

Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

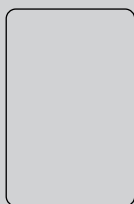
Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between November 2020 and January 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2012
Tenth edition
ISBN 978-1-83862-662-4

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Foreign Investment Review 2021

Contributing editor

Oliver Borgers
McCarthy Tétrault LLP

Lexology Getting The Deal Through is delighted to publish the tenth edition of *Foreign Investment Review*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the European Union, France, Italy, Pakistan, Spain, Sri Lanka and Uzbekistan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.



London
January 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in January 2021
For further information please contact editorial@gettingthedealthrough.com

Contents

Australia	5	Laos	80
Deborah Johns Gilbert + Tobin		Dino Santaniello Tilleke & Gibbins	
Austria	12	Myanmar	86
Isabella Hartung and Julia Schönhuber Barnert Egermann Illigasch Rechtsanwälte		Nwe Oo and Ross Taylor Tilleke & Gibbins	
Cambodia	17	New Zealand	89
Jay Cohen and Nitikar Nith Tilleke & Gibbins		Ben Paterson and Lance Jones Russell McVeagh	
Canada	21	Pakistan	99
Oliver Borgers, Dominic Thérien, Jonathan Bitran and Erin Keogh McCarthy Tétrault LLP		Sarjeel Mowahid and Ahmed Reza Mirza ABS & Co	
China	33	South Korea	107
May Liu Global Law Office		Joo Hyoung Jang, Rieu Kim, Kyunghun Kim and Youjin Hwang Barun Law LLC	
European Union	39	Spain	112
Charles Pommiès, Dominic Long and Jonathan Benson Allen & Overy LLP		Juan Manuel de Remedios and Laura del Olmo White & Case LLP	
France	45	Sri Lanka	117
Orion Berg and Camille Grimaldi White & Case LLP		Nirosha Peiris Tiruchelvam Associates	
Germany	51	Switzerland	123
Roland M Stein and Leonard von Rummel BLOMSTEIN Partnerschaft von Rechtsanwälten mbB		Stephan Erni, Astrid Waser and Eric Olivier Meier Lenz & Staehelin	
India	58	Thailand	131
Hardeep Sachdeva and Priyamvada Shenoy AZB & Partners		Jirapong Sriwat and Apinya Sarntikasem Nishimura & Asahi	
Italy	68	United Arab Emirates	136
Francesco Salerno and Kathleen Lemmens Gianni & Origoni		Silvia Pretorius Afridi & Angell	
Japan	74	United Kingdom	142
Koki Yamada and Dai Iwasaki Tokyo International Law Office		Tim Cowen and Claire Barraclough Preiskel & Co LLP	

United States 148

Paul Marquardt, Chase Kaniecki, Nathanael Felix Kurcab,
Nora McCloskey and Elise Lane
Cleary Gottlieb Steen & Hamilton LLP

Uzbekistan 154

Mahdi Magdiev
Winfields

Vietnam 159

Phuong Thi Minh Tran and Nam Ngoc Trinh
Tilleke & Gibbins

Myanmar

Nwe Oo and Ross Taylor

Tilleke & Gibbins

LAW AND POLICY

Policies and practices

- 1 | What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Under the Myanmar Investment Law 2016 (MIL), the Myanmar Investment Commission (MIC) classifies a small number of investments as restricted investment activities and an extensive list of investments as promoted investment activities. Restricted investment activities are further divided into investment activities to be carried out only by the union government (federal government); investment activities that are not allowed to be carried out by foreign investors; investment activities allowed only in the form of a joint venture with any citizen-owned entity or any Myanmar citizen; and investment activities to be carried out with the approval of the relevant ministries.

There are also promoted investment activities (of both foreign and local investors) eligible for tax exemptions and reliefs.

The MIL requires certain investment activities to obtain an investment permit. These include: activities that are essential to the government's strategy; activities with large capital intensive investment projects; projects that are likely to cause a large impact on the environment and the local community; investment businesses that use state-owned land and buildings; and investment businesses required by the government to submit a permit proposal to the MIC. Other types of investment would require only investment endorsement.

The Central Bank of Myanmar (CBM) had been maintaining a managed floating exchange rate regime as a reference exchange rate since 2012 but changed to a market-based weighted average rate regime as the reference exchange rate in February 2019.

Main laws

- 2 | What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

- The MIL (18 October 2016);
- the Myanmar Companies Law (6 December 2017) (MCL);
- the Myanmar Special Economic Zone Law (23 January 2014) (MSEZL);
- the Transfer of Immovable Properties Restriction Act (16 March 1987) (TIPRA);
- the Income Tax Law (23 February 1974);
- the Union Tax Law (drafted and enacted anew each fiscal year);
- the Competition Law (24 February 2015) (CL);
- the Foreign Exchange Management Law (10 August 2012);
- the Insurance Business Law (24 June 1996);
- the Financial Institutions of Myanmar Law (25 January 2016); and
- the Environmental Conservation Law (30 March 2012).

Scope of application

- 3 | Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The MIL governs all investment activities outside special economic zones, while the MCL regulates company incorporation. The MSEZL deals specifically with all investment activities in Myanmar's special economic zones. The TIPRA restricts foreign persons and entities from owning immovable properties such as land (except short-term lease of up to one year). However, as an exception to the TIPRA, the MIL and the MSEZL allow foreign investors to obtain long-term leases of up to 70 years (50+10+10) with approval. Foreign operators in the insurance and banking sectors must secure permits from the Insurance Business Regulatory Board and the CBM respectively.

A limited range of investment activities such as manufacturing products for security and defence; manufacturing and servicing arms and ammunition for national defence; air traffic services; pilotage services; feasibility study and production of radioactive metals (eg, uranium and thorium); and administration of electric power systems to be undertaken by the government and private investors (either domestic or foreign) are not allowed. Investment activities such as publishing and distribution of periodicals in ethnic languages including Burmese; medium-scale and small-scale refinement of minerals; operating shallow oil wells; prospecting, exploration and production of jade or gemstones; tour-guide services; and small retail or convenience stores are not open to investment by foreign investors.

The CL deals with collaboration between business by merger, consolidation, acquisition or joint venture, and states that no business may collaborate if it significantly increases the market dominance over a certain period; if the collaboration decreases competition in a small market; or if the combined market share exceeds the market share specified by the Competition Commission (no such shares have yet been specified).

Definitions

- 4 | How is a foreign investor or foreign investment defined in the applicable law?

Under the MIL, a foreign investor is defined as a person who invests within the country and is not a Myanmar citizen. This also includes foreign companies (ie, companies with more than 35 per cent foreign shareholding), branch offices, and other enterprises established and registered in accordance with the MCL, as well as enterprises formed in accordance with the laws of any other country. Foreign investment is defined as any direct investment (an investment in which the

investor has the right to control, influence or manage the assets that are invested) made by a foreign investor within Myanmar.

Special rules for SOEs and SWFs

- 5 | Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

No. Every investment made by a foreign person or entity, including of a foreign state-owned enterprise or a sovereign wealth fund, is considered a foreign investment in accordance with the MIL. There is no specific definition for state-owned enterprises or sovereign wealth funds under the MIL.

Relevant authorities

- 6 | Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

There is no system of merger and acquisition review on national interest grounds, although the MIC will review proposed large-scale investments.'

- 7 | Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

We are not aware of any transactions having been rejected on national interest grounds.

PROCEDURE

Jurisdictional thresholds

- 8 | What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The Myanmar Investment Commission (MIC) has delegated local investment committees and local governments to oversee and issue investment permits or endorsements for investments up to the threshold of US\$5 million and for non-strategic investment activities.

However, the following are considered strategic investments and are required to be reviewed by the MIC and the union government:

- investment exceeding US\$20 million in any business in the area of communication and information technology, pharmaceutical technology, biotechnology, similar technologies, energy, infrastructure and urban development, extraction of natural resources and media;
- investment exceeding US\$20 million under a grant of land use (or other property) rights, concession agreement, or similar authorisation by government department or government organisation;
- investment in agriculture on more than 1,000 acres of land;
- investment to carry out a business other than agriculture on more than 100 acres of land;
- large capital intensive investment if the expected investment value exceeds US\$100 million;
- investments with a large impact on the environment and the local community requiring an environmental impact assessment; and
- investment business located in a designated or proposed protected area, forest reserve area, key biodiversity area or area selected to support the ecosystem, and cultural and natural heritage including cultural monuments and unspoiled natural areas.

National interest clearance

- 9 | What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Usually, an investor or promotor can make an investment screening application to the MIC to determine whether the desired investment activity is eligible for immediate investment; would fall under restricted investment activity; or would require special clearance from union government or union parliament. The MIC will issue non-binding guidance in response to a screening application, explaining whether a potential investment would require national interest clearance.

- 10 | Which party is responsible for securing approval?

The applicant for approval would be the investment vehicle (eg, the joint venture company in a joint venture, or the target in an acquisition).

Review process

- 11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Generally, the screening process will only take a few weeks.

- 12 | Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Yes, the review should be completed before parties finalise the deal.

Involvement of authorities

- 13 | Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

The Investment Monitoring Section of the MIC is open for all investors to consult before filing or arranging transactions to ensure compliance with the relevant laws.

- 14 | When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Such specialists are not used in Myanmar; however, law firms will frequently have meetings with MIC officials to discuss the case, and MIC officials are quite open to these meetings.

- 15 | What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

There are no pure mergers in Myanmar. If a restricted business was pursued without the relevant approvals, then there are various routes that the authorities could follow. In general, these could be warnings, fines or blacklisting.

SUBSTANTIVE ASSESSMENT

Substantive test

- 16 | What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

There are no specific test procedures for clearance. The Myanmar Investment Commission (MIC) decides in accordance with the scope of permissible investment types.

- 17 | To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

This is unlikely.

Other relevant parties

- 18 | What other parties may become involved in the review process? What rights and standing do complainants have?

The review process may garner involvement especially by respective line ministries, and sometimes by civil society organisations. Respective line ministries have the right to oppose, recommend or make exceptions.

Prohibition and objections to transaction

- 19 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The MIC has wide discretion on whether to grant approval to a proposed transaction.

- 20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

Theoretically, yes, especially for environmental impact-related projects. Respective parties must undertake the following: an initial environmental examination; an environmental impact assessment; a social impact assessment; and an environmental management plan, and they must comply with the tight regulations.

Challenge and appeal

- 21 | Can a negative decision be challenged or appealed?

Yes, a negative decision can be challenged and appealed to the union government. The decision of the government is final and conclusive on grounds of national interest.

Confidential information

- 22 | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Competition law prohibits the breach of confidential information or trade secrets by any means. Such a breach, or dissemination of false news, is punishable by imprisonment, a fine or both.

Tilleke & Gibbins

Nwe Oo

nweoo@tilleke.com

Ross Taylor

ross.t@tilleke.com

No. 1608, 16th Floor, Sakura Tower
339 Bogyoke Aung San Road
Kyauktada Township
Yangon 11182
Myanmar
Tel: +95 1 8255 208
www.tilleke.com

RECENT CASES

Relevant recent case law

- 23 | Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

There is no news or other information available on transaction rejections.

UPDATES AND TRENDS

Key developments of the past year

- 24 | Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

To date, there are no proposed changes.

Coronavirus

- 25 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Myanmar government implemented the large-scale Covid-19 Economic Relief Plan and is now finalising the Myanmar Economic Resilience and Reform Plan.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)