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THE NEW LAW AND MARKET ACCESS FOR PETROLEUM PRODUCTS IN MYANMAR

A combination of recent law and policy developments has put in motion a tectonic shift for the fuel sector in Myanmar. Since a few months, foreign investors have a much larger access to invest in petroleum products businesses, and are no longer required to conclude a joint venture with the Ministry of Electricity and Energy (MOEE). At the same time, a newly updated Petroleum Products Law has been issued to govern the import, storage, transport, processing and distribution of all kinds of fuel products. And finally, a recent unpublicized shift in company regulator practice makes it now possible for foreign companies to buy shares in pre-existing, Myanmar national owned companies owning fuel terminal or marketing assets. The perfect storm of these three interesting developments is bound to, and already has, boosted interest by a wide range of market players.

In this client briefing note, we briefly examine the new legal and regulatory landscape for petroleum product businesses in Myanmar.

What were the obstacles to market access?

There are, or rather were, three main obstacles preventing foreign companies from entering the petroleum products sector in Myanmar.

Highlights of this note

- ▶ Key changes
- ▶ Which projects can no longer receive a Permit?
- ▶ Do these thresholds make sense?
- ▶ Construction Period extension remains too rigid
- ▶ The indirect offshore transfer of shares now also needs MIC permission
- ▶ How does the Endorsement procedure work?
- ▶ Land Right Authorizations better outlined
- ▶ New investor responsibilities
- ▶ The list of required insurance policies has been modernized
- ▶ Some final practical and logistical issues
- ▶ Structuring Options Fuel Terminal & Marketing Project

PROGRESS REPORT 2016 MYANMAR



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NOTICE:

We are hosting a client briefing event entitled "The New Law and Market Access for Petroleum Products in Myanmar - Update on Import, Terminals, Storage, Distribution and LNG" in Yangon on 18 August 2017 from 09.00am-11.30am. To attend, you can request an invite from Nidhi Shenoy at nidhi.shenoy@vdb-loi.com.

1. The requirement of joint venture with the Government:
2. The policy that foreign owned companies may not engage in any trading;
3. The practical impossibility for foreigners to buy shares in a Myanmar-national owned company.

All three of these obstacles have, at least to a very large degree, been removed.

The requirement of JV with MOEE is gone

In 2014, the storage, transport, pipeline, jetty or terminal and distribution of all petroleum products was suddenly restricted from foreign investors. Notification 49/2014, decreed that foreign investors would only be permitted to invest in this activity under a JV with the MOEE. As we pointed out at the time, this move was made to support the previous Government's initiative to find foreign JV partners for a number of state owned assets. As a result, only very few foreigners succeeded to enter this sector, such as PUMA in the aviation fuel segment in joint venture with the MOEE's MPPE. Most others had to content themselves with supplying fuel from offshore.

In 2017, by means of Notification 15/2017, these foreign ownership restrictions have been abolished, and are replaced with a general requirement of obtaining MOEE approval for the investment project in the petroleum sector. But, no new comprehensive regulation was issued explaining the new policy in any detail. So, what exactly is permitted for foreign investors in the petroleum products sector is not spelled out anywhere.

Foreign companies are allowed to do trading, but only as part of an investment project

The Myanmar rules setting out which products foreigners may trade still do not include petroleum products. But, the practice of both the MIC and the MOEE now indicates that a foreign invested company in energy infrastructure may indeed also carry on a trading activity of fuel.

What is more, in theory at least, foreign companies do not need a local partner for investments in petroleum products businesses in Myanmar. Notification 15, which provides in a (probably non-

comprehensive) list of activities for which foreign investors need a local partner in Myanmar, does not mention anything of the kind. However, in our view, despite Notification does not impose a local partner, the final decision as to whether a local partner is merely desirable or required, has not yet been taken.

But, note that Notification 15 only concerns investments under the Myanmar Investment Law 2016 (MIL). Projects which are too small or which for some other reason do not qualify as an "investment project" do not benefit from Notification 15;

For the remainder (projects which are not investments under the MIL), the Government policy to, except for a few exempted businesses, not allow foreign invested companies to engage in "pure" trading (in this case mainly import and domestically reselling of fuel) remains in place as far as petroleum products are concerned. That means that foreign companies are not allowed to import and distribute fuel products, that is, except in the context of an investment project under the MIL and Notification 15.

	Activity	Foreign ownership restrictions	MIC Permit	Tax holiday available?
1	Fuel terminal and storage	Allowed as JV or perhaps also as 100% foreign owned.	Required	No tax holiday
2	Fuel terminal, storage, import and distribution	Allowed as JV or perhaps also as 100% foreign owned.	Required	No tax holiday
3	Import and distribution wholesale	No foreign ownership allowed unless as an MIC project.	Possible if project cost exceeds 20MUS\$	No tax holiday
4	Import and distribution retail	No foreign ownership allowed unless as an MIC project.	Possible if project cost exceeds 20MUS\$	No tax holiday
5	Regasification service of LNG and other processing	Most likely allowed up to 100% foreign ownership.	Required	Tax holiday available
6	Import and regasification of LNG, sale of gas	Allowed as JV or perhaps also as 100% foreign owned.	Required	Tax holiday available

A foreign company can now buy shares in an existing Myanmar-national fuel terminal business

As most readers are aware, a wholly Myanmar national owned company ("a Myanmar national company") cannot have any foreign shareholders. This means that a pre-existing company owned by Myanmar nationals holding, for example, a fuel terminal lease, cannot issue or transfer shares to a foreign investor. The New Myanmar Companies Act, currently being debated by the National Assembly, aims to change that by allowing 35% foreign shareholding without the company losing its status as



Government Guarantees for PPP Projects in Myanmar
March 31, 2017, Nay Pyi Taw.



a “Myanmar national company”. But this change is not yet in force and as it is somewhat controversial, it might never become applicable.

The demarcation line between “Myanmar national companies” and “foreign companies” has however been crossed when in 2016, VDB Loi achieved for the first time the conversion of a Myanmar national company into a foreign company without the formation of a new legal entity.

Ever since, the regulator can –on a case by case basis and if following the same compliance route as we did at that time– allow any Myanmar national company to convert into a foreign company. There is no cap of 35% as under the (Draft) New Companies Act. The foreign investor can own up to 100% of the pre-existing company, provided there are no foreign ownership restrictions to the activities the company carries out.

The consequences for the fuel terminal sector cannot be underestimated. It is a new option very few people are aware of. If the assets are too cumbersome

to transfer (for example because land owner consent for the sublease or lease assignment takes too long) parties may consider instead to turn the pre-existing company into the JVCo. Of course that would only be possible if the to-be-JVCo has no legal or tax exposure to speak of, which can be ascertained in a due diligence.

How can a foreign invested company obtain the land rights for a fuel terminal lease?

Not all land is suitable for a fuel terminal project. Given that the land is adjacent to a navigable waterway, we usually see that a land lease from the Ministry of Transport and Communications (MOTC), through the Myanmar Port Authority (MPA), is involved. Incidentally, as you are probably already aware, a foreign invested company can only lease land in Myanmar for periods of 50+10+10 years. The lessor can be a Government agency or a private land right holder. In any event, the MPA is the regulator for all facilities where goods or persons are being brought into Myanmar from an overseas location, as the administrator

of any international port.

These land leases, with and without port terminal concession, are a major element in determining the more efficient structure for any fuel terminal project. The foreign investor will of course prefer that the (master) lease is issued directly in the name of the foreign invested project- or joint venture company. Why take the risk that something happens with the master lease, which may detrimentally affect the sublease as well? Not all local partners are happy with a direct master lease from the MPA to the JVCo, as it reduces their leverage.

There are several situations possible. In some cases, the master lease from MPA was already issued in the local partner’s name, or the local partner has through some other means already obtained the land rights from another Government agency, such as a Regional Government, or from a private land holder.

Now the question becomes if the existing lease should be assigned to the new JVCo (so that JVCo would have a direct lease with the land owner), or if instead the local partner will keep the land right in his name, and will provide a sublease to the JVCo. Both situations are possible under the investment law, but both usually require the consent of the land owning authority. The process for obtaining that consent is not regulated, and the authority does not have to agree.

It is a major challenge for foreign investors to get a clear view on the authority’s position, and this is often virtually undoable if communications



are mainly run through the local partner, who may have his own agenda. In our experience, a close and open coordination between the teams managing the MIC process and the MPA approval process is absolutely necessary.

One possibility half way between the direct lease and the sublease, is a sublease where the MPA recognizes the sub-lessee's rights (and his lenders) in case of termination of the master lease.

Another alternative is to use the existing lessee, which already has received the land rights, as the JVCo. The foreign investor would have to purchase or subscribe shares into the company which already received the land lease rights. This alternative structuring option was explained above.

Highlights of the New Law on Petroleum Products: expanded definition

The New Law has an expanded definition of petroleum products. LNG, LPG and compressed natural gas (CNG) are now expressly included as a 'petroleum product', which additionally includes any compound containing hydrocarbon obtained from petroleum processing and refining, or anything designated as a Petroleum Product by the Ministry.

The definitions of import and export are broadly defined. Import and export both are defined as "the bringing of the product into Myanmar through sea, air, pipeline or any other matter." Specifically excluded from the definition of import is "transport across the territory... of Myanmar."

Regulatory power in the New Law

The New Law provides broad powers on the Ministry, Relevant Ministries and the Committee in order to regulate LNG (and other petroleum substances).

Importantly, in respect to LNG, the New Law allows the Relevant Ministry to "set the terms and conditions in relation to import and export, prescribe the place for import and export, prescribe the periods within which licenses for the import and export shall be applied for, and gives the power to confiscate or handle any products for which the relevant license has not been applied."

It provides the Ministry with broad discretion over LNG in terms of transport and cross border transport, specifying the way in which LNG must be stored, or the terms and conditions of any other matter which it deems expedient for proper control over import, export, transport, transfer, receipt, storage, testing or distribution and sales of LNG.

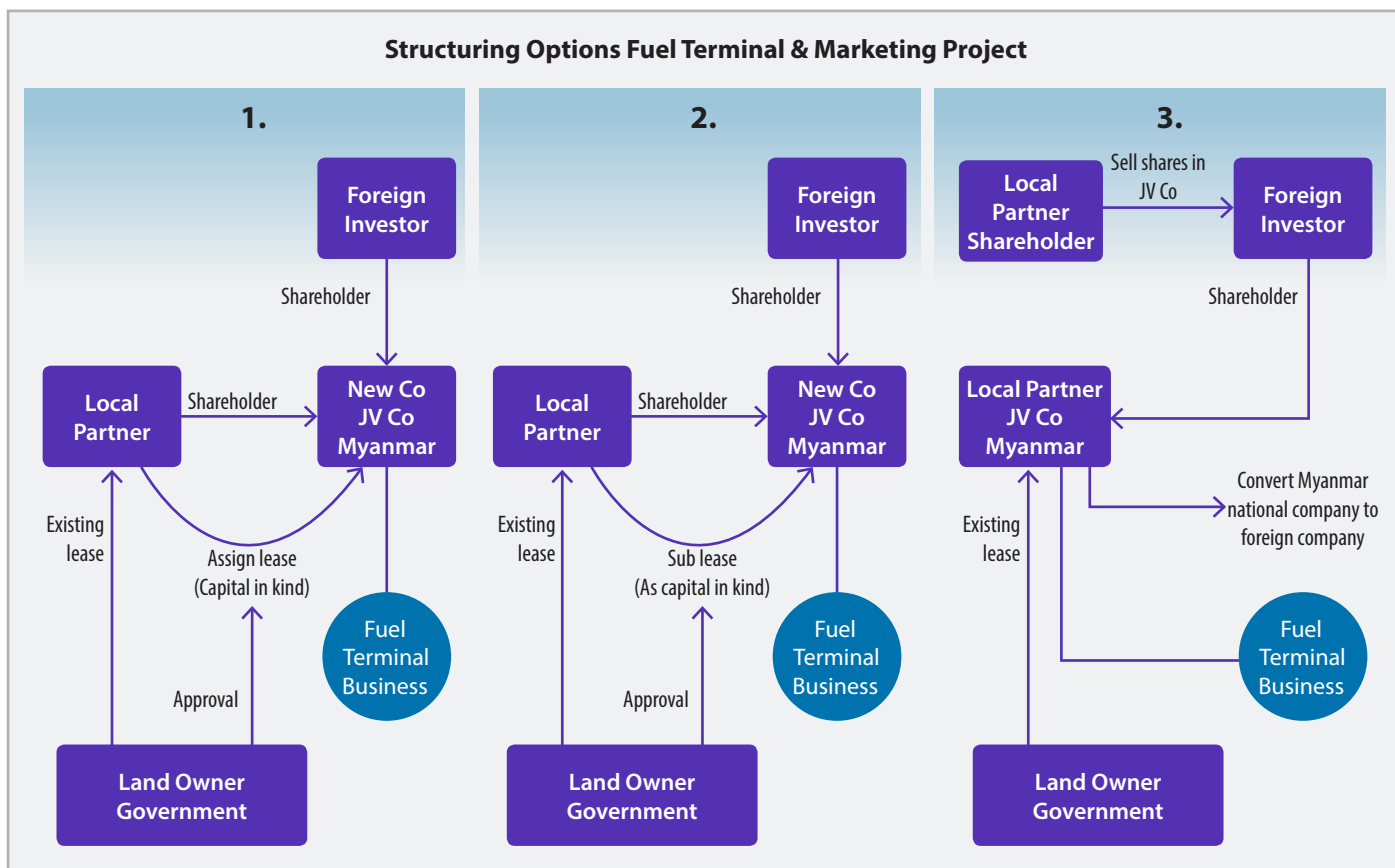
The New Law also allows for the MOEE and any Relevant Ministry to enter places where LNG is being used in any commercial setting in order to ascertain if the product is being kept or used in compliance with the provisions of this law or related notifications.

Formation of a Supervisory Committee

Under the New Law, the MOEE is to form a supervisory committee in order to systematically supervise and control import, export, storage, transport, refining, distribution and sales of petroleum and any petroleum product performed by the private sector.

The duties of the Supervisory Committee are broadly defined to include:

- Supervising import, storage, transport, refining, distribution, sales of petroleum and petroleum products under the licenses;
- Ensuring standards, quality, and accurate measurement;
- Forming Supervisory Sub-committees for each region and state;
- Environmental protection;
- Designating testing labs; and
- Taking action against non-complying entities.



"The New Law and Market Access for Petroleum Products in Myanmar - Update on Import, Terminals, Storage, Distribution and LNG" in Yangon on 18 August 2017 from 09.00am-11.00am

In this highly practical client briefing event, VDB Loi shares its outstanding experience working in this space with supermajors, petroleum product marketing companies, Governments and international institutions. Here are the highlights:

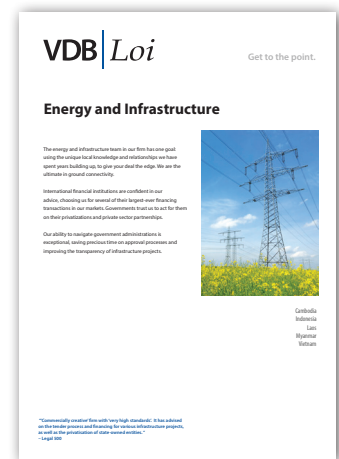
- Import, trading, storage, transport: Which activity is now allowed 100% foreign owned? Which as a JV?
- The new Petroleum Products Law: what are the key points to know?
- How does the new Petroleum Products Law impact Myanmar LNG import and regasification projects?
- Buying a stake in a Myanmar national-owned fuel terminal or distribution business: a new structuring option has opened up by a change in the regulatory practice;
- Deal killers in fuel terminal due diligence: a roundup of VDB Loi experience scrutinizing land sites;
- Last minute changes adopted during the National Assembly discussion of the new Petroleum Products Law: what was the rationale behind the new provisions?

To attend, you can request an invite from Nidhi Shenoy at nidhi.shenoy@vdb-loi.com.

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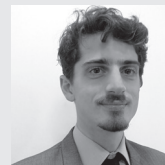
Edwin Vanderbruggen is one of the most prominent foreign legal advisers in Myanmar, and he is widely recognized for his experience in the energy and infrastructure space in Myanmar. Edwin's experience working with the Myanmar Government is second to none, as he advises the Government on privatization transactions and PPPs in energy, transport and telecommunications. He and his team have uniquely extensive experience in electric power, and were involved in four out of five of the Myanmar gas and renewable projects concluded in March 2016, and he advised the Japanese Government on their investment in the Thilawa SEZ. Edwin worked on the planning, negotiation, documentation and financing for projects of all types of power generation, including gas, coal, hydro, solar, wind and W2E in Myanmar. He also advises four of the 'super majors' on oil and gas interests in Myanmar and on the first LNG terminal in the country. He lives in Yangon.

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ENERGY TEAM

VDB Loi has created a practice team to support the partners comprising foreign and locally qualified lawyers and regulatory advisers work exclusively on Energy matters.



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The Energy team is led by Charles Magdelaine. Charles is a French lawyer qualified to practice in Paris educated in France, the United States and China. He has extensive experience in the documentation, financing and negotiation of energy projects in Southeast Asia, and Myanmar more in particular. Charles focuses on oil and gas, infrastructure, power and other natural resources projects.

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