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THE INVESTORS ARE COMING



Turning an Eye to IP
Protection in Myanmar

The Investors are Coming

After 25 years of sanctions, investors have turned an optimistic eye toward Myanmar. The country once known as Burma is loosening restrictions and updating its laws as quickly as it can. **Gregory Glass** reports.

Investors are coming to Myanmar.

After 25 years of sanctions and shunning, the country once known as Burma is quickly emerging as one of Asia's most interesting, and potentially lucrative, destinations for foreign investment, despite the lack of anything resembling modern intellectual property laws.

by opposition leader Aung San Suu Kyi's National League for Democracy (NLD).

Sanctions imposed by the United States and the European Union against the military government resulted in the withdrawal from Myanmar of most US and many European countries, although many Asian companies have continued to do business in Myanmar, particularly those from Japan and South Korea.

Tourists also abandoned the country, many at the behest of Suu Kyi and the NLD, who urged foreign tourists to avoid the country, leaving it mostly isolated from Western influence for more than two decades.

But with promises of a general election sometime in 2015 and an aggressive modernization of laws – intellectual property and otherwise – this large country wedged between Thailand, India and China is back on the map. “The introduction of sweeping economic reforms over the past three years have liberalized Myanmar's economy

and opened the doors to foreign investment and trade,” the Directorate of Investment and Company Administration (DICA) trumpets in its *Myanmar Investment Guide 2014*.

Currency reforms – the *kyat* was floated in 2012, the use of

Investors are very excited about the commercial opportunities in Myanmar.

- Dan Greif, senior counsel,

Siam Premier International, Bangkok



Myanmar has been largely cut off from Western foreign investment since the country's military government came to power in 1988, more so since that government refused to honour the election results of the 1990 general election, won

foreign exchange certificates eliminated only in 2013 – and a new foreign investment law were followed by a 2014 law creating special economic zones and tax reforms aimed at reducing profit taxes, all of which led to GDP growth of 7.8% in 2014, according to Asian Development Bank figures. The ADB expects GDP growth of 7.8% in 2015, as well.

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The fact that Myanmar lacks modern IP laws doesn't mean that brands are without protection. You can use common law laws. It's just that in Myanmar, those laws are very, very old.

- Michael Ramirez, consultant,
Tilleke & Gibbins, Yangon

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Foreign direct investment (FDI) in Myanmar totalled K3.8 trillion (US\$3.8 billion) in the first eight months of the 2014-15 fiscal year, according to DICA, from 108 companies in 19 countries, an amount which is on track to be up from US\$4.11 billion in 2013-14, and up sharply from 2012-13 when FDI totalled US\$1.42 billion. In 2009-10, the year before President U Thein Sein took office, FDI was only US\$329.6 million.

One-third of FDI in Myanmar comes from Singapore, in part because many companies from the US (and some parts of Europe) use their Singapore affiliates as an intermediary for investment. While many of the economic sanctions have been rolled back

in recent years, President Barack Obama told lawmakers in the United States that he had renewed the National Emergencies Act for another year. The law prohibits US businesses and individuals from doing business with those involved in repression of Myanmar's democracy movement.

“Most of the US investments have indirectly entered into Myanmar through Singapore,” U Aung Naing Oo, director general of DICA, told local media in December 2014. “The investments of some other countries entered into Myanmar indirectly through Singapore, too. That's why the amount of Singapore's investments in Myanmar is huge. It is partly because there are still some US economic sanctions.”

Hong Kong-based companies are the second-largest group of investors in Myanmar, followed by China, South Korea, Thailand, the United Kingdom, Malaysia, the Netherlands, India, Japan, Canada, Malaysia and the Philippines.

And Myanmar is back on the tourist trail, too. Not only has the government simplified the process for tourist visa applications, the NLD has softened its stance against tourism. Suu Kyi told the *Lonely Planet* travel guide in 2011 that while the NLD was not in favour of group

tourism, it welcomed individuals. “Foreign tourists could benefit Burma if they go about [their travels] in the right way, by using facilities that help ordinary people and avoiding facilities that have close links to the government. If [tourists make the effort] to meet people working for democracy, then it might help,” she told the travel guidebook publisher.

(Suu Kyi deliberately uses the word Burma to refer to her country as a political statement, though the country's people generally seem to be content using the name most of the world, and this magazine, use: Myanmar.)

In 2010, a mere 791,000 foreign tourists visited Myanmar.

Existing Laws Relating to IP in Myanmar

Type of IP	Substantive Law	Related Law
Trademark	None	Penal Code Merchandise Marks Act Specific Relief Act Sea Customs Act Registration Act
Copyright	Myanmar Copyright Act	Specific Relief Act Television and Video Law
Patent	None	Patent and Design (Emergency Provisions) Act Specific Relief Act
Industrial Design	None	Patent and Design (Emergency Provisions) Act Specific Relief Act

Source: Dan Greif/Siam Premier International

By 2013, the government's Central Statistical Organization reported, more than 2 million tourists visited, with an estimated 3 million expected in 2014. The government has set a goal of welcoming 5 million foreign tourists this year. Visitor numbers

Euromonitor says the growth will be fuelled by a growing middle class and increasing consumer sophistication, which also bolstered sales of non-essential products, such as beauty and personal care, tissue and hygiene and home care products.

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Many of the substantive and procedural laws introduced by the British are still in force.

- Thein Aung, advocate,

Myanmar Trademark and Patent Law, Yangon

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remain significantly below those of its neighbours: Vietnam's 2013 arrivals totalled 7.5 million, Indonesia 8.8 million, Malaysia 25.7 million and Thailand 26.5 million, according to figures from the World Tourism Association.

Rapid growth in investment and tourism has led to unprecedented real estate prices in Yangon, the country's commercial centre, squeezing small and medium enterprises and making entry expensive for foreign investors. Office rental costs in 2014 averaged US\$88 per square meter in Yangon, compared to US\$75 in Singapore and just US\$25 in Bangkok. While office supply is expected to nearly double the end of 2015, demand may continue to outstrip supply, with some market-watchers predicting rents exceeding US\$100 per square meter this year, as more foreign banks open offices in Yangon and the Yangon Stock Exchange opens in late 2015.

But it has also led to an increased awareness of foreign products and foreign brands, which has created a bonanza of work for the country's IP lawyers.

Foreign Brands Coming

While much of the present foreign investment in Myanmar is in infrastructure – foreign firms invested US\$354 million in the hotel sector in the first eight months of 2014-15 and US\$623 million in real estate – lawyers in Yangon expect more Western brands to turn up shortly. US-based General Electric, Ford, Coca-Cola, PepsiCo and Colgate have all launched operations in Myanmar in the past two years, with Coca-Cola pledging more than US\$200 million in investment over the next five years.

Research firm Euromonitor International forecast in 2014 that overall packaged food sales in Myanmar are anticipated to register a compound annual growth rate (CAGR) of 15% between 2014 and 2018, while soft drinks (including juices and carbonated beverages) are expected to grow at a CAGR of 23% over the same period.

“Myanmar is one of the largest countries in Southeast Asia, with a population of more than 55 million people. Investors are very excited about the commercial opportunities in Myanmar,” says Dan Greif, a senior counsel at Bangkok-based Siam Premier International who heads the IP teams at that firm and at its Yangon-based affiliate, Myanmar Premier International.

Sanctions, isolation and high rents aside, foreign brands face a market in Myanmar which, for the moment, has very little modern intellectual property protection, although a plethora of IP laws are – and have been for some time – in the drafting stage. Lawyers and investors

have been expecting new IP laws since at least December 2013, but the government has missed targeted dates on numerous occasions. A Bangkok-based lawyer who works extensively in Yangon said that the present delay is thought to involve the forthcoming copyright law, about which some stakeholders apparently hold reservations.

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We started to collect notices in 1959, and now have 70,000 notices in our database as a trademark search service. My grandfather started to collect the newspapers, and my father, Min Tayza, built it into a database.

- Kyaw Moe Htet, partner,

U Nyunt Tin Associates International, Yangon

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Other rumours within Yangon's tightly-knit community of foreign and local lawyers indicate that perhaps some high-level interests within Myanmar are not completely supportive of the changes to the IP law. “Perhaps some entrenched business interests would prefer the status quo,” the lawyer says. “We're in limbo until there's enough pressure to move the bills out of the attorney general's office and into Parliament.”

The IP laws are being crafted by the Ministry of Science and Technology (MOST) with input from both local and foreign experts, before ending up in the attorney general's office for review. Most high profile lawyers in Myanmar have been consulted in some form.

Most lawyers seem to believe that the IP laws will be introduced

as a package deal – as separate trademark, copyright, patent and design laws – rather than one-by-one, and tell *Asia IP* that it's virtually impossible to predict when the suite of IP laws will debut. While many say that the laws will likely be rolled out sometime in

The World Trade Organization (WTO) has already given Myanmar two extensions of time on its deadline to produce a trademark law, which was originally due in 1996. In June 2013, WTO members agreed to extend until July 1, 2021, the deadline for all least developed countries – including Myanmar – to protect intellectual property under the TRIPS agreement, with a further extension possible when the time comes. As a result, Redfearn notes, “the pressure on Myanmar to enact IP/trademark laws has significantly reduced.”

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When it comes to absolute legal principals, it's really just the old common law principal of intent to use.

- Pedro Jose Fausto Bernardo, principal consulting attorney,

Kelvin Chia Yangon, Yangon

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2015, Rouse partner and deputy CEO Nick Redfearn, writing in a January 13, 2015, client alert, says he believes that it is unlikely for the government or Parliament to make a push for the laws to pass before the 2015 general election. “It seems probable that no new trademark law will be enacted in 2015,” he wrote.

Very, very old is no hyperbole. Laws used in IP rights enforcement include the Copyright Act of 1911, the Merchandise Marks Act 1889, the Registration Act No. 16 of 1908, the Sea Customs Act No. 8 of 1878, the Code of Criminal Procedure (1898) and the Myanmar Penal Code of 1860. Newer laws do

Protecting Brands in Myanmar

The fact that Myanmar lacks modern IP laws doesn't mean that brands are without protection. “It doesn't mean there are no avenues to enforce IP rights,” says Michael Ramirez, a consultant at Tilleke & Gibbins in Yangon. “You can use common law laws. It's just that in Myanmar, those laws are very, very old.”

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The Managing Intellectual Property IP Handbook 2009

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exist, including the Motion Picture Law (1996) and the Television and Video Law, but these were implemented by the country's executive branch and are generally considered to be toothless.

though that has not always been the case. "Only foreigners and a few Myanmar people read English papers, but our target with the notices is local people, so in the early 2000s, we began to

use local newspapers as well as the *Myanmar Times* to publish our clients' notices," he says. "Local newspaper readership in Myanmar is quite high."

U Nyunt Tin Associates has been collecting cautionary notices for more than 50 years, and has what may be the country's only trademark searching system. "We started to collect notices in 1959, and now have 70,000 notices in our database as a trademark search service," Kyaw Moe Htet says. "My grandfather started to collect the newspapers, and my father, Min Tayza, built it into a database." Min Tayza Nyunt Tin has recently left his family's firm to form MN Associates in Yangon.

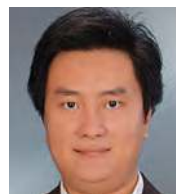
Renewal of the recordal is optional and typically done every three years, though when the new law comes into effect, this will most likely change.

Pedro Jose Fausto Bernardo, principal consulting attorney at Kelvin Chia Yangon, says that while "IP laws are effectively non-existent, in the modern sense," foreign IP owners use this registration method to have "at least a veneer of protection."

Superior Rights for First to Use

While registering and publishing a cautionary notice will put infringers and other people on notice that a particular trademark is owned by the party publishing the notice, court cases come down to use, says Bernardo. "When it comes to absolute legal principals, it's really just the old common law principal of intent to use," he says. "First to use has superior rights in Myanmar. When international clients seek advice on prior use, we tell them they need to create a presence to show use in Myanmar."

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Shops selling counterfeits often don't even know they're selling counterfeit goods. They just assume they are selling low-grade, inexpensive goods from China as parallel imports, for example.

- Moe Mynn Thu, senior associate,
Rouse, Yangon

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"Many of the substantive and procedural laws introduced by the British are still in force," says Thein Aung, an advocate at Myanmar Trademark and Patent Law and secretary general of the Intellectual Property Proprietors' Association of Myanmar. British rule of Burma lasted from 1824 to 1948, first as a province of British India and later as an independently-administered colony.

At the moment, Myanmar has no IP office and no official search process (though at least one firm has developed a functional search system). Trademarks are not officially registered, though a system has been developed whereby trademarks are registered through the Ministry of Agriculture and Irrigation's Settlement and Land Records Department, which is the same office where mortgages are recorded.

Greif says the process involves a Declaration of Ownership of Trademark which declares that the mark is being used for specified types of goods which are being manufactured and distributed for sale, that the mark was created by the applicant, that the mark is not an imitation of another person's trademark and that the mark has not been used for any goods of the same type.

Registration takes approximately six weeks. Following registration, trademark owners typically publish notice of the registry in local newspapers. Infringement is punishable under the country's penal code.

"It's a standard process," says Ramirez. "Not a *trademark* recordal process, but just a recordal process. You get a recordal number, and then publish that in local newspapers, because there is no official gazette. It's not mandatory, but you can use the process to put third parties or infringers on notice."

Kyaw Moe Htet, a partner at U Nyunt Tin Associates International in Yangon, says that notices run in newspapers which publish in the local Myanmar language and in English,

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We don't know what the law will be in the future. Negotiating a good agreement with any potential infringers is far better.

- Yuwadee Thean-ngarm, consultant,
Tilleke & Gibbins, Yangon

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Use is very important in Myanmar, says Ramirez. "If you have a mark with recordal in 1965, for example, but you don't use it and someone else does, the priority right is with the person who uses it. There is no examination process and no cancellation process. Courts can and will cancel a mark based on first use."

Based on calculations from the U Nyunt Tin Associates trademark database, approximately 15% of trademarks in

Myanmar are owned by local people, with 85% owned by foreigners. "The awareness of intellectual property among local

because of news coverage of trademark disputes. Local companies, too, are beginning to experience trademark infringement, which will also act to raise awareness of intellectual property in Myanmar.

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Land prices are high, even in the countryside. The government could set aside the foreign investment zones and let the investors develop it themselves, as they already have the know-how, but the government has to open the door.

*- Min Tayza Nyunt Tin, managing partner,
MN Associates, Yangon*

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people is quite weak. This year, we will calculate again to see if local registration has increased," says Kyaw Moe Htet.

Where awareness has been increasing, it has often been

Myanmar who negligently use infringing goods will change their minds about infringing. "Shops selling counterfeits often don't even know they're selling counterfeit goods," he says. "They

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just assume they are selling low-grade, inexpensive goods from China as parallel imports, for example.” To prevent the selling of counterfeit goods in Myanmar, he says, brand owners should not only register their trademarks but also file an *ad hoc* application at Myanmar Customs, which is the new strategy.

More and more, Moe Mynn Thu says, people in Myanmar are gaining an understanding of trademarks, though he says their knowledge is often incomplete. “Some people do understand trademarks, but not the real nature of trademarks. They know a logo is a trademark, but they don’t understand that a trademark is more than a logo.”

The majority of people in Myanmar who use infringing goods don’t want to steal, maintains Min Tayza Nyunt Tin, managing partner at MN Associates, but do so because they lack sufficient income to buy authentic goods. “But even for those who can afford authentic goods, it’s been difficult to do so because of the sanctions placed on Myanmar in the recent past,” he says.

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Foreign investment is coming in in much larger numbers than just a year ago. Myanmar is a country with great potential.

*- Minn Naing Oo, managing director
Allen & Gledhill (Yangon), Yangon*

Brand owners have been eager to conduct workshops recently on brand awareness, he says, to emphasize the differences between authentic and counterfeit goods. “It’s important for people to understand what will happen if infringement continues. It will only benefit the infringers, and will harm the owner. If there’s no money, the owner’s business won’t survive, which will lead to no more ideas, and no more creations.”

Most infringement situations in Myanmar involve someone unrelated to a business infringing, probably knowingly. But other situations are more troubling, notes Ramirez. “There are numerous cases where Myanmar business partners have infringed a mark, through unauthorized distribution, for example. Through use, they become the effective brand owner, and you have to negotiate your way out of the situation.”

When infringing goods are discovered, most trademark owners tend to take a similar approach.

Typically, says Kyaw Moe Htet, trademark owners will first negotiate and ask the infringing party to stop. If that is successful, the IP owner will demand a deed of confession be signed with a promise to stop producing infringing products. If the other party continues to infringe, the aggrieved party can then sue under contract or civil procedure law.

“I always recommend clients not sue under criminal law,” he says. “Sure, you can raid, but you have to contact the police first, you still have to get the infringer’s signatures on the deed of confession, and then you’re not sure that the judge will punish them, anyway, and criminal fines tend to be small. It’s not often worth it.”

Kyaw Moe Htet says that many times, infringing products are found in small village shops, in small quantities. “High fines are less than US\$100, and if the infringer can’t pay – and they usually cannot – they’ll go to jail for a year or two, and it won’t solve the problem, because somebody else will start selling the goods.”

But civil procedure law has a specific relief act, which allows the court to grant an temporary injunction leading to a perpetual injunction against selling infringing goods, which is much stronger than the criminal law. The mark owner can also ask for compensation.

“In some areas, such as the unauthorized sale of grey market goods, a deed of confession is the only effective means of IP enforcement. Because grey market goods are genuine products, they cannot be stopped under either criminal or civil procedure laws, but if a deed of confession is signed, it will be effective at stopping infringers under either contract or civil procedure law,” says Kyaw Moe Htet.

Protecting IP in Myanmar has been a challenge, says Bernardo.

“You have to be practical. If the law says first use wins, you have to find a way to use it. For foreign investors, it’s often difficult to use the product legally, so you have to find a way. Maybe you sample the product. Or maybe you protect yourself through contractual provisions in distribution agreements, such as including a dispute clause that includes arbitration in Singapore, for example. Everybody is waiting for 2015.”

The New Trademark Law

Any discussion of Myanmar’s new trademark is fraught with uncertainty. While drafts of the proposed law have circulated widely among the legal community, nobody is exactly sure

where the draft stands at the moment.

Late last year, for example, lawyers gave *Asia IP* widely varying predictions of important aspects of the forthcoming trademark law, such as the period for transition from the old system to the new system (we were told anywhere from six months to two years) and whether or not the trademark office will consider use and registrations from other countries to determine



With no dedicated IP office, trademarks are registered at the Registry of Deeds.

Myanmar's Legal System Matures Under Pressure from Foreign Firms

Myanmar's intellectual property legal market has changed dramatically in a very short period of time. Once the exclusive domain of local lawyers, foreign law firms are increasingly eyeing the country as an opportunity to expand their practices.

"For the longest time, only Kelvin Chia Yangon and DFDL were here," says Myint Lwin, an advocate and proprietor of U Myint Lwin Law Office in Yangon. "But now there are quite a lot of foreign firms."

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Lawyers were worthless under the strict military government," Myint Lwin says. "The Chamber of Commerce didn't appreciate my service at that time, for example. But now, legal ideas in business are very important."

- Myint Lwin, proprietor,

U Myint Lwin Law Office, Yangon

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Much of the drive for foreign law firms to enter the market is a result of decades of a languishing market during the country's period of military rule. "Lawyers were worthless under the strict military government," Myint Lwin says. "The Chamber of Commerce didn't appreciate my service at that time, for example. But now, legal ideas in business are very important."

For a period of time, the only real work lawyers did in Myanmar was criminal litigation and intellectual property rights registration. "There was not much trade during the military government, but multinational corporations are always interested in protecting their IP, including in Myanmar," says Minn Naing Oo, managing director at Allen & Gledhill (Myanmar) and a corporate and commercial lawyer. "While there weren't many foreign law firms during that period, a lot of local lawyers used to do a lot of IP work," he says.

Until recently, the country has had few corporate lawyers. One local lawyer told *Asia IP* that he believes eight of 10 lawyers in Myanmar don't speak English at a level which would allow them to work with foreign investors.

"Legal education is insufficient at the moment, from the short term required interning in chambers to the lack of a bar exam and the lack of any sort of continuing legal education (CLE) programme," says Min Tayza Nyunt Tin, managing partner at MN Associates.

Foreign law firms are also setting up shop at the request of their existing clients, who are increasingly setting up ventures in Myanmar. Dan Greif, a senior counsel at Bangkok-based Siam Premier International, says his firm's Yangon office, Myanmar Premier International, was driven in part by demand from Siam Premier clients in Thailand. Myanmar Premier International opened in 2013 with two local lawyers, and now has a large IP

team mainly as a result of demand for trademark prosecution and enforcement work for its international and Thai clients. "Many international firms are in Myanmar thanks to demand from their clients in Europe and the US. That's true for us, too, to some extent, but our business in Myanmar has also been driven by indigenous, local Southeast Asia and Thai clients."

There are some 40 foreign firms in Myanmar, mostly in Yangon, many with connections to Singapore, which shares a common law and British colonial history with Myanmar. "It's relatively easy for a Singapore lawyer to know Myanmar laws," says Kyaw Moe Htet, a partner at U Nyunt Tin Associates International in Yangon. "The difficulty for them is that all documents are in the Myanmar language."

Most foreign law firms are based in Yangon, Myanmar's commercial centre, though some have opened elsewhere, including DFDL in the capital city, Naypyidaw, and Kelvin Chia in the country's second-largest city, Mandalay.

The presence of foreign law firms does put extraordinary pressure on local law firms. Most local law firms pay US\$500-600 monthly for a partner, and US\$300-400 for an associate, while foreign law firms often offer US\$600-800 for an associate with good legal knowledge. "Good associates are naturally drawn to

foreign firms, and not to us," one local lawyer told *Asia IP*.

Additionally, when foreign firms open in Myanmar, local firms often lose the registration work they once did.

Foreign law firms also have the advantage of good internal training programmes, while local firms typically incur the expense of sending lawyers out for additional training. "We have to work harder against the foreign firms," the lawyer said. "But the competition is still unfair."

Thein Aung, an advocate at Myanmar Trademark and Patent Law and secretary general of the new Myanmar Intellectual Property Proprietors' Association (IPPAM), says professional organizations like the IPPAM are essential if the IP sector is to thrive. "From the beginning, we understood the need to create an IP association, not with government officials but with IP lawyers and the private sector," he says.

The IPPAM has already begun cooperation with IP associations in other countries, Thein Aung says. "IP goes hand-in-hand with rapid development. We believe the efforts of IPPAM will help raise awareness of intellectual property and encourage IP owners to protect their rights. We believe that Myanmar can have IP rights in line with the TRIPS Agreement."

While the entry of foreign law firms to Myanmar may place pressure on local lawyers, Myint Lwin says the foreign firms will help the country through its growing pains. "I welcome the foreign lawyers. Foreign clients like foreign lawyers, and many local lawyers are simply not ready," he says.

Besides, he says, foreign lawyers will always need local lawyers. "Local laws are only written in Burmese. Without me, foreign lawyers cannot easily understand the laws."

- Gregory Glass

who ultimately has rights to a mark, where the predictions ranged from yes to no to maybe.

Also unknown is whether the new law will provide for an IP gazette and, if it does, whether lawyers – especially foreign lawyers – will be able to obtain a copy. “Will it be online? Will it be bilingual? Will you have to have an official relationship with the IP office to get a copy? For foreign companies, getting information on publication of marks could be very difficult,” a foreign-registered lawyer laments.

That said, sources in Yangon say that it is likely the transition period will be only one year. “If the transition period is only one year, that makes it more important than ever that brand owners be ready now to register or re-register their marks under the new system,” says Greif.

It also seems likely at this point that the new trademark office will consider use and registrations from other countries when determining which entity has rights to a mark, but lawyers warn that this will be a complex process – where it occurs at all – and that the office will face challenges as to how to implement this concept.

Myanmar’s trademark system has evolved to include highly-descriptive trademarks, most of which would not have been registered under the best practices of better-developed trademark registration systems. “These marks may not be approved under the new law,” Greif says.

Skillful negotiation is important for investors who enter Myanmar before the new IP laws come into effect, says Yuwadee

Thean-ngarm, a Yangon-based consultant at Tilleke & Gibbins. “We don’t know what the law will be in the future. Negotiating a good agreement with any potential infringers is far better.”

Myanmar’s new IP laws are likely to draw on the IP laws of other ASEAN countries, as well as countries like Japan, but lawyers note that you can’t just “throw everything” into the new laws.

“The government has been receptive and cooperative in drafting the law, but there’s a paucity of real, recognized experts in the country with familiarity with IP laws who could draft the law themselves,” says Ramirez. “We expect even after the law is passed that it will continue to evolve. In the legal community, regardless of whether we’re competitors or partners, we’re all here learning together. It’s a very collaborative atmosphere.”

Will New Laws Bring New Investors?

While the lack of a modern IP regime may keep some foreign companies from making investments in Myanmar, it’s not necessarily the most important factor driving investment decisions.

“Investors who view Myanmar as a long-term investment are not dissuaded by the lack of a fully developed IP regime,” says Ramirez. “It’s certainly an issue that needs to be addressed, but it is not the determining factor for most of our clients in making that decision to enter the marketplace. The decisions tend to be made on a number of things.”

Minn Naing Oo, managing director at Allen & Gledhill (Yangon)

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Founded in 1994, U MYINT LWIN LAW OFFICE has a well established reputation in the area of Intellectual Property Law. The firm has extensive experience in providing highly efficient services to domestic and international clients in obtaining, and maintaining intellectual property applications and registrations in Myanmar.



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and a partner at Allen & Gledhill in Singapore, a corporate and commercial lawyer, says that while Asian investors have been quick to come to Myanmar, while investors from the US and the European Union have been a bit slower. "Investors from the US and the EU are waiting to see if the changes to the government and the legal system stick, and for the results of the 2015 election. If things go smoothly, there will be more investors from Europe and the US."

The two-year-old law governing foreign investment has been very good at providing incentives and creating a favourable environment for investment, he says. The law provides better opportunities for securing land for investment use, with leases of up to 50 years possible, with up to two 10-year extensions. "The law now gives you the possibility of a long lease," he says.

Under the prior law, foreigners were permitted to lease land for only one year.

With Myanmar's large workforce, there is the possibility that some of the manufacturing work leaving China will find its way here, but high land prices and lack of adequate infrastructure in many parts of the country make Myanmar less attractive than many of its neighbours. "Even with the 50+10+10 land lease rules, the question is, where will you find land?" asks Min Tayza Nyunt Tin. "Land prices are high, even in the countryside. The government should develop foreign investment zones. Or better yet, the government could set aside the foreign investment zones and let the investors develop it themselves, as they already have the know-how, but the government has to open the door."

Investors can count themselves fortunate that many aspects of doing business in Myanmar have improved dramatically from the recent past, says Myint Lwin, advocate at U Myint Lwin Law Office and a vice president of the Myanmar Intellectual Property Proprietors' Association. "In the past, conducting simple business matters was difficult," he says. "In 1989, for example, you had to make a reservation to make an international phone call. Say you had an 8 am reservation to call Thailand. Maybe you finally got to make the call at 2 pm. It's totally different today."

Internet connections, however, remain woefully slow. (Hackers replaced two government emblems on the website of Myanmar's Ministry of Communications with images of turtles in July.) WiFi is the norm in hotels and international businesses are wired as well, but capacity in the fibre optic cables connecting Myanmar with the rest of the world is inadequate.

A lack of mature government ministries also hinders foreign investment, Myint Lwin says. "Government ministries need training and information. It can be a challenge to simply navigate the government ministries," he says. "When you come to Myanmar as a foreign investor, you can't expect the country to be like a supermarket. You have to approach it like a hunter. You have to hunt and fish for yourself."

Even with continuing challenges for investors, both foreign and domestic, the outlook is rosy for Myanmar. "We are very busy," says Minn Naing Oo. "Foreign investment is coming in in much larger numbers than just a year ago. Myanmar is a country with great potential. It just makes sense for us to be here." **AIP**

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Intellectual Property Rights in the New Frontier Economy

Often referred to as Asia's last frontier, Myanmar is considered as one of the region's most promising frontier economies. **Celeste Marie R. Cruz** examines how each step Myanmar takes towards sustainable economic development and political stability will help it realize its potential.

Referred to as "Asia's last frontier," Myanmar is considered as one of the most promising frontier economies since it transitioned from military rule to democratic governance a few years back. With its natural resources and strategic geographical location, it is poised to reclaim its lost post as a trade centre in Asia with a hope to become one of its most dynamic economies. The World Bank and the Asian Development Bank are one in finding that Myanmar's economy is enjoying a historic high percentage of growth caused by the influx of local and foreign investments since its economy opened up. For the fiscal year 2013-2014 alone, Myanmar experienced an 8 percent economic growth driven by construction, manufacturing and services. However, as ADB noted, Myanmar can only sustain this performance through "continued reform momentum, the strengthening of institutions and capacities, and concerted efforts to improve infrastructure and service delivery." However, as with most transitioning and least-developed states, maintaining a steady, well-paced growth is as tricky as the initial step of triggering a development.

After decades of absconding from its obligations under international obligations during the military regime, Myanmar's "reformation since 2010 have paved the way to its reintegration to the international community," according to the World Trade Organization, in a Trade Policy Review paper on Myanmar. The reintegration has so far been beneficial to Myanmar in two ways. First, it spurs support from international organizations and various nations, and thus supplying Myanmar with the needed assistance

in structuring the country's domestic policies and other reforms. Second, Myanmar's increasing visibility in the international arena promotes a global awareness of the country's emergence from socio-political and economic isolation, thereby, attracting more investors and other stakeholders to tap into Myanmar's strong potential as new frontier economy.

In 2011, Myanmar introduced various political and economic reform programmes not only to participate in and comply with treaty obligations and international best practices but also to cope with the changing needs brought about by its transition from a centrally directed to a market-oriented economy. Myanmar's reform programmes cover a wide range of governance and development concerns from constitutional rights to economic investments, including the recognition and enforcement of intellectual property rights, whether in the form of patents, trademarks, copyright, or industrial designs. IPRs, called "one of the engines that influences and drives the national economy" by Shwe Zin Ko, a staff officer in the Ministry of Commerce's Directorate of Trade in a 2012 issue of the Law Society of Singapore's *Law Gazette*, are a pivotal international issue affecting various industries and technology-driven sectors, and even influencing capital investments per se. The relevance of IPRs in Myanmar's rapidly growing economy — from its blossoming *thanaka* business to the spur of foreign investments and MNC franchises — cannot be more apparent. Hence, the Myanmar government now gives priority to stronger IPR protection, considering it a catalyst for economic growth, not only by creating a promising environment for foreign investment

and technology diffusion, but also by encouraging domestic innovation and creativity.

Myanmar's Role in the International IP Community

Myanmar's aim to establish a locally-apt yet globally-cooperative IP system may be driven by its current macroeconomic reforms, but it is also long overdue for compliance with its international obligations. Myanmar is actually an original member of the

the World Intellectual Property Organization (WIPO). By virtue of its memberships in both the WTO and the ASEAN, Myanmar is therefore expected to comply with the Agreement of Trade Related Aspects of the Intellectual Property Rights (TRIPS) supposedly as early as 2001. The country is also covered by the ASEAN Framework Agreement on Intellectual Property Cooperation, together with the ASEAN IPR Action Plan 2011-2015.

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Myanmar's aim to establish a locally-apt yet globally-cooperative IP system may be driven by macroeconomic reforms.

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General Agreement on Tariffs and Trade (GATT), and is a founding member of the World Trade Organization. Myanmar joined the Association of South East Asian Nations (ASEAN) as a full-fledged member and commenced its participation in the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC) in 1997. By January 2001, Myanmar acceded to

“(i) notification of, access to and translation of national laws and regulations; (ii) implementation of procedures for the protection of national emblems; and (iii) technical co-operation” by 1996.

The ASEAN Framework Agreement on Intellectual Property Cooperation, on the other hand, articulates the six objectives for cooperation and coordination on IP matters among the

In a nutshell, TRIPS forms part of the WTO Agreement in line with the goal of promoting sufficient protection of IPRs without unreasonably restricting legitimate trade. TRIPS introduces *de minimis* standards of IP protection, as well as provisions on domestic procedures and remedies for the enforcement of such rights, along with provisions on dispute settlement and technology transfer and cooperation. To reinforce the implementation of the TRIPS, the WTO and WIPO further agreed to cooperate in three main areas of concern, namely:



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A BUSINESS APPROACH TO LAW

Kelvin Chia Yangon Ltd (KCY) is an international commercial law firm that has been in active operation in Myanmar since 1995 and has close to 40 experienced lawyers, paralegals and business researchers based in Yangon and Mandalay. KCY is a subsidiary of Kelvin Chia Partnership (KCP) in Singapore and is a member of the KCP network of offices across the Asian region, including offices in Thailand, Cambodia, Indonesia and Vietnam.

KCY is the firm of choice for those seeking to navigate the fast-changing legal and regulatory landscape in Myanmar, where we have gained significant legal, regulatory and practical experience and expertise across all areas of commercial practice, including the multi-faceted and often overlapping legal and business issues involved in intellectual property rights and portfolios. We have advised and acted on behalf of marquee international clients and significant Myanmar businesses for their legal and regulatory requirements. The scope of our intellectual property work, in particular, covers registration



and commercialization of trademarks and industrial designs, assistance with IPR contentious matters, and legal audit and review of corporate IP portfolios that may include trademarks, patents, copyright and industrial designs. Consistent with our signature brand of client-focused, solution-driven legal service, we have also advised individual and corporate clients on IP legal and commercial issues in light of the fast-developing IPR system in Myanmar. We are always committed to adding value to our clients' businesses by helping them achieve their commercial goals.



MAIN PRACTICE AREAS:

Intellectual Property | Trademark Registration | Foreign Investments | Incorporation and Company Maintenance | General Corporate and Commercial | Due Diligence | Mergers and Acquisitions | Joint Ventures and Production Sharing Agreements | Investment Funds | Energy/Oil and Gas | Natural Resources/Mining | Banking Regulatory | Project and Project Financing | Manufacturing | Education | Agriculture | Real Estate | Infrastructure | Construction | Telecommunications | Compliance/Regulatory | Licensing and Permits | Labor and Employment | Immigration | Taxation | Insurance | International Arbitration | Special Economic Zones



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member states, with special reference to the principles laid down in TRIPS. These objectives are concretized in the ASEAN IPR Action Plan 2004-2010/2011-2015, which serves as a blueprint for the undertakings of AWGIPC. As in the case with the WTO, WIPO also coordinates with the ASEAN and renders support to ASEAN Member States in devising their national IP strategies and policies.

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Recognizing the need for more foreign capital and technology, Myanmar adopted measures to strengthen its IP system.

With the common call for domestic protection of IPRs, signatories of these agreements, such as Myanmar, are expected to issue responsive IP legislation. However, since becoming a member of both the WTO and the ASEAN, Myanmar still lacks a domestic law on the issue, such that IP rights in the country are almost nonexistent save for reference to common law principles and scattered IP-related provisions in its century-old civil and criminal laws. This notwithstanding, Myanmar's recent transitions, and along with its long-standing duty to conform with TRIPS provisions by the extended deadline of July 1, 2021, has urged the country to finally revamp its IPR system as part of its ongoing reforms in its macroeconomic policies. With its revived commitment to be globally connected, Myanmar is preparing IP legislation in conformance to the goals of the WTO, WIPO and ASEAN.

The Development of Myanmar's IP System

Conscious of the fact that the absence of a treaty-compliant IPR legislation is disincentive to foreign direct investment and local innovations alike, Myanmar has prioritized the creation and implementation of a strengthened IPR regime. Hence, under Myanmar's existing Constitutional Law, enacted in 2008 and awaiting promulgation by the Union Parliament, IPR is guaranteed as a Constitutional right. It secures the citizens' right to patent and the right to private invention and patent in the conduct of business in accordance with law as provided under its Fundamental Principles and the Fundamental Rights and Obligations of the Citizens, respectively. More explicitly, IPRs such as copyright, patent, trademark, and industrial design are explicitly guaranteed under the Union Legislative Lists.

Recognizing the need for more foreign capital and technology to improve Myanmar's business climate and achieve sustainable development, Myanmar adopted further measures to strengthen its IP system. Together with the promulgation of a new Foreign Investment Law in 2012, Myanmar continues with the preparation of comprehensive and specific IP Laws that are both responsive to its domestic needs while matching WTO standards as provided

in TRIPS.

Aware of its difficult goals and limited capacity to achieve it, Myanmar has requested the support of the international community in this endeavour, which is now providing technical assistance in the drafting of the IP laws and public awareness campaigns about IPRs. WIPO is spearheading the effort on IP legislation, nominating Myanmar's Ministry of Science and

Technology (MOST) as the lead agency for drafting the IP Laws using the WIPO Model Law and the IP Laws of developed countries as templates. WIPO's support in this endeavour is extensive such that WIPO's Director-General visited Myanmar to discuss new areas of IP cooperation in November 2012. While WIPO plays a vital role in providing "better focused, quantifiable, and realistic development aid in the building and modernization" of Myanmar's IP regime, write Joel Angkar and Chris O'Hara of the Institute for Security and

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Development Policy in a 2013 story on IP rights in *The Irrawaddy* magazine, other intergovernmental organizations and countries also currently extend relevant technical support to Myanmar. The United States Patent and Trademark Office (USPTO) and the Japan Patent Office, as well as the AWGIPC and even the Japan International Cooperation Agency (JICA) and the Asian Patent Attorneys Association (APAA), are among them.

Moe Moe Thwe, deputy director of the MOST's IP Section, told a United Nations Conference on Trade and Development Meeting in December 2014 that with constant consultation with WIPO and other foreign supporters, Myanmar's government ministries and its Supreme Court, as well as NGOs such as the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) and private law firms, MOST submitted the 11th draft of the IP laws in English and Myanmar versions to the Union Attorney-General Office for review in June 2014. The most recent draft of IP laws constitute four components, namely, Trademark Law, Patent Law, Industrial Design Law and Copyright Law. Consistent with the TRIPS and ASEAN

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Legislation is only the first step in reforming Myanmar's IP system.

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objectives, it also provides for the establishment of Intellectual Property Office of Myanmar (IPOM), which will most likely be composed of four main departments, namely Policy and Strategic Planning Department, IP Department, Education and Awareness Department, Financial and Administrative Department. One of the notable changes under the proposed legislation refers to Myanmar trademark protection's shift from the first-to-use system to the predominantly-observed first-to-file system. Considering that trademark is the most common form of IPR in Myanmar, the shift can potentially increase the certainty of acquisition and enforcement of trademark rights in the country.

While the 11th draft of IP laws was originally intended to be passed by the Union Attorney-General Office and the Parliament by the end of 2014, it is still under review as of writing. While there is an urgent need to establish an IPR framework, the delay is predominantly considered as a positive step in ensuring that Myanmar's first comprehensive IP laws strike a good balance between the shared-yet-conflicting interests of foreign investors and international community on one side, and of the domestic players and country development on the other. Given the difficult steps that must be taken in IP protection, Myanmar is prudently taking advantage of the extended time granted by the WTO to least-developed countries to comply with TRIPS in order to industrialize and develop. Additionally, Myanmar's existing IP system, while archaic, can still provide reasonable protection particularly in light of the transitional provisions of the upcoming



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Just last year, Myanmar took the rotating chair of ASEAN for the first time after joining 17 years ago.

IP laws. For instance, with the shift to first-to-register trademark system, it is advisable for current trademarks to be registered under the current system of registration through submission of Declaration of Ownership, publication of Cautionary Notice, including the oft-observed re-registration/re-publication every three years. This is relevant considering that under the transitory provision of the proposed Trademark Law, while trademark holders must still re-register their marks when the new Law takes effect, those marks registered under the old trademark regime will enjoy priority under the new law. Hence, considering the expected disputes with conflicting applicants in a changed system, the priority right can be an added layer of protection to the old regime registrants later on.

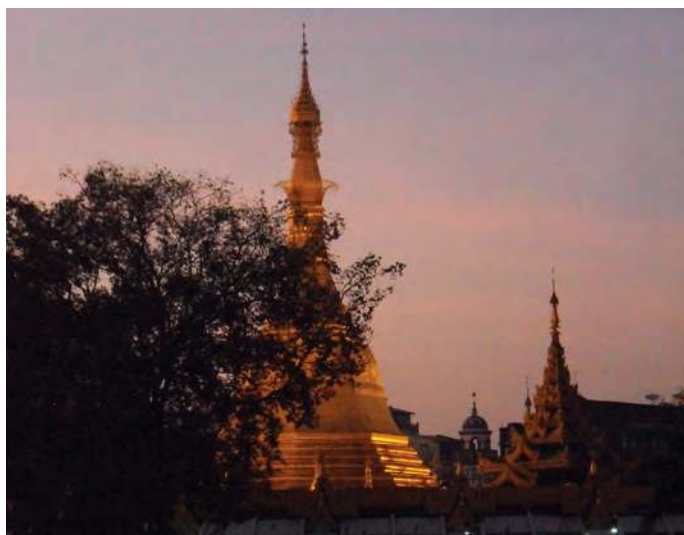
Of course, the legislation of comprehensive IP laws is

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only the first, albeit important, step in reforming Myanmar's IP system. The implementation of the provisions and enforcement of the IPRs are equally vital concerns that require strong political willpower, well-abled institutions, and informed public participation. It is good to note that Myanmar and its supporters are simultaneously working on these aspects. WIPO and APAA, for instance, have been conducting training of chosen employees in preparation for the establishment of

the IPOM. Many foreign public and private organizations are likewise conducting public information campaigns to create an IPR-conscious culture in the country. Just recently, UMFCCL launched the Intellectual Property Proprietors' Association of Myanmar (IPPAM) prior to the passage of the IP law to serve as an additional venue to promote IPRs in the country.

As Myanmar continues with its reforms reconnecting with the globe either to comply with its treaty obligations or to garner technical support and investments, it also earns Myanmar a renewed standing in the international community. Just last year, Myanmar took the rotating chair of ASEAN for the first time after joining ASEAN 17 years ago. With its socio-economic and political reforms, each difficult-yet-laudable step Myanmar takes towards sustainable economic development and political stability will only help it realize its potential as the new, perhaps last, frontier economy of Asia. **AIP**



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