specified by the Capital Structure Committee of the Ministry of National Planning and Economic Development. As a guide, the current minimum Capital for each category of company is:

- Ks 1,000,000 (approx. U.S.$170,000) for an industrial company;
- Ks 500,000 (approx. U.S.$84,000) for a trading company; and
- Ks 300,000 (approx. U.S.$50,000) for a services company.

At least fifty percent (50 percent) of the Capital must be deposited with either the Myanma Foreign Trade Bank or the Myanma Investment and Commercial Bank in Yangon after the preconditions to issuance have been notified and prior to the issuance of the Permit to Trade. The balance of the Capital must be brought into Myanmar within the following year.

The Capital may be used for payment of the costs of incorporation of the Foreign Company and company expenses within Myanmar after the issuance of the CA Permit. Up to 75 percent of the Capital may be used to pay for the import of equipment and goods for the company.

B. Cancellation or Suspension of the CA Permit

A CA Permit (and thus the right to carry on business in Myanmar) may be cancelled or suspended if the Foreign Company or any of its officers or agents knowingly commits:

- an offence under the Myanmar tax laws;
- an offence under the Foreign Exchange Regulations Act 1947;
- an offence under the Sea Customs Act;
- any other offence in respect of which the company is liable to punishment under any law at that time in force; or
- a breach of any of the conditions of the CA Permit.

IX. Incorporation of a Foreign Company in Myanmar

A foreign investor wishing to carry on business in Myanmar through a locally incorporated limited liability company must incorporate:

- under the Myanmar Companies Act; *or*
- if the company involves a State-owned enterprise or the Government, under the Special Companies Act and be approved under the Foreign Investment Law.

Incorporations under the Companies Act are now divided into five categories:

- Trading Companies
- Construction Companies
- Services Companies
- Banking and Finance Companies
- Hotel and Tourism Companies.

It is no longer acceptable to include a wide range of objects in the Memorandum of Association of the proposed company. The objects of the company must be limited to specific activities in one of the categories referred to above. This leads to the extraordinary consequence that a separate company must be incorporated should a “manufacturing” company wish to also engage in the retail sale of its products.

Incorporation fees range from a minimum of Ks 600 up to a maximum fee of Ks 15,000 (payable at the official exchange rate).

X. Company Requirements

Foreign Companies in Myanmar are “required” to remain solvent, the domestic debts and other liabilities of the locally incorporated Foreign Company are not to exceed the amount of Capital and the domestic debt/equity ratio is not to exceed 1:2.

A Foreign Company incorporated in Myanmar must:

a. appoint an auditor soon after incorporation;

b. hold its first annual general meeting within 18 months of incorporation;

c. file with the Office of the Registrar of Companies Registration an annual return within 21 days of the company’s annual general meeting, which return is to include:

    1. a list of members and directors;
    2. details of the capital structure of the company;
    3. mortgages; and
    4. a certificate to the effect that the company has not issued any invitation to the public to subscribe for shares;

d. keep proper books of account and statutory records (such as Registers of members, shareholders, share transfers, directors, mortgages, charges and etc); and

present the company’s audited financial statements (in the prescribed form) for each accounting period to the members at the company’s annual general meeting.