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Investing in Mainland Southeast Asia

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Investing in Mainland Southeast Asia

Cambodia, Laos, Myanmar, Thailand, and Vietnam are promising jurisdictions that offer investors many compelling reasons to do business in the region, from the region's fast economic growth to its relatively inexpensive operating costs and attractive incentives for investment. While the process of market entry into these countries entails some similar steps, each jurisdiction presents a unique set of requirements and concerns. This guide lays out the fundamental processes, possibilities, and legal considerations for investors looking to commence operations in these countries.

CAMBODIA

Jay Cohen, Nitikar Nith

Cambodia is unique in the region in that foreign and domestic investors are not differentiated by law. The requirements for licenses, permits, and other procedures are the same for both domestic and foreign companies. In Cambodia, the Ministry of Commerce is broadly responsible for regulating the registration of companies in Cambodia, while the Council for the Development of Cambodia (CDC) has the authority to grant investment incentives to qualified investment projects.

Business Structures

Selecting the form of business vehicle is one of the first choices an investor needs to make after deciding to establish operations in the Cambodian market. The most common business structure is the limited liability company (LLC), which can be either private or public.

Private limited companies may have up to 30 shareholders. If there is only one shareholder, the company is registered as a single-member private limited company (but this registration can be amended if new shareholders are added). A private limited company may not offer its shares or other securities to the general public, and may only offer them to shareholders, family members of shareholders, and the company's managers. Restrictions on share transfers are permissible.

Public limited companies, on the other hand, are LLCs that are authorized to issue securities to the general public. In certain industries, such as banking and insurance, business can only be carried out by public limited companies.

An offshore company may choose to open a branch office, which is an office established in Cambodia to conduct commercial, revenue-generating activity on behalf of the company. The key drawback to operating as a branch office (instead of an LLC) is that a branch office operates as an agent of the parent company, and thus the parent has unlimited liability for the losses and debts of its Cambodian branch. A branch office may carry out various research and promotional activities for its parent company, as well as regularly buying and selling goods and services and engaging in manufacturing, processing, construction, and other revenue-generating activities conducted by its principal.

In contrast, an offshore company may also choose to open a representative office in Cambodia. A representative office can also carry out research and promotional activities for the parent company, but it is not permitted to generate its own revenue.

Restrictions on Foreign Businesses

Though domestic and foreign companies are treated the same under the law, only Cambodian citizens and companies of Cambodian nationality can own land. To be considered a company of Cambodian nationality, the company must be incorporated in Cambodia and at least 51% of the company's shares must be owned by Cambodian citizens or other companies of Cambodian nationality. If the shareholding in the company changes, the nationality of the company could be recategorized, which may affect its ability to own land.

As for the remittance of profits or other fund transfers, there are no currency controls in Cambodia, and companies and individuals are allowed to freely remit funds from Cambodia so long as the funds are sent through a licensed bank. Persons carrying cash into or out of Cambodia of USD 10,000 or more must declare the amount at customs.

Labor and Employment

The minimum wage for the textile, garment, and footwear sector has been set at USD 190 per month for 2020. There is no minimum wage mandated for other sectors at the moment, but the minimum wage in the garment sector is influential and other sectors look to it for guidance. There is also the possibility that the government could extend the minimum wage to other sectors.

Employers are also responsible for some other payments either to or on behalf of their employees. The employer must pay an additional contribution to the National Social Security Fund each month equal to a percentage of each employee's salary (currently capped at KHR 40,800 or USD 101 for each employee). In addition, pension payments are currently under consideration, and this would result in an additional expense equal to 2% or 4% of the employee's salary. Finally, Cambodia recently introduced the concept of seniority payments, which replace the previously required indemnity for dismissal. Though there is a specific formula for calculating seniority payments, they generally amount to 15 days' additional wages per employee per year.

Any company wishing to employ foreign employees must request a foreign work quota every year, and obtain or renew foreign work permits for their foreign employees every year. The current statutory quota is one foreign employee for every 10 local employees, although permission to hire additional foreigners is normally granted if the company shows reasonable cause. Quota requests and applications for work permits and employment cards must be submitted through the online portal at www.fwcms.mlvt.gov.kh.

All business owners and employees (both Cambodians and foreigners) must be registered with the Ministry of Labour (MOL) or the Department of Labour (DOL) and require either an employment book (for Cambodian employees) or a work permit (for foreign employees).

For Cambodian employees, the employment book can be requested at the MLVT (or DOL, if the enterprise is located in the province). The employment book should be retained by the employer, and should be returned to the employee on the last day of employment.

The total cost of one employment books is KHR 10,000 per employee.

A foreign national applying for a work permit must possess an e-visa with a remaining validity of at least six months. E-visas are first issued for a period of 30 days and can be extended. Foreigners must renew

[1] All USD equivalents herein are approximate and reflect exchange rates as of August 2020.

their work permits on an annual basis; however, an employment book issued to a Cambodian is valid for the duration of the employment and does not need to be renewed.

The total cost of visa and work permit requirements for a foreign employee is KHR 788,000 to 868,000 (USD 193 to 212) per employee, depending on the type of work permit.

Incentives for Investment in Cambodia

Investment incentives are available to both domestic and foreign investors, whether in the form of qualified small medium-sized enterprises (SMEs) or qualified investment projects (QIPs).

SMEs

Under Sub-Decree No. 124 on Tax Incentives for SMEs dated October 3, 2018, a "small-sized enterprise" refers to any enterprise that has an annual revenue of KHR 250 million to 700 million (USD 61,000 to 171,000), or has 10 to 50 employees. Meanwhile, a "medium-sized enterprise" refers to any enterprise that has an annual revenue of KHR 700 million to 4 billion (USD 171,000 to 979,000), or has 51 to 100 employees. In the event that a company falls in between the thresholds for a small or medium sized enterprise, the higher classification will apply.

Under Sub-Decree 124, six sectors are classified as priority sectors for SMEs: agriculture products or agro-industry; food production and processing; manufacturing of products used in waste processing and tourism; manufacturing of parts and equipment supplied to other manufacturers; research and development of information technology including the supply of innovative information management services; and enterprises located in SME cluster zones and enterprises developing these zones.

SMEs in the above priority sectors are entitled to the following incentives:

- Income tax exemptions of between three to five years;
- Exemptions on prepayment of profit tax and minimum tax; and
- Increased deductions for expenditures on IT-based accounting software and staff technical training, and equipment or new technology that increases productivity.

QIPs

Under the Law on Investment, companies granted a QIP from the CDC are entitled to import duty exemptions and either (1) a tax holiday for up to nine years (depending on the size of the investment) or (2) accelerated depreciation.

QIPs that elect to receive an exemption on profit taxes enjoy a tax holiday for up to nine years. The tax holiday comprises a trigger period, which is followed by a three-year period, and then a priority period. Most businesses in Cambodia are also subject to a 1% tax on gross revenue each month, but QIPs are exempt from this tax during the tax-holiday period.

However, these tax exemptions only apply to revenue and profits generated from the QIP itself, and may not be applied to any income generated from non-QIP activities. In addition, the tax holiday is not applicable to withholding taxes, taxes on salaries, value-added tax, or any other taxes specified by Cambodian law.

If QIPs elect special depreciation instead of the profit tax exemption, then they are entitled to a special depreciation allowance of 40% of the value of new or used tangible property that is used in the QIP's production or processing.

In addition, QIPs are entitled to the following incentives:

- Duty-free import of production equipment, construction materials, and production inputs that will be used in the manufacturing of products for export;
- Exemption from export tax, except for activities specifically stipulated under Cambodian law;
- Preferred treatment when hiring foreign employees: can hire as many foreigners as necessary to work as managers, technicians, and skilled workers, provided that each foreign employee is supported by documentation proving that their qualifications and expertise are required for the job;
- Entry into land leases for an unlimited term, instead of the normal 50-year maximum term;
- Permission to include foreign arbitration clauses in their contracts with the Cambodian government.

The rights, privileges, and entitlements of a QIP can be transferred or assigned to a person who has acquired or merged with a QIP, subject to the approval of the CDC or Provincial-Municipal Investment Sub-Committee.

LAOS

Dino Santaniello

The landlocked but centrally located country of Laos has already attracted foreign direct investment (FDI)—especially related to mining and natural resources—and has strong potential to function as a crossroads for further foreign investment. The country has also taken legislative steps to spur investment—both through domestic laws and accession to international bodies and instruments. Laos became a member of the World Trade Organization in February 2013, and in March 2019 became the 90th country to join the UN Convention on Contracts for the International Sale of Goods (Vienna Convention).

The authorities generally responsible for issuing business registrations are the Ministry of Industry and Commerce and the Ministry of Planning and Investment, depending on the type of activities. Similar to other countries in the region, certain business activities are controlled and may thus require approval from other government bodies or may be subject to foreign investment restrictions that limit the share equity ratio available to foreign investors.

Business Structures

There are two favored business vehicles in Laos. Limited companies are preferred by foreign investors. A limited company must have at least two shareholders and one director. The liability of the shareholders is limited to the capital they brought to the company. The other type is the sole limited company; these companies follow the same rules as those imposed on a limited company, but the shareholding structure includes only a single shareholder.

Restrictions on Foreign Investment

Some businesses cannot be wholly owned by foreign investors, so foreign investors will have to look for a local partner. The permitted share equity ratio varies, depending on the activity. For example, transport or logistics businesses are usually not allowed to let foreign investors own more than 49% of the share equity in the company. Similarly, while wholesale, retail, and distribution activities may be available to a 100% foreign-owned legal entity, it will be depend whether the minimum required investment threshold for the foreign investor (LAK 20 billion or USD 2.2 million) is met. Below this threshold, an obligation to partner with a Lao national will be imposed. The full list of such restrictions and conditions is exhaustive, so foreign parties should seek local counsel before investing in Laos.

Concessions are also available to foreign investors. Concession activities are activities that are developed on land granted by the government. Negotiations of the MOU and the concession agreement with the local government may provide some exemptions to the common rules, granted on a case-by-case basis. Some activities are reserved by law for Lao nationals; these usually involve activities that require only small investment capital (such as a hairdressing business).

Laos also does not allow foreign persons or entities to own land, which may only be leased to foreign investors for their use. Land may be leased for a maximum of 50 years, renewable, under a concession agreement entered into with the Lao authorities.

Capital sent into the country must be certified by the central bank (Bank of the Lao PDR), as must any loan agreement made in a foreign currency, prior to importation into Laos. Similarly, the opening of a bank account abroad by a domestic company must be approved by the central bank.

Labor and Employment

The monthly minimum wage in Laos is LAK 1.1 million (USD 120), and the employer’s contribution to the country’s social security system is equal to 6% of the employee’s salary.

The number of foreign employees allowed in a company depends of the nature of the work. For physical labor, foreign employees are limited to the equivalent of 15% or less of the total number of Lao employees. For foreign technical experts engaging in specialized work, this limitation is 25%.

A foreign employee working in Laos must be in possession of a work permit. To obtain the permit, the employer is required to submit an application to obtain quota approval from the Ministry of Labor and Social Welfare (province level) to import foreign labor. Thereafter, the employer must request a work permit within one month of the approval of the quota. A work permit will then be issued to the foreign employee at the same time as his or her business visa. In addition to the work permit, a foreign employee is required to have a stay permit card issued by the Ministry of Public Security.

The total cost to obtain the work permit, business visa, and stay permit is LAK 3,620,000 (USD 400), and these need to be renewed annually.

Incentives for Investment in Laos

Incentives for promoted businesses can include profit tax exemptions, depending on business activities and location; rental fee and land concession fee privileges; exemptions on customs duty and 0% assessment of value-added tax (VAT) for some imports; and 0% assessment of VAT on the use of domestic raw materials.

The Law on Investment Promotion gives a full list of promoted sectors for which the government grants incentives to both domestic and foreign investors. This list includes fields like science and technology, clean agriculture, sustainable tourism, education and sports, hospital construction and pharmaceutical production, infrastructure, and poverty alleviation projects.

MYANMAR

Yuwadee Thean-ngarm

Myanmar has captured the world's attention with its remarkable legal, social, and economic reforms in recent years already bringing an influx of foreign investment. The passage of legislation like the Myanmar Investment Law 2016 and the Myanmar Companies Law 2017 points to the government's focus on market liberalization and the promotion of FDI.

The authority responsible for overseeing trade activities is the Ministry of Commerce, which has an important role in the implementation of economic reforms toward being a market-oriented economy, especially in the trade sector. Another important authority in this area is the newly established Ministry of Investment and Foreign Relations, which was set up specifically to promote foreign investment and implement investor-friendly measures in the country.

Business Structures

The Myanmar Companies Law 2017 governs the incorporation and registration of companies. The two main categories for businesses set up in Myanmar are limited companies and unlimited companies. Limited companies are further separated into two categories. The first type, companies limited by shares, can be private (limited to 50 shareholders) or public (which may have any number of shareholders). The second type is a company limited by guarantee. The other common type, the unlimited company, can also have any number of shareholders. Two other types of corporation that may be registered are a business association and an overseas corporation.

Restrictions on Foreign Investment

In addition to not allowing foreign companies or individuals to own land, Myanmar also restricts the involvement of foreign nationals in some types of businesses. Activities that are strictly forbidden to be carried out by foreign investors are listed in full in Myanmar Investment Commission (MIC) Notification No. 15/2017 and encompass ventures such as mineral refinement, shallow oil wells, and tour guide services. There are also some investment activities that are only open to foreign investors that form a joint venture with Myanmar entity or individual. These include such activities as manufacturing and marketing plastic products, and operating veterinary clinics.

As for remittance of profits or other funds transfers, any remittance or transmission exceeding USD 10,000 (or equivalent in other currency) will require approval from the Central Bank of Myanmar.

Finally, Myanmar has a provision on directors that may be relevant to foreign companies. Though there is no specific restriction on having foreign directors, the Myanmar Companies Law 2017 requires that for a company registered under this, at least one of the directors must be ordinarily resident in the country. This means that one of the directors of the company must be resident in the country for at least 183 days within a calendar year.

Labor and Employment

The latest minimum wage standard was set in 2018 at MMK 4,800 (USD 3.60) per day. In addition, employers are required to make contributions to Myanmar's social security system (on top of each employee's social security contributions).

Employers must hire Myanmar citizens for work that does not require special expertise. As for employing non-Myanmar nationals for specialized work, there is no work permit system yet for foreign employees. However, foreign workers under MIC-approved investment entities are required to obtain a specific work permit for employment and stay permit in Myanmar.

Foreign employees who are not in a MIC-approved business are required to hold a business visa and, if necessary, a stay permit, which allows the holder to be in the country for more than 70 days. The costs for a business visa, which vary depending on the type and length, range from USD 50 to 600.

Incentives for Investment in Myanmar

Several sectors are promoted by the Myanmar Investment Law 2017, and the MIC may grant privileges to companies active in these sectors, which include fields such as agriculture and related services, livestock production, and breeding and production of fishery products. MIC-approved investments in these sectors are eligible for three to seven years of tax exemptions and reliefs, depending on the status of the zone in which they are located.

THAILAND

Supasit Saypan

The persistent focus of successive governments on making Thailand a hub for foreign investment has helped the country become a regional leader in attracting FDI and encouraging businesses to develop operations in the country. Thailand's well-developed and modern legal framework have further persuaded investors to identify Thailand a s a business center in Southeast Asia.

Business Structures

The Ministry of Commerce oversees registration of the various business vehicles that investors can establish. These options include sole proprietorship, partnership, limited company, representative office, regional office, branch office, and joint venture.

Partnerships can be either limited or ordinary, and an ordinary partnership can be either registered or unregistered (partnerships registered with the Ministry of Commerce are given juristic person status). The main difference in these types is the level of liability assumed by the partners. In ordinary partnerships, the partners are jointly liable with no limitation. In limited partnerships (which all must be registered), on the other hand, one or more partners take on unlimited liability, while the others have only limited liability.

Limited companies are the most popular structures for foreign investors, and they can be private or public. Though many of the requirements are the same for public and private limited companies, public limited companies face greater regulation and scrutiny as they offer shares for sale to the public.

Foreign companies also have a few different options for opening offices in Thailand. A representative office is defined as an office in Thailand of a foreign company engaged in "international trading business," which means activities such as finding sources for purchase by the head office, checking or inspecting purchased goods and advising the head office accordingly, and reporting on various operations in Thailand relevant to the head office or its affiliated companies. A representative office cannot engage in any profit-seeking or profit-making enterprises. Another type of office is the regional office, which may contact, coordinate with, and supervise regional branches on behalf of the head office. Like a representative office, though, a regional office must rely solely on the head office for its revenue, and cannot generate its own income. Finally, a branch office can be established to carry out business operations in the country, and is subject to the same license requirements as other business establishments.

In a contracted project that cannot be carried out by a single company, it is common for a company to join with others in the form of a joint venture, which refers to a limited company in Thailand owned by two or more companies. A joint venture has no legal personality under Thai law. It is formed by contract between two legal persons and exists only for a particular project or venture. Although it may engage in business, it cannot be registered. However, the Revenue Department treats a joint venture as a juristic company, so a joint venture must apply for a taxpayer identification card and VAT registration (if applicable).

Restrictions on Foreign Investment

The Foreign Business Act (FBA) governs all foreign businesses, which are defined as having at least 50% non-Thai control. The FBA prohibits foreign businesses from engaging in some activities, such as mass communications, farming, forestry, fishery, land trading, and some cultural or Buddhism-related activities. Another category established by the act is businesses that require permission from the Minister of Commerce with the approval of the cabinet. However, the Thai ownership of the company must be at least 40%. These include businesses related to national safety or security, businesses affecting arts and culture (especially traditional), and affecting natural resources and the environment. The third category covers businesses in which foreign nationals are prohibited unless permission is granted by the director-general of the Department of Business Development in the Ministry of Commerce. This consists of businesses deemed not yet ready for competition from foreign participants, and includes such activities as rice milling; architectural, engineering, or legal services; some construction businesses; brokerage or agency businesses; retail and wholesale trading; and other service businesses.

A foreign company that participates in a joint venture is required to obtain a foreign business license if the intended activities are restricted under the FBA, and create a branch office in Thailand to engage in business as a partner of the joint venture.

Thailand is like other countries in the region in that it does not allow foreign individuals or companies to own land (but see the incentives section below).

Labor and Employment

The minimum daily wage in Thailand as of January 1, 2020, is THB 313 to 336 (USD 10 to 11), depending on the province in which the work is performed. In addition, an employer must contribute to the social security fund at a rate equal to 2.5% of an employee's salary each month, capped at THB 750 (USD 24). The employer's required pension contribution for each employee ranges from 2% to 15% of the employee's salary, and cannot be lower than the employee's contribution rate.

To work in Thailand, a foreign national must have a valid visa and work permit. A work permit can be granted for up to two years (renewable), and the foreign employee is permitted to work under the work permit regardless of changes in position or work location, provided that he or she still works for the same company. Though fees can vary based on the type and duration of the visa and work permit, total initial costs are typically about THB 5,000 to 8,000 (USD 160 to 256).

Incentives for Investment in Thailand

Thailand was the first country in Asia to introduce investment promotion laws, which offer both tax and non-tax incentives. The Board of Investment (BOI) and the Industrial Estate Authority of Thailand (IEAT) both grant various privileges to businesses established in certain sectors and locations. In addition to the long-standing BOI and IEAT incentives, Thailand launched a package in September 2019 that includes tax incentives, measures to improve regulatory efficiency, workforce development allowances, and other investment promotion regulations, such as preparing land specifically for use by foreign investors.

VIETNAM

Nam Ngoc Trinh, Tan Nhat Truong Phan

FDI is a cornerstone of Vietnam's economy, which is well known as one of the fastest-growing economies in Asia. Year after year since 2013, record-high levels of FDI have been pouring into Vietnam as investors consistently find the country to be a vibrant and attractive destination for business operations. The country's investment potential is regularly touted as one of the top opportunities in the region.

Business Structures

One of the business vehicles investors can consider is a single-member limited liability company, which has a single owner with no shares. This business vehicle is only applicable for business sectors that do not have limitations on foreign ownership.

A multiple-member limited liability company (MLLC) is for businesses subject to restrictions on foreign ownership or participation, or where there will be more than one owner. An MLLC does not have shares and only has "charter capital," with liability limited to each member's capital contribution amount. The maximum number of members is 50.

A shareholding company, also called a joint-stock company, has its charter capital divided into equal portions called shares. Shareholding companies can issue corporate bonds and be listed on a Vietnamese stock exchange. Shareholders can be organizations or individuals, and there must be at least three shareholders at all times.

Foreign investors may set up new legal entities either as wholly foreign-owned enterprises or as joint venture companies co-owned with Vietnamese investors.

Restrictions on Foreign Investment

In Vietnam, private land ownership is not allowed. Land is owned either by collectives or by the state. Foreign enterprises can only lease land from the state or from developers in industrial zones, or they can obtain the right to use land via a joint venture company. Foreign investors must also register their investments and comply with additional restrictions. These include limitations on foreign ownership, restriction of business sectors, investment requirements, geographic restrictions, and minimum qualifications of Vietnamese partners.

Prohibited sectors include trade in chemicals, minerals, and narcotic substances, as well as some other highly sensitive or suspect activities. There are also “conditional” sectors, where foreign investors must satisfy certain conditions such as obtaining a sublicense to provide the specific services (for example, retail, education, finance, telecommunications, logistics, etc.).

Foreign currency transactions are heavily regulated, with rules on inflow more relaxed than rules on outflow. Foreign investors can bring capital into Vietnam, but a Vietnamese investor would be required to notify or obtain approval from the State Bank of Vietnam if he or she would like to invest offshore. Persons leaving Vietnam with more than USD 5,000 in cash must declare the amount upon departure. Foreign nationals who have fully paid tax and fulfilled any financial obligations to the Vietnamese state may repatriate proceeds back to their countries.

Labor and Employment

The minimum monthly wage in Vietnam ranges from VND 2,920,000 to 4,180,000 (USD 126 to 181), depending on geographical area. Employers are also obligated to contribute to social, health and unemployment insurance funds for employees equal in total to around 21.5% of each employee’s salary.

Permission must be sought in order to hire foreign employees, and authorities have extremely wide discretion in determining whether to reject or allow foreign workers. However, there is no mandatory local hire requirement. Foreign workers must have a work permit under normal circumstances, and they must also have a visa or temporary resident card. The total initial costs for work permit and visa range from VND 980,000 to 4,200,000 (USD 42 to 181).

Incentives for Investment in Vietnam

Incentives are available for certain geographic areas and industries, and for high-tech, scientific, or technological enterprises or organizations. The investment amount must be at least VND 6 trillion (USD 259 million). Incentives typically include corporate income tax reduction or exemption, exemption from duty on some imports, and land use tax and fee reduction or exemption.

Take Action

Regardless of the jurisdiction, entrepreneurs and investors should always seek local assistance to ensure that their venture is fully compliant and equipped to operate freely. They should also take the time to understand the general rules and regulations for operating in the country. Being familiar with the requirements will help in strategizing and taking action efficiently and without unnecessary risk of noncompliance.

Tilleke & Gibbins' business law specialists in each of these jurisdictions guide incoming investors in allocating their resources efficiently and strategically. Whether a business is looking to expand across Southeast Asia or just move operations into one specific country, the experience and local insight of Tilleke & Gibbins makes the process of market entry smooth and enables operations to commence without delay.

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