



OECD Investment Policy Reviews

MYANMAR

2020



OECD Investment Policy Reviews: Myanmar 2020

This work is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of OECD member countries.

This document, as well as any data and map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

Please cite this publication as:

OECD (2020), *OECD Investment Policy Reviews: Myanmar 2020*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/d7984f44-en>.

ISBN 978-92-64-80871-3 (print)

ISBN 978-92-64-53297-7 (pdf)

OECD Investment Policy Reviews

ISSN 1990-0929 (print)

ISSN 1990-0910 (online)

Photo credits: Cover © Oleksii Hlembotskyi/iStock/Getty Images Plus.

Corrigenda to publications may be found on line at: www.oecd.org/about/publishing/corrigenda.htm.

© OECD 2020

The use of this work, whether digital or print, is governed by the Terms and Conditions to be found at <http://www.oecd.org/termsandconditions>.

Preface

by
His Excellency U Thaung Tun, Minister of Investment and Foreign Economic Relations,
Republic of the Union of Myanmar
and
Mr. Masamichi Kono, Deputy Secretary-General, OECD

In the past decade, Myanmar has implemented major economic and political reforms to gradually open its economy and to build sustainable private sector-led growth, with the ultimate objective of improving the lives of Myanmar citizens. As a result, Myanmar has become one of the fastest growing economies in the region. The number of people living under the poverty line has fallen drastically. However, 50 years of isolation cannot be overcome overnight. As this 2nd *OECD Investment Policy Review of Myanmar* aptly states, “despite substantial improvements, a peaceful Myanmar, open to the world and on a sustainable and inclusive development path, is still a work in progress.”

Myanmar has come a long way in laying down the legal foundations to support a thriving business environment. Building on many of the recommendations from the first *OECD Investment Policy Review of Myanmar* (2014), outdated colonial era laws governing business activities have been replaced by modern frameworks, and many restrictions placed on foreign investments have been removed in the past five years. The government established in 2015 its first Special Economic Zone (SEZ) at Thilawa on the outskirts of Yangon and more are expected to be created in the near future to attract further investments. The Thilawa SEZ has attracted over a hundred investors from nearly 20 countries and is charting the way for a successful business environment nationwide. These advancements are contributing to further economic diversification and generating quality jobs for the people of Myanmar. These reforms have also resulted in increased foreign investment, with FDI stocks growing 12% on average annually from 2011 to 2019, and playing a major role in Myanmar’s economic transformation in the post-liberalisation era, contributing both to capital accumulation and productivity gains.

The first *OECD Investment Policy Review of Myanmar* (2014) was in many ways instrumental in shaping these past reforms, but the full achievement of Myanmar’s sustainable development objectives will require building and expanding on this progress. This 2nd *OECD Investment Policy Review of Myanmar* focuses on complementary actions that can further support the strengthening of Myanmar’s business environment and to ensure that these reforms benefit society at large. It provides an assessment of Myanmar’s current policies in critical areas such as green growth, responsible business conduct (RBC), SEZs and land rights and administration. The recommendations provide the government with tangible policy options to enhance the mobilisation of investments that can support the needs of the times in terms of environmental sustainability, inclusiveness, and responsible business conduct more broadly.

The *Review* stresses, for instance, the importance of embedding Myanmar’s SEZ and industrial zone development strategies into a broader enabling policy and institutional eco-system for nurturing deeper linkages of zones, and foreign investors more generally, with the local economy. It documents the unique opportunity for Myanmar to strengthen at this early stage of development its commitments to green growth policies for avoiding locking-in unsustainable development pathways to the detriment of more forward-

looking, low-emissions and climate-resilient development. Myanmar is one of the most vulnerable countries in the world to climate change and cannot afford to consume its rich natural endowments in an unsustainable manner. The livelihoods of millions of its citizens are directly at stake.

The *Review* also underlines the important role that the government can play in promoting and supporting RBC. This becomes ever-more important as Myanmar increasingly opens its economy and progressively integrates itself into the world economy. Societal demands on RBC are rising globally alongside greater international scrutiny by trading partners, businesses and civil society. A failure to meet and address these RBC standards can negatively impact on investment, trade and tourism. There is a clear argument, therefore, to work toward promoting the protection of human rights, ensuring that businesses identify and manage RBC risk, and that there is a strong framework for RBC in Myanmar. The *Review's* recommendations provide insights and directions to make progress in this regard.

Addressing the complicated and conflicting land-governance situation is perhaps Myanmar's greatest reform challenge in the near term. As stressed in the *Review*, this is a complicated issue that, if not addressed, will continue to have important economic and political implications, including for the ongoing peace process.

Like for most countries, Myanmar's previous achievements and efforts will be put at considerable strain due to the covid-19 crisis. GDP growth is expected to more than halve in 2020 due to declines in trade, FDI, and tourism, as well as commodity prices shocks, with the most vulnerable populations being disproportionately affected. Investment will be key for the recovery and many of the structural challenges and policies to investment discussed in this *Review* will resurface again in an ever more important fashion as investors become more risk-averse and selective and industries get eventually reshaped by a faster adoption of transformative technologies and new business models.

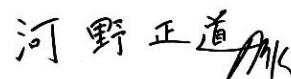
Moving ahead with reforms in all these areas will, therefore, be essential in the long run, if Myanmar is to benefit in full from past reforms to improve its investment climate. In so doing, Myanmar can ensure that incoming investments truly contribute towards improving the lives of Myanmar people and meeting the Sustainable Development Goals (SDGs).

The Government of the Republic of the Union of Myanmar and the OECD are very pleased to have once again joined forces in this *2nd OECD Investment Policy Review of Myanmar*, giving continuity to a collaboration that first started in the early years of reform. This could not have been achieved without the support of the governments of Norway and Switzerland.

H.E. U Thaung Tun
Union Minister of Investment and Foreign
Economic Relations



Masamichi Kono
Deputy Secretary-General
OECD



Foreword

Only six years sets this *2nd OECD Investment Policy Review of Myanmar* apart from the first review published in 2014, but much progress has occurred in investment policies and related areas in Myanmar in the interim. The first review was in many ways instrumental in shaping these past reforms. It took place at a time when very little policy work had been undertaken with the Government of Myanmar, and donors were just beginning to turn their attention to private sector development in Myanmar.

This 2nd *Review* takes place at a time when diagnoses of the economic challenges facing Myanmar are multiplying and donor support is ubiquitous. The *Review* is therefore more selective in its policy areas coverage and focuses more on impact and on how foreign investment can help Myanmar achieve the Sustainable Development Goals. As with the first review, it relies on the *OECD Policy Framework for Investment (PFI)*, a tool developed at the OECD to help governments address investment climate challenges.

The *Review* was mostly prepared before the outbreak COVID-19 pandemic, but some consideration is given to the immediate challenges emerging from the crisis in the Assessment and Recommendations. The *Review* remains, nonetheless, highly relevant for the aftermath of the current global economic crisis. Investment will be key for the recovery and many of the pre-COVID-19 structural challenges and policies discussed in this *Review* will resurface then in an ever more important fashion, as investors become more risk-alert and selective, and industries are eventually reshaped by the faster adoption of transformative technologies and business models.

This *Review* has been prepared by the OECD Secretariat at the request of the Government of Myanmar. It was carried out in close co-ordination with the Directorate of Investment and Company Administration of the Ministry of Investment and Foreign Economic Relations and supported by an inter-ministerial task-force established for discussing in a whole-of-government approach – characteristic of the OECD's PFI – policy priorities, assessments and strategic orientations of the government in the area of investment. It has benefited from the peer review of the OECD Investment Committee and stakeholder consultations with Myanmar-based foreign government representatives, international organisations, the private sector, civil society and academia. It was discussed at the OECD Investment Committee in June 2020 with the participation of a Myanmar delegation led by H.E. U Thaug Tun, Minister of Investment and Foreign Economic Relations.

The *Review* was prepared by a team led by Fernando Mistura and comprising Iris Mantovani and Baxter Roberts from the OECD Investment Division, Mike Pfister from the OECD Public Governance Directorate, and Naeeda Crishna Morgado and Margaret Wachenfeld, external consultants, under the overall guidance of Stephen Thomsen, Head of Investment Policy Reviews. The RBC chapter was authored by Coralie Martin from the OECD Centre for Responsible Business Conduct as part of the broader project on *Responsible Supply Chains in Asia* funded by the European Union. Angèle N'Zinga provided administrative assistance. Kosu Kunii, former OECD policy analyst, provided inputs. Ana Novik, Head of the Investment Division, Alexandre de Crombrughe and David Gaukrodger, senior policy analysts at the OECD Investment division, and Tihana Bule, manager at the OECD Centre for RBC, provided comments.

This *Review* was supported by the Governments of Switzerland and Norway.

Table of contents

Preface	3
Foreword	5
Acronyms and abbreviations	13
Executive Summary	17
1. Assessment and recommendations	19
Economic reforms have seen some measure of success	20
...but many problems raised in the first review persist	20
Taking stock of investment-related developments since 2014	22
The challenge of effective governance	38
Decentralisation as a political imperative	43
Improving the investment climate in Myanmar	45
References	63
Notes	66
2. Investment policy	67
The regulatory regime for foreign investors: barriers to entry and operations	70
Protection of investments and dispute settlement in Myanmar	81
References	95
Notes	101
3. Investment promotion and facilitation	105
Institutional setting for investment promotion and facilitation	109
The Investment Promotion Plan and related investment facilitation reforms	111
Strengthening the autonomy of the IPA	119
Policy advocacy, investor targeting and aftercare?	122
Domestic coordination for investment promotion and facilitation	124
Policy monitoring and evaluation	127
International policy frameworks to facilitate investment to Myanmar	127
References	128
Notes	129
4. Promoting and enabling responsible business conduct	131
Scope and importance of RBC	134

With Myanmar's greater openness and integration into global supply chains has come increased international scrutiny	136
Clarifying expectations on RBC	140
Supporting businesses in navigating RBC risks and implementing RBC principles and standards	142
Channelling national efforts to promote RBC in Myanmar	153
References	155
Notes	161
5. Infrastructure connectivity	163
Myanmar's trade structure and potential for export-oriented investment development	166
Transport connectivity weaknesses in the main economic corridors and international gateways	170
Investments into transport infrastructure: more resources and efficiency needed	176
References	180
Notes	181
6. Investment framework for green growth	183
Green growth and investment in Myanmar: seizing the opportunity to transition to an environmentally sustainable development pathway	185
Policy framework for green growth and climate change	187
Promoting investment in priority areas for green growth: renewable energy	191
Financing for green growth	193
References	195
Notes	196
7. Making the most of economic zones	197
The case for special economic zones	201
The regulatory framework for zones in Myanmar	205
Implementation and impact: Thilawa and Mingaladon	214
Enhancing the impact of SEZs through business linkages	220
References	227
Notes	229
8. Fostering secure and well-defined land rights	231
Overview of Myanmar's land regime and recent reform context	235
Key overarching challenges of Myanmar's land regime	239
A National Land Law to update and consolidate the current framework	263
Key policy recommendations to improve land tenure security and administration	264
Key considerations for responsible investors in agriculture and other land-intensive projects	273
References	275
Annex 8.A. Main types of land use rights in Myanmar	278
Notes	279

Tables

Table 1.1. Overview of FDI qualities in Southeast Asia	32
Table 1.2. Myanmar strategic and sectoral plans	34
Table 1.3. The legislative framework for investment has improved significantly	34
Table 1.4. Some key recommendations from the 1 st OECD Investment Policy Review	35
Table 1.5. Brief comparison of the new Myanmar Investment Law (2016) and previous Foreign Investment Law (2012)	36
Table 1.6. Selected governance indicators for Myanmar	39

Table 2.1. List of manufacturing activities facing FDI restrictions	75
Table 2.2. Restrictions on foreign investors in land under Myanmar land laws	79
Table 3.1. Achieving the FDIPP targets	111
Table 3.2. Myanmar's Performance in the World Bank's Doing Business Index, by category, out of 190 countries included	112
Table 3.3. Doing Business in Myanmar and selected ASEAN economies, 2014 and 2020	116
Table 3.4. Advantages and disadvantages of joint investment and export promotion mandates	124
Table 3.5. General framework of IPA institutional co-operation and co-ordination	125
Table 3.6. DICA's institutional interactions	125
Table 5.1. Myanmar regional trade: Exports and imports (USD millions)	166
Table 5.2. Myanmar top 5 export partners in 2017 (USD millions)	167
Table 5.3. Myanmar top 5 import partners in 2017 (USD millions)	167
Table 5.4. Myanmar top 5 trade products in 2017 (USD million)	168
Table 5.5. Myanmar principal commodity exports by destination in 2017 (mt)	168
Table 5.6. Myanmar border trade by border stations (USD million)	169
Table 5.7. Myanmar national logistics master plan 2018-2030: Main corridors	170
Table 5.8. Conditions in Myanmar's backbone freight transport corridors	172
Table 6.1. Multilateral environmental agreements (MEAs) ratified by Myanmar	188
Table 6.2. Policy framework related to green growth and the environment in Myanmar	189
Table 7.1. Types of zones	201
Table 7.2. SEZs in Myanmar	202
Table 7.3. Main policy areas covered by regulatory framework of SEZs	205
Table 7.4. Investment attraction tools in SEZ laws	206
Table 7.5. Preferential tax treatment inside and outside Myanmar SEZs	207
Table 7.6. Establishment and operational requirements for SEZ users	209
Table 7.7. Action plan for improving industrial zone administration	212
Table 7.8. Industrial zone occupancy by region	220
Table 8.1. Statutory authority assigned to different government departments/ministries in accordance with different land categories	236
Table 8.2. Area classified by type of land, 2017	237

Figures

Figure 1.1. GDP Growth Decomposition in post-liberalisation period: Myanmar and regional peers, percent	23
Figure 1.2. Foreign Direct Investment: (A) FDI Inflows in post-liberalisation period, years from reform commencement (percent of GDP) and (B) Approved FDI stocks: total and manufacturing (USD million)	23
Figure 1.3. Real GDP Growth, 2015-2021	25
Figure 1.4. FDI and sustainable development outcomes in Myanmar	31
Figure 1.5. FDI and job creation by industry	33
Figure 1.6. FDI and job creation in Southeast Asia	33
Figure 1.7. OECD FDI Regulatory Restrictiveness Index, 2019 (open=0; closed=1)	37
Figure 2.1. OECD FDI Regulatory Restrictiveness Index, 2019 (open=0; closed=1)	73
Figure 2.2. OECD FDI Regulatory Restrictiveness Index, by sector and type, 2019	76
Figure 2.3. Simulated effects of FDI liberalisation reforms in Myanmar	81
Figure 2.4. World Justice Project Rule of Law Index, 2019: Myanmar and lower-middle income peers (best=1; worst=0)	85
Figure 3.1. DICA's structure	110
Figure 3.2. DICA Investment Promotion Budget Use	110
Figure 5.1. Myanmar trade over sea vs border, 2019 (USD million)	169
Figure 5.2. The World Bank's 2018 Logistics Performance Index: ASEAN comparison	171
Figure 5.3. Trends in long-distance transport by mode, 1990-2013	171
Figure 5.4. OECD 2017 Trade facilitation indicators	175
Figure 5.5. Net ODA (% of GNI): Myanmar and selected peers, 2008-2017	177
Figure 6.1. Forest cover as % of total land area in selected Southeast Asian countries, 1990 to 2017	186
Figure 6.2. Backlog of responses to and approvals for EIAs, IEEs and EMPs	190
Figure 6.3. Climate-related development finance to Myanmar, 2013 to 2018, by sector	194
Figure 7.1. Existing industrial zones in Myanmar	204
Figure 7.2. Myanmar's institutional set-up for SEZs	211
Figure 7.3. Investment structure of the Thilawa SEZ developer	215

Figure 7.4. Setting up a business in Thilawa SEZ	216
Figure 7.5. Firms in Thilawa are predominantly foreign and larger	217
Figure 7.6. Large-scale employers prevail in the Free Zone	218
Figure 7.7. Skills are the most important perceived benefit of working in Thilawa and local content is relatively low	218
Figure 7.8. A step-by-step approach to develop Supporting Industries	225
Figure 7.9. A strategic network approach to linkage promotion	227
Figure 8.1. Land tenure security and agricultural productivity	240
Figure 8.2. Large-scale land allocations for agriculture (thousand acres)	262
Figure 8.3. FAO Proposed Structure of NLUP Implementation	264

Boxes

Box 1.1. The Policy Framework for Investment	21
Box 1.2. Myanmar's COVID-19 Economic Relief Plan (CERP): main support measures	26
Box 1.3. OECD IPAs' strategic responses to the COVID-19 outbreak	28
Box 1.4. The OECD FDI Qualities Indicators	30
Box 1.5. What are regulatory impact assessments?	40
Box 1.6. Good practices for public consultations	41
Box 1.7. Decentralisation in Indonesia has been a learning process	44
Box 2.1. Calculating the OECD FDI Regulatory Restrictiveness Index	71
Box 2.2. Recent approaches to the FET provision and ISDS	89
Box 2.3. Negative and positive list-approaches to NT and MFN exceptions	92
Box 3.1. OECD Recommendation of the Council on Regulatory Policy and Governance	115
Box 3.2. Key requirements and steps for setting up a business in Myanmar	117
Box 3.3. One-stop shop inter-ministerial coordination	118
Box 3.4. Rwandan Development Board	120
Box 4.1. Key International Instruments on RBC	134
Box 4.2. Examples of social and inclusive business models and strategies	135
Box 4.3 Rising demands on RBC	139
Box 4.4. The OECD-FAO Guidance for Responsible Agricultural Supply Chains	144
Box 4.5. Examples of initiatives to support and facilitate implementation of the OECD Due Diligence Guidance for Responsible Mineral Supply Chains	147
Box 7.1. Evidence of SEZ impacts	202
Box 7.2. Experience of centralised and decentralised zone authorities	213
Box 7.3. Investor facilitation excellence in the Philippines	216
Box 7.4. Lessons from Malaysia's Penang Skills Development Centre	223
Box 7.5. Thailand's approach to developing supporting industries	224
Box 7.6. Thailand's strategic network approach to linkage promotion	226
Box 8.1. Key recent land policy developments	238
Box 8.2. FAO guidelines on tenure rights – recognising customary tenure	241
Box 8.3. Current land administration bodies	246
Box 8.4. Land-related requirements under the Myanmar Investment Law	252
Box 8.5. Land and the Panglong process	261
Box 8.6. Expropriation legislation in India	268

Follow OECD Publications on:



http://twitter.com/OECD_Pubs



<http://www.facebook.com/OECDPublications>



<http://www.linkedin.com/groups/OECD-Publications-4645871>



<http://www.youtube.com/oecdilibrary>



<http://www.oecd.org/oecddirect/>

Acronyms and abbreviations

ACC	Anti-Corruption Commission
ACIA	ASEAN Comprehensive Investment Agreement
ACT	Action, Collaboration, Transformation
ADB	Asian Development Bank
ADS	Agriculture Development Strategy and Investment Plan 2018–2023
AJCEPA	ASEAN-Japan Comprehensive Economic Partnership Agreement
AMS	ASEAN Member States
APG	Asia / Pacific Group on Money Laundering
ASEAN	Association of Southeast Asian Nations
ASM	Artisanal and Small-scale Mining
BECZ	Border Economic Cooperation Zones (BECZ)
BHR	Business and Human Rights
BITs	Bilateral Investment Treaties
BRI	Belt and Road Initiative
CBD	Convention on Biological Diversity
CCVfV	Central Committee for the Management of Vacant, Fallow and Virgin Lands
CETA	Comprehensive Economic and Trade Agreement
CIT	Corporate Income Tax
COVID-19	Coronavirus 2019
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRM	Customer Relationship Management
CSOs	Civil Society Organisations
DALMS	Department of Agriculture Land Management and Statistics
DICA	Directorate for Investment and Company Administration
DISI	Directorate of Industrial Supervision and Inspection
EAOs	Ethnic Armed Organisations
ECCs	Environmental Compliance Certificates
ECD	Environmental Conservation Department
ECL	Environmental Conservation Law
EIA	Environmental Impact Assessment
EITI	Extractive Industry Transparency Initiative
EMP	Environmental Management Plan
EPZ	Export Processing Zones
ESG	Environmental, Social and Governance
ESIA	Environmental and Social Impact Assessment
ESR	Export Share Requirement
EU	European Union
EU EBA	European Union Everything But Arms arrangement
FAB	Farmland Administrative Body
FAO	Food and Agriculture Organization of the United Nations
FATF	Financial Action Task Force
FDI	Foreign Direct Investment

FET	Fair and Equitable Treatment
FIL	Foreign Investment Law
FPIC	Free, Prior and Informed Consent
FWF	Fair Wear Foundation
G20	Group of Twenty biggest economies in the world
G7	Group of Seven Nations
GAD	Union Government's General Administration Department
GMS	Greater Mekong Subregion
GVCs	Global Value Chains
GW / GWh	Gigawatt / Gigawatt-hour
IAC	Investment Assistance Committee
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDPs	Internally Displaced Persons
IEE	Initial Environmental Examination
IFC	International Finance Corporation
ILO	International Labour Organisation
IMF	International Monetary Fund
Index	OECD FDI Regulatory Restrictiveness Index
IP	Intellectual Property
IPA	Investment Promotion Agency
IPC	Investment Promotion Committee
IPP	Independent Power Producers
ISDS	Investor-State Dispute Settlement
ISIC	International Standard Industrial Classification
ISPAT	Investment Support and Promotion Agency of Turkey
IWT	Inland Water Transport
IZ	Industrial Zone
JETRO	Japan External Trade Organisation
JICA	Japan International Co-operation Agency
LRA	Land Rights Authorisation
LUC	Land Use Certificate
M&E	Monitoring and Evaluation
MAC	Myanmar Arbitration Centre
MACCS	Myanmar Automated Cargo Clearance System
MCCSAP	Myanmar Climate Change Strategy and Action Plan 2018–2030
MCIS	Myanmar Customs Intelligence System
MCL	Myanmar Companies Law
MCRB	Myanmar Centre for Responsible Business
MEAs	Multilateral Environmental Agreements
MFN	Most-Favoured Nation
MIC	Myanmar Investment Commission
MIFER	Ministry for Investment and Foreign Economic Relations
MIL	Myanmar Investment Law
MIOD	Myanmar Institute of Directors
MIPP	Myanmar Investment Promotion Plan
MIR	Myanmar Investment Rules
MJTD	Myanmar Japan Thilawa Development Ltd.
MMK	Myanmar Kyat
MNE	Multinational Enterprises
MNHRC	Myanmar Human Rights Commission
MOALI	Ministry of Agriculture, Livestock and Irrigation
MONREC	Ministry of Natural Resources and Environmental Conservation

MOPFI	Ministry of Planning, Finance and Industry
MoU	Memorandum of Understanding
MSDP	Myanmar Sustainable Development Plan
MST	Minimum Standard of Treatment
MW / MWh	Megawatt-hour
MyCo	Myanmar Companies Online Portal
NAFTA	North American Free Trade Agreement
NAP	National Action Plan
NCP	National Contact Point
NDCs	Nationally-Determined Contributions
NEP	National Environmental Policy 2019
NLD	National League for Democracy
NLL	National Land Law
NLMP	National Logistics Master Plan 2018-2030
NLUC	National Land Use Council
NLUP	National Land Use Policy
NSW	National Single Window
NT	National Treatment
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
ORD	Office of Registration of Deeds
OSS	One-Stop-Shop
OSSC	Thilawa One-Stop-Shop-Centre
PAT	Proposal Assessment Team
PFI	Policy Framework for Investment
PIE	Private Industrial Enterprise Law 1990
PPA	Power Purchase Agreement
PPP	Public-Private Partnership
PSDC	Private Sector Development Committee
R&D	Research & Development
RBC	Responsible Business Conduct
RBF	Responsible Business Fund
RCEP	Regional Comprehensive Economic Partnership
RIA	Regulatory Impact Assessment
SDGs	Sustainable Development Goals
SEA	Strategic Environmental Assessments
SEE	State Economic Enterprises
SEZs	Special Economic Zones
SMEs	Small and Medium-sized Enterprises
SOEs	State-Owned Enterprises
SOPs	Standard Operating Procedures
TEU	Twenty-foot Equivalent Unit
TIPRA	Transfer of Property Restriction Act
TRIPS	WTO Trade-Related Aspects of Intellectual Property Rights Agreement
TSMC	Thilawa SEZ Management Committee
TVET	Technical and Vocational Education and Training
UAGO	Union Attorney-General Office
UMFCCI	Union of Myanmar Federation of Chambers of Commerce and Industry
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme

UNFCCC	United Nations Framework Convention on Climate Change
UNGP	United Nations Global Compact
UNHCR	United Nations High Commissioner for Refugees
UNWG	United Nations Working Group on Business and Human Rights
USMCA	United States-Mexico-Canada Agreement
VAT	Value-added Tax
VFV Land	Vacant, Fallow and Virgin Land
VGGT	FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
VTAs	Village Tract Administrators
WIPO	World Intellectual Property Organisation
WJP Index	World Justice Project Rule of Law Index
WTO	World Trade Organisation
WWF	World Wildlife Fund

Executive Summary

Myanmar has undergone a tremendous economic and political transformation since 2011. Following decades of economic and political isolation, democracy has been restored. Formerly a virtually closed economy with a regulatory framework for business based on a century-old colonial model, Myanmar is now an open economy with modern business regulations. Consecutive governments since 2011 have been able to give continuity to reforms oriented at further opening the economy and building a sustainable, private sector-led growth trajectory, fuelled in part by foreign investment, with the ultimate objective of improving the lives of Myanmar citizens. This aspiration and vision have been consolidated in the Myanmar's Sustainable Development Plan (MSDP) 2018–2030. But despite improvements, a peaceful Myanmar, open to the world and on a sustainable and inclusive development path, is still a work in progress.

The reform momentum needs to be sustained and deepened for the benefits of recent investment climate reforms to be shared widely and for growth to be environmentally sustainable, ultimately contributing toward the Sustainable Development Goals (SDGs).

The adoption of the new Myanmar Investment Law (2016) and the new Myanmar Companies Law (2017) went a long way in establishing a modern legislative framework for businesses, pioneering explicit investors' obligations to act responsibly and considerably reducing regulatory barriers to foreign direct investment (FDI), but implementation still lags behind in various areas and some critical complementary reforms have not kept pace. The overall legislative framework has not been renewed in all areas, most notably in the area of land, and institutional reforms have not by themselves resolved the issue of inter-ministerial co-ordination. The slow pace of the peace process and the humanitarian crisis in Rakhine State have also continued to weigh on Myanmar's investment climate.

The newly established investor grievance mechanism and recent laws concerning intellectual property rights and arbitration are laudable additions to an improved investment climate, as they bring Myanmar's legal framework broadly in line with international standards in these respects. But the success of these recent developments hinges on ongoing efforts to improve the independence and competency of the judiciary and the Myanmar courts. Myanmar is also at an important juncture in terms of its approach to investor protection in investment treaties. With relatively few investment treaties in force today, Myanmar is in a favourable position to review its approach to investment treaties so that its treaty network reflects the appropriate balance of preserving the government's right to regulate while contributing to Myanmar's efforts to attract FDI.

Myanmar's investment promotion and facilitation framework has also evolved considerably since the early days of reforms. The new Union Ministry of Investment and Foreign Economic Relations has been created to steer and co-ordinate investment policy, and development financing more broadly, and the Myanmar Investment Promotion Plan (MIPP) for 2016–2036 now provides long-term guidance for investment promotion activities. Important strides have also been made in streamlining procedures for establishing a business and in obtaining investment approvals and other needed licences with the one-stop-shop (OSS). The substantial progress made in the ease of starting a business has been attested by Myanmar's considerable improvement in the relevant World Bank's *Doing Business* sub-indicator. Nevertheless, more

could still be done. Investors still complain about the lack of clarity and the burden of procedures for obtaining ministerial licences and permits necessary for operating their businesses, and the OSS system still operates more as a centralised information centre than an actual single window agency.

With the renewed investment framework in place, the Directorate of Investment and Company Administration, Myanmar's investment promotion agency, may also start to graduate to more sophisticated investment facilitation and promotion activities. Beyond strengthening its investment facilitation and policy advocacy functions, it could leverage its reputation and close proximity with investors to assist the relevant agencies in capacity building for domestic industries and linkage programmes with foreign investors.

Building on the experience of other countries and on Myanmar's own experience with the Thilawa Special Economic Zone (SEZ) and industrial zones, it is important that Myanmar's SEZ and Industrial Zones approach integrates a broader strategy and institutional eco-system for nurturing deeper linkages of such zones with the local economy. The Thilawa SEZ has been successful in attracting and diversifying investments and is charting the model for a successful operating environment for business nationwide, but without the development of domestic industry capabilities, the zone spillover potential will remain fairly low.

Increasing investments in transport connectivity and enhancing the efficiency of hard and soft transport infrastructure are other equally important elements for a thriving business environment. Myanmar's transport and logistics infrastructure is still underdeveloped and has failed to keep pace with the rising demand on the main logistics corridors. The Project Bank will contribute to channelling resources to priority projects, but such an endeavour would greatly benefit from improvements in the framework for public and private investments in infrastructure, the rehabilitation and modernisation of state-economic enterprises, and the strengthening of trade facilitation and other soft infrastructure.

Attracting investments that contribute to sustainable and inclusive development as sought in the MSDP and the MIPP could also be facilitated by a clearer and more ambitious government signalling of its expectations and commitments to promoting responsible business conduct (RBC) and green growth. With Myanmar's greater openness and integration into global value chains has also come increased international scrutiny. In a context where demands on RBC are rising globally, Myanmar has every interest in working towards strengthening the enabling framework for RBC and minimising businesses' exposure to RBC risks. Sending a stronger signal to investors about Myanmar's commitments to green growth, including by promoting renewable energy more aggressively and in a more structured manner, and ensuring the effective implementation of Myanmar's environmental impact assessment system, would similarly help to avoid locking the economy into an unsustainable development pathway.

Lastly, a truly inclusive and sustainable investment-friendly environment will only be possible when investors' and people's rights to land can be adequately secured. Few matters are as complex as land policy in Myanmar. Addressing the many weaknesses of the land regime will be challenging, not least because of the deeply rooted interlinkages between land governance and the peace process, but delays in finding a solution will continue to impose damaging consequences on the economy, the environment and the population. Moving forward with this complex process of land reform in a conflict-sensitive manner, taking into account land-related matters of the peace process and through wide engagement with stakeholders, is nonetheless essential for incoming investments to sustainably contribute to improving the livelihood of Myanmar citizens.

1. Assessment and recommendations

Myanmar's economic and political reform path is now approaching its first decade. Following decades of economic and political isolation, Myanmar returned to civilian rule in 2011 and installed its first democratically elected government in 2016. This political transformation has been accompanied by substantial economic reforms to open the economy and to build a growth trajectory based on export-led development fuelled in part by foreign investment. But despite substantial improvements, a peaceful Myanmar, open to the world and on a sustainable and inclusive path of development, is still a work in progress.

Putting an end to decades of conflict between various ethnic groups – and even among and within some ethnic minorities themselves – has proven to be a formidable challenge. The peace process has been painstakingly slow, with occasional reversals, while at the same time the conflict in Rakhine state continues to create a humanitarian crisis. While this review focuses primarily on the set of policies which can best stimulate responsible domestic and foreign investment and enhance its contribution to sustainable and inclusive development, it is not possible to separate economic policy from the broader political context. Questions of decentralisation and land reform, which would figure in any assessment of the investment climate, are also fundamental elements of any lasting peace settlement.

Many investors will hesitate before investing in conflict-affected areas without a peace settlement, and the peace process will never be fully complete without economic security and an adequate division of resources and responsibilities between the Union and the States and Regions. And local resistance to certain large projects, while driven primarily by concerns about resettlement plans and environmental risks, are nevertheless amplified by historical frustrations over the lack of agency of local stakeholders and the lack of accountability of decision makers. Local populations have also often seen little benefit accruing from the extraction of natural resources and hydropower projects in their territory.

The emerging global economic crisis related to the COVID-19 pandemic is another important challenge with acute short-term effects and potential long-term implications for Myanmar's development. Much of Myanmar's economic growth and transformation since 2011 has been propelled by greater integration into the world economy through trade and investment linked to global value chains (GVCs), both of which have come to a sudden halt in many sectors as a result of the COVID-19 outbreak and are unlikely to recover quickly (OECD, 2020; World Bank, 2020). Myanmar firms and workers have already been strongly affected by the crisis (Asian Foundation, 2020; Myanmar Times, 2020).

In the short-term, it is imperative that the government dedicate its attention during the COVID-19 pandemic to securing the functioning of the health system and preventing a deeper economic recession with lasting poverty and welfare impacts. In the long-run, many of pre-COVID-19 structural challenges and policies to investment discussed in this *2nd Investment Policy Review* will resurface again in an ever more important fashion as investors become more risk-averse and selective and industries get eventually reshaped by a faster adoption of transformative technologies and new business models.

Economic reforms have seen some measure of success

At the time of the first political reforms in 2011, Myanmar was in many respects a closed economy, with little interaction with the outside world. Economic policy was largely driven by the requirements of self-sufficiency and the regulatory framework for business was based on a century-old colonial model. A first OECD *Investment Policy Review* undertaken in 2012-14 provided a road map for reforms to improve the investment climate, not just to attract more investment but also to ensure that investors act responsibly. These reforms included key legislative improvements such as the Myanmar Investment Law (MIL) and the Myanmar Companies Law (MCL), a number of strategic national plans brought together within the Myanmar Sustainable Development Plan (MSDP), and institutional reforms, such as the suppression of several ministries and the creation of the new Ministry for Investment and Foreign Economic Relations (MIFER). Substantial progress has been made in terms of foreign direct investment (FDI) liberalisation and the ease of doing business, as well as in terms of corporate governance, which has significantly improved Myanmar's rankings in some of the World Bank's *Doing Business* indicators.

As a result of these reforms and the lifting of sanctions and provision of duty-free access in key markets, Myanmar has been one of the world's fastest growing economies and foreign investors were initially enthusiastic about exploring opportunities for investing in one of Asia's last frontiers. A large market, rich in natural resources, with a young population, located within one of the most dynamic regions in the world offers a good basis on which to attract the attention of potential investors.

...but many problems raised in the first review persist

The overall legislative framework has not been renewed in all areas, most notably in the key area of land, and institutional reforms have not by themselves resolved the issue of poor inter-ministerial coordination. But to a certain extent, it is possible to say that the first phase of reform, including many areas highlighted in the first OECD *Investment Policy Review*, is on track. To call these reforms the low hanging fruit would be to underplay their importance, but in many ways the hard part of reform is yet to come. A modern legislative framework regulating business activity, developed through an inclusive process, is a good place to start, but implementation still lags far behind in various domains. Poor coordination among ministries and capacity constraints across the whole of government, which were identified in the first review, continue to hamper the effective implementation of reforms. Stakeholders on the ground also point to an overall slowdown in reform efforts, including pushback on liberalising measures and continued anti-competitive practices by rent-seeking incumbents.

Potential investors have also been dissuaded by the slow and uneven pace of the peace process and the on-going humanitarian crisis in Rakhine State. Beyond the reputational risk faced by investors and the need for rigorous due diligence, the potential reaction of home country governments in terms of market access and continuing donor support for reform also weighs on investment decisions. Partly as a consequence of these challenges, foreign investment approvals have fallen sharply from their peak in 2015-16.¹

The reform momentum thus needs to be sustained and deepened for the benefits of investment reforms to be shared widely and for growth to be environmentally sustainable. With this aim, this *2nd OECD Investment Policy Review of Myanmar* takes stock of the major investment climate reforms since the first review in 2014 and assesses the remaining challenges in a number of priority areas. It looks at how the Directorate for Investment and Company Administration (DICA), the investment promotion agency and key player in terms of business regulation, can improve the investment climate by strengthening its investment facilitation and policy advocacy functions, as well as leverage its reputation and close proximity with investors to work closely with other government agencies to foster greater linkages between domestic and foreign investors. It gives heightened attention to how the government can promote responsible

investment, one of the aims of the recent Myanmar Investment Law and an objective frequently reaffirmed by high-ranking Myanmar officials at investment fora.

Drawing on the experience of many other countries in the region and elsewhere, the review also addresses the potential role of special economic zones (SEZs) and industrial zones in promoting export-led development and the pitfalls to avoid in such a strategy. It also looks at how Myanmar could leapfrog carbon-based energy strategies to promote renewable sources of electricity and other aspects of sustainability, such as natural resource management. At the request of the Ministry for Investment and Foreign Economic Relations (MIFER), the main counterpart for this review, the review also addresses the persistent need to foster secure and well-defined land rights. This problem was raised in the first review, with limited improvement since then. It is a central component of any reform effort as it is key for inclusiveness, sustainability and the peace process, beyond the obvious need to provide certainty for investors.

The first OECD *Investment Policy Review* took place during the early years of reform, at a time when very little policy work had been undertaken with the government, and donors were only just beginning to turn their attention to private sector development in Myanmar. At the request of DICA, it took a comprehensive approach to investment climate reform, including a strong emphasis on the need to ensure responsible investment. This second review takes place at a time when diagnoses of the economic challenges facing Myanmar are multiplying and donor support for legislative reform and for national plans and strategies is ubiquitous. It is therefore more selective in its policy recommendations and focuses more on impact and on how foreign investment can help Myanmar to contribute to the Sustainable Development Goals (SDGs). As with the first review, it relies on the *Policy Framework for Investment* (Box 1.1), a tool developed at the OECD to help governments to address investment climate challenges.

Box 1.1. The Policy Framework for Investment

The *Policy Framework for Investment* (PFI) helps governments to mobilise private investment in support of sustainable development, thus contributing to the prosperity of countries and their citizens and to the fight against poverty. It offers a list of key questions to be examined by any government seeking to create a favourable investment climate. The PFI was first developed in 2006 by representatives of 60 OECD and non-OECD governments in association with business, labour, civil society and other international organisations and endorsed by OECD ministers. Designed by governments to support international investment policy dialogue, co-operation, and reform, it has been extensively used by over 30 countries as well as regional bodies to assess and reform the investment climate. The PFI was updated in 2015 to take this experience and changes in the global economic landscape into account.

The PFI is a flexible instrument that allows countries to evaluate their progress and to identify priorities for action in 12 policy areas: investment policy; investment promotion and facilitation; trade; competition; tax; corporate governance; promoting responsible business conduct; human resource development; infrastructure; financing investment; public governance; and investment in support of green growth. Three principles apply throughout the PFI: policy coherence, transparency in policy formulation and implementation, and regular evaluation of the impact of existing and proposed policies.

The value added of the PFI is in bringing together the different policy strands and stressing the overarching issue of governance. The aim is not to break new ground in individual policy areas but to tie them together to ensure policy coherence. It does not provide ready-made reform agendas but rather helps to improve the effectiveness of any reforms that are ultimately undertaken. By encouraging a structured process for formulating and implementing policies at all levels of government, the PFI can be used in various ways and for various purposes by different constituencies, including for self-evaluation and reform design by governments and for peer reviews in regional or multilateral discussions.

The PFI looks at the investment climate from a broad perspective. It is not just about increasing investment but about maximising the economic and social returns. Quality matters as much as the quantity as far as investment is concerned. It also recognises that a good investment climate should be good for all firms – foreign and domestic, large and small. The objective of a good investment climate is also to improve the flexibility of the economy to respond to new opportunities as they arise – allowing productive firms to expand and uncompetitive ones (including state-owned enterprises) to close. The government needs to be nimble: responsive to the needs of firms and other stakeholders through systematic public consultation and able to change course quickly when a given policy fails to meet its objectives. It should also create a champion for reform within the government itself. Most importantly, it needs to ensure that the investment climate supports sustainable and inclusive development.

The PFI was created in response to this complexity, fostering a flexible, whole-of-government approach which recognises that investment climate improvements require not just policy reform but also changes in the way governments go about their business.

For more information on the *Policy Framework for Investment*, see:

<http://www.oecd.org/investment/pfi.htm>.

Taking stock of investment-related developments since 2014

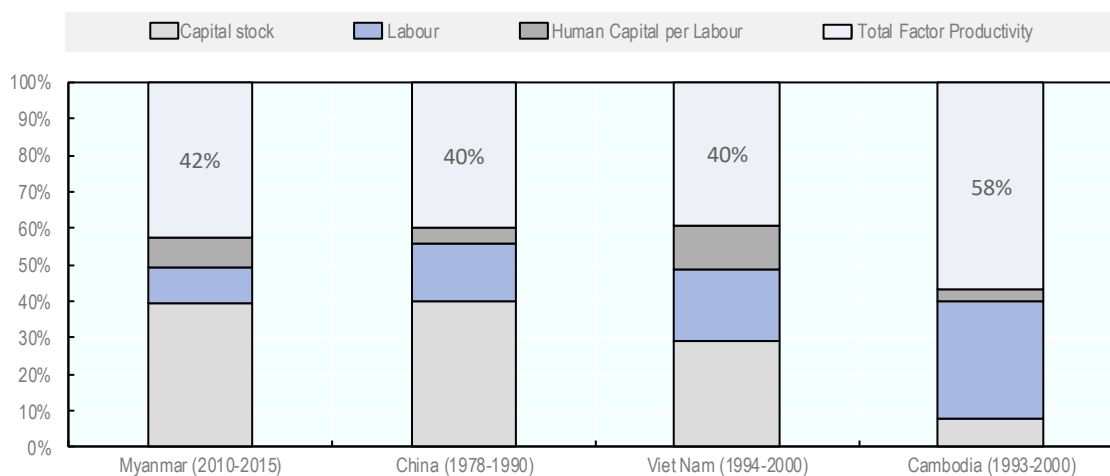
Economic performance

At a time of rapid economic change, it is perhaps easy to forget how far Myanmar has already come in such a short period of time. Prior to the reform period, the Myanmar economy was in many ways closed off to the global economy. Exports were minimal as a share of GDP and foreign investment was limited to a few large projects in natural resources, including hydropower. The financial system was primitive, with largely cash-based transactions and a dual exchange rate, while tax revenues relative to GDP were among the lowest in the world. Poverty was rampant, particularly in rural areas where much of the population lived without electricity.

Nine years cannot erase decades of mismanagement and Myanmar still faces many challenges, as befitting a least developed economy, but the achievements have nevertheless been impressive. According to the *Myanmar Sustainable Development Plan*, Myanmar has been one of the world's fastest growing economies in recent years, partly as a result of foreign investment, and poverty has declined from nearly one third of the population in 2005 to below 20% in 2015. The economy benefits from low inflation and monetary and fiscal stability, and state economic enterprises (SEEs) are being encouraged to transform into non-budgeted units, followed eventually by corporatisation and then equitisation (MOPFI, 2018). Exports of garments in particular have grown rapidly, along with employment in the sector.

Growth in the post-liberalisation period has been mainly driven by capital accumulation and productivity gains (World Bank, 2018), similar to the experience of regional peers during their respective periods of post-liberalisation reform (Figure 1.1). The large gains in productivity largely reflect the rapid structural transformation and greater integration into the world economy that Myanmar is going through.

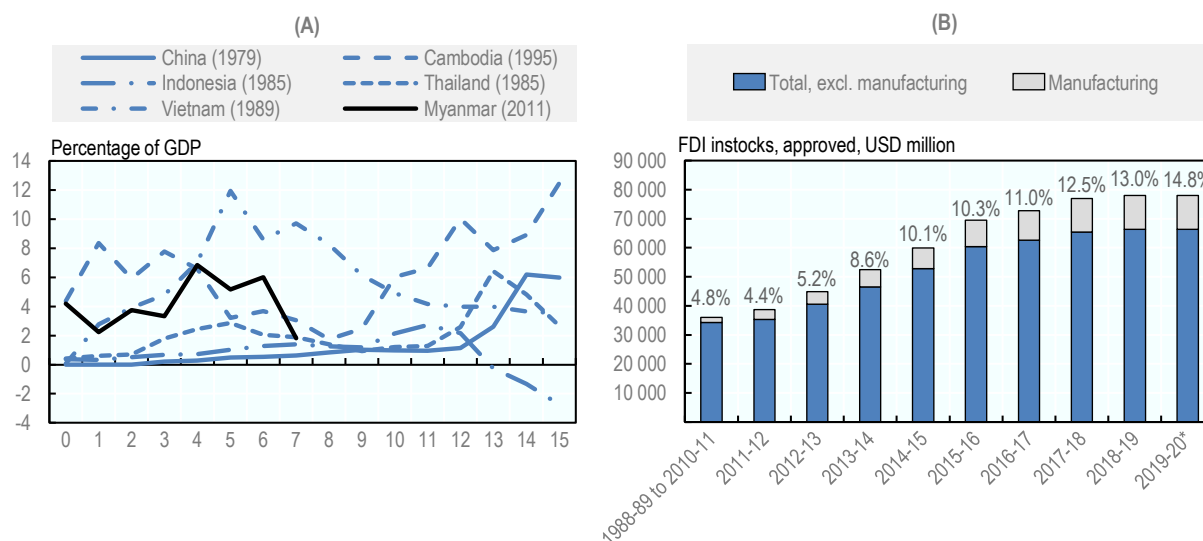
Figure 1.1. GDP Growth Decomposition in post-liberalisation period: Myanmar and regional peers, percent



Source: reproduced from World Bank (2018).

FDI has played a major role in supporting this economic transformation. Actual FDI inflows as a percentage of GDP grew considerably in the post-liberalisation period starting in 2011, notably during 2015-17. It then declined sharply in 2018, partly due to uncertainties arising from the Rakhine crisis and perceptions of slowing government reforms (Figure 1.2, Panel A).

Figure 1.2. Foreign Direct Investment: (A) FDI Inflows in post-liberalisation period, years from reform commencement (percent of GDP) and (B) Approved FDI stocks: total and manufacturing (USD million)



Note: (A) adapted from IMF (2018) with data from the World Bank World Development Indicators; and (B) based on data from DICA on cumulated FDI approved (permitted). Excludes foreign investment in SEZs and investments not under the purview of Myanmar Investment Commission in the past or present. Cumulative approved FDI does not necessarily match realised investments, but is indicative of the pattern of future inflows. (*) data for 2018-2019 estimated as of 30 September 2019.

Source: IMF (2018), World Bank Development Indicators database and DICA official statistics.

The government's renewed focus on economic reforms, with the announcement of the Project Bank (see Chapter 5) and the further opening of the financial sector to FDI (see Chapter 2) in early 2019, as well the creation of MIFER in late 2018, is expected to help spur investors' interest in Myanmar in the near term again and to halt this recent downward trend.

Approved FDI into manufacturing sectors outside SEZs has risen significantly since 2011, increasing from about 5% of foreign investments up to 2012-13 to 13% in 2018-19 (Figure 1.2, Panel B). Approved investments have in large part been implemented. Data on existing investments by foreign enterprises suggest that the manufacturing sector accounted for about 15% of the stock of existing foreign investments in Myanmar as of September 2019, in comparison to only 9% in 2015. Inside Thilawa SEZ which is the only operational SEZ at present, FDI in manufacturing is even more prevalent and growing, responsible for about 80% of all foreign investments. In total, as of September 2019, existing FDI inside the SEZ represented roughly 3% of all FDI in Myanmar, up a half percentage point from end-December 2018. These investments have and should contribute to furthering economic diversification, job creation and the development of better employment opportunities (see section below).

Despite the overall improvements since 2014, a number of development obstacles remain. The MSDP lists many of the challenges still faced by Myanmar, including a rural-urban divide, vulnerability to climate change, limited access to finance which is particularly acute for smaller companies, low productivity, an infrastructure gap and historic mismanagement and opacity in the natural resources sector (MOPFI, 2018). Only an estimated 50% of households have access to electricity, one of the lowest levels in the world in spite of abundant natural gas and hydropower. Furthermore, in spite of poverty reduction, one half of the population is estimated to be near poor and hence highly vulnerable to shocks (IMF, 2018). The private sector also complains of shortages of skilled labour.

Investment will be essential for Myanmar to meet the Sustainable Development Goals (SDGs), notably goals 8 and 9 on "sustained, inclusive and sustainable economic growth with increased economic productivity through diversification, technological upgrades and innovation" and to "build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation".

The government has set an ambitious target of 7.7% GDP growth, driven in large part by FDI and exports. While growth has been strong in the reform period, there are many risks which could affect this performance, not least through their impact on both FDI and exports. Already FDI flows have tapered off from the rapid growth in the early years of reform. In the short-term, the emerging global economic crisis related to the COVID-19 pandemic will certainly slow progress in this respect.

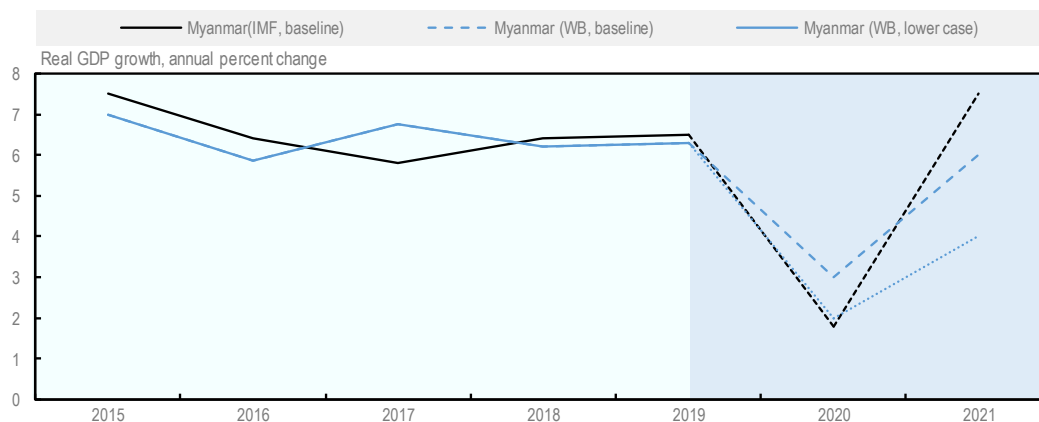
COVID-19 and its implications for Myanmar

The emerging global economic crisis related to the COVID-19 pandemic is expected to significantly slowdown Myanmar's previous strong economic growth. Real GDP growth is expected to more than halve to approximately 2-3% in 2020, compared to 6.3-6.5% estimated for 2019, before rebounding to 6%-7.5% in 2021 according to the baseline estimations by the World Bank (2020a) and the IMF (2020) (Figure 1.3). Global projections by the OECD (2020a) point to a 4.5% fall in global economic activity in 2020, before picking up by 5% in 2021. The magnitude of these extraordinary shocks is unprecedented. By the end of 2021, the global loss of income will exceed that of any previous recession over the last 100 years outside wartime, with dire and long-lasting consequences for people, firms and governments in 2020.

Myanmar is affected through trade, FDI, tourism, and commodity prices, with poor households being disproportionately affected (World Bank, 2020a). Merchandise trade represents about 51% of GDP in Myanmar, with regional trade with China, India and other ASEAN member states, notably Thailand and Malaysia, accounting for about three-quarters of Myanmar's trade. All of them are substantially exposed to the crisis. Economic activity in China and India are expected to contract by 2.6% and 3.7%, respectively, in the most optimistic scenario according to the OECD (2020a). The IMF (2020) estimates that Thailand's

economy will contract by 3% in 2020 and that of Malaysia by 1.7%, rebounding respectively by 6.1% and 9% in 2021. Globally, trade is projected to decline 9.5%-11.4% in 2020, before resuming by 2.5%-6% in 2021 (OECD, 2020a).

Figure 1.3. Real GDP Growth, 2015-2021



Source: IMF (2020) and World Bank (2020a)

Global FDI activity is expected to plummet by at least 30% under the most optimistic scenario (OECD, 2020b). FDI flows to developing countries are expected to drop even more because sectors that have been severely affected by the pandemic, including the primary and manufacturing sectors, account for a larger share of their FDI than in developed economies. The supply and demand shocks resulting from the pandemic will hit strongly some of Myanmar's most prominent investment sectors. Garments which represent about 28% of total merchandise exports are overwhelmingly intended for European markets, the worst hit region, and rely extensively on imported inputs from China. Over two-thirds of fuel exports, which represent over 21% of total merchandise exports, go to Thailand, the worst hit economy in ASEAN according to the World Bank (2020), with the rest going to China. Declining global energy prices also add further downward pressure to exports and fiscal revenues.

Tourism-supported services, such as hotels, restaurants and transport, which account for about 16% of GDP and 27% of employment in urban areas, were among the first to be affected by the crisis and possibly will be among the last to recover as the global economic downturn will have lasting effects on household spending. Travel and border restrictions initially placed on travelers arriving from China, which made up about 20% of international arrivals in 2018/19 (World Bank, 2020a), and then extended later to all international arrivals, were imposed in early February, about a month and half before the first two reported official COVID-19 cases. By 27 April, nearly a month after the first domestic containment measures were implemented, mobile phone mobility data reported a drop of 74% in visits to retail and recreational locations, such as cafés, restaurants, shopping centres and movie theaters as compared to early January. A 67% reduction was observed in visits to public transport stations, and grocery stores and pharmacies saw a 64% decline in visits during the same period (IFPRI, 2020).

The crisis has now already begun to reverberate strongly across the economy. A recent survey by the Asia Foundation (2020) indicates that nearly one third of companies in Myanmar had to temporarily close due to the COVID-19 outbreak and the vast majority of those maintaining operations have reported a turnover drop of more than 50%. Another survey conducted by Eurocham Myanmar (2020) with its member companies reported expected revenue losses in the range of 30% to over 50%. The biggest projected losses are found in tourism, automotive, garments, fast-moving consumer goods and retail distribution. By the end of April 2020, according to the government, over 60 000 workers had lost their jobs due to closures

and workforce reductions in factories following cancelled orders and the disruption of raw material supplies due to the pandemic (Myanmar Times, 2020a).

In such a pandemic crisis, aside from strengthening the health system, including by securing the supply of needed medical equipment, the government needs to focus on protecting jobs and household income and on preventing otherwise viable firms from bankruptcies. A number of policies have been used by governments worldwide for these purposes (e.g. short-time work and income support schemes, tax deferrals and credit guarantees etc.) according to the IMF's COVID-19 policy tracker. The Myanmar government has established the COVID-19 Economic Relief Plan (CERP), which consists of a comprehensive set of emergency fiscal and monetary measures addressing workers and businesses' needs, although implementation has sometimes been faulted for not reaching those most in need (Myanmar Times, 2020a; IFPRI, 2020). Among the most noteworthy measures are the establishment of a USD 71 million COVID-19 Fund to provide loans to mostly Myanmar-owned SMEs in the apparel, hospitality and tourism sectors, and deferral of corporate and commercial taxes interim payments until the end of the 2019/20 fiscal year (see Box 1.2).

Box 1.2. Myanmar's COVID-19 Economic Relief Plan (CERP): main support measures

The COVID-19 Economic Relief Plan (CERP), released on 27 April, consists of 7 goals, 10 strategies, 36 action plans and 76 actions covering a range of emergency fiscal and monetary measures. It is expected to cost over USD 2 billion and the funding is to come from a reallocation of budget resources, with 22 ministries contributing 10% of their 2019/20 fiscal budgets to the plan, and from international development partners. Among other things, the government has obtained the Parliament's approval for a USD 700 million loan from the IMF to finance budget deficits due to COVID-19 and a USD 50 million loan from the World Bank to support prevention operations and healthcare facilities. Below are the CERP's main announced measures:

1. Improving macroeconomic environment through monetary stimulus:

- Lower bank deposit and lending rates by 3%
- Lower minimum reserve requirements by banks

2. Easing the impact on the private sector:

- Establish MMK 100 billion COVID-19 Fund (USD 71 million, 0.1% of GDP) to provide loans at reduced interest rates for working capital finance of affected local SMEs, particularly in the apparel, hospitality and tourism sectors. The fund is one of the smallest stimulus measures in the region (OECD, 2020c), although its size might increase to MMK 200-500 billion depending on market response
- Defer payments until the end of the fiscal year on 30 September 2020 of corporate income and commercial tax
- Waive withholding tax on exports, specific goods tax, custom duties, and commercial tax on critical medical supplies and products related to the prevention, control, and treatment of COVID-19
- Myanmar Agricultural Development Bank ("MADB") under the MOPFI to offer agricultural, rural development, and livestock loans at reduced rates (1% to 1.5% lower)
- MOPFI to guarantee 50% of any new loans made by banks to enterprises not beneficiaries of the low cost fund for working capital.
- CBM to allow banks to restructure and reschedule MSME loans that regularly pay interest and principal for a longer period of no more than 3 years

3. Easing the impact on workers:

- Extend labour benefits to unemployed Social Security Board (SSB) members from six months to 1 year from the date of unemployment
- Implement labour-intensive community infrastructure projects for laid-off workers and returning migrants

4. Easing the impact on households:

- Exempt electricity tariffs for all households up to 150 units per month
- Provide in-kind food transfers and emergency rations to vulnerable households and at-risk populations
- Provide cash transfers to vulnerable households, including internally-displaced persons (IDP) in high-risk areas.
- Improve benefits for social pension and Maternal Child Cash Transfer beneficiaries.
- Negotiate with financial institutions for more flexibility related to interest rates and mortgage payments for affected households.

5. Promoting innovative products and platforms:

- Promote mobile payment systems and use of e-commerce and social commerce systems.
- Encourage retail businesses and logistics firms to make use of existing websites to sell products and provide services.
- Develop a central e-commerce website.
- Initiate grant competitions for innovative ideas to combat the pandemic's impacts.

6. Strengthening healthcare systems:

- Under immediate plans, improve quarantine facilities, import key medical products required for COVID-19, and improve preventive healthcare measures.
- For long-term plans, improve capacity building for the health care sector and upgrade existing health and medical facilities.

7. Increasing access to COVID-19 response financing (including contingency funds):

- All government entities to reallocate part of their 2019/20 budgets to the CERP fund, improve budget flexibility, and acquire external grants and concessional loans to finance the CERP action plans

Source: IFPRI (2020), KPMG (2020) and IMF's COVID-19 policy tracker, <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>.

In the aftermath of the pandemic, policies focusing on mobilising responsible investments will be key for the recovery and many of the pre-COVID-19 structural challenges and policies discussed in this *Review* will resurface in an ever more important fashion, as investors will be more risk-averse and selective, and industries might eventually be reshaped by the adoption of transformative technologies and new business models. Unlocking constraints to productivity growth will be critical to compensate for potentially higher transaction costs, lower mobility and reduced scope for resource reallocation across firms, sector and countries following the crisis. This *Review's* policy recommendations, albeit addressing pre-COVID-19 challenges, remain thus highly relevant and may help to build a faster and more inclusive and sustainable recovery.

But investment policies and institutions can also be called on to assist in the immediate efforts of re-establishing critical supply chains disrupted by the pandemic and supporting the business sector during the crisis. High-quality aftercare services by investment promotion agencies (IPAs) can be vital to ensure that investors remain and reinvest in the country during and following the recovery (see Chapter 3). Alleviating administrative burdens and reducing bureaucratic obstacles for investors can contribute to more efficient production processes and faster delivery of much needed goods to clients during the pandemic. Several countries have already taken steps in this direction (Box 1.3).

Box 1.3. OECD IPAs' strategic responses to the COVID-19 outbreak

The capacity of IPAs to adapt to new situations makes them key actors in governments' responses to the COVID-19 crisis. OECD IPAs' strategic responses to the COVID-19 outbreak have included:

Re-organisation and innovation. OECD IPAs have seen an immediate impact of the crisis on the way of “doing business”. Most of them re-organised rapidly to dedicate a COVID-19 section on their website with information on government support and applicable restrictions. Close to two-thirds of the agencies have a dedicated webpage in English.

Focus on existing clients and information provision. The nature of services provided by IPAs has changed radically by shifting away from marketing to intense aftercare. As new regulations are adopted to mitigate the impact of the crisis, IPAs provide support to investors to navigate the rapidly evolving legal framework. They also play a key facilitating role to support firms with their ongoing operations and supply chain relationships.

Activating business networks. IPAs have activated their business networks, particularly in the health sector and hardest hit activities, to help the government fight the crisis. For instance, Germany Trade and Invest narrowed down its services to five industries, which are both the most hit by the crisis and for which the IPA can maximise its impact.

Going digital. Digital means will allow IPAs to continue servicing and identifying future clients, which requires access to different digital tools. For example, digital client prospecting, capable of correctly identifying potential leads, and virtual-reality solutions for site visits can gain in importance. Some IPAs are already going digital. CINDE Costa Rica has accelerated its digital plans, including artificial intelligence-based marketing, providing services and products online. Business Sweden provides investors with access to online interactive maps of different industrial clusters, and plans to expand them.

New focus and prioritisation. The COVID-19 crisis may propel agencies to reconsider their prioritisation strategies. For example, Business Sweden has used for years a qualitative evaluation system to identify “high-quality” projects and the UK Department for International Trade will continue using economic analysis and intelligence driven prioritisation to ensure that FDI plays an effective role in economic recovery.

Rethinking strategies and reforms. In light of their evolving roles, OECD IPAs are rethinking their strategic orientations to better respond to both public and private sector needs. Investment climate reforms, supported by IPA policy advocacy, will become ever more important in a context of uncertainty and possible protectionist tendencies.

Source: OECD (2020d)

The MIC has taken rapid measures both to facilitate investment and to mitigate the impact of the COVID-19 outbreak, including steps to encourage investment in the medical sector. On 9 April 2020, the MIC announced a 50% reduction of investment application fees, and, on 11 April, that it would accelerate approvals for investments in labour-intensive and infrastructure projects (Myanmar Times, 2020b, 2020c).

The MIC also accelerated approvals for investments in healthcare and medical equipment (e.g. producers of personal protective gear) and prioritised pharmaceutical enterprises and healthcare service providers. DICA has been publishing information related to COVID-19 on its website, although in Myanmar language only. Translating future announcements and publications into English would greatly help potential and existing investors in accessing important information.

Adopting a responsible business conduct (RBC) approach in government and business responses to the crisis can also bring short and long-term benefits to businesses and the economy as a whole (see Chapter 4). It would help ensure that such responses do not create further risks to people, planet and society – or contribute to destabilising supply chains down the line (e.g. resurgence of forced or child labour in certain strategic sectors). Promoting and enabling RBC as part of overall COVID-19 policy responses is thus essential for ensuring coherence between immediate actions and the expected recovery trajectory. Governments are in a particularly strategic position to steer the economic recovery towards long-term value creation (including reduced greenhouse gas emissions, enhanced worker skills and benefits and emergency preparedness).

For businesses, implementing internationally recognised RBC standards such as the OECD *Guidelines for Multinational Enterprises* or the OECD *Due Diligence Guidance for Responsible Business Conduct* can enhance their capacity to build resilience and better deal with current and future supply chain disruptions. For example, information from supply chain due diligence (e.g. on the origin of raw materials, and other traceability data) when overlaid with risks related to COVID-19 (such as infection rates, government restrictions and associated disruptions in production or distribution channels) can be used to understand short and medium term vulnerabilities in the supply chain, and support continuity planning to manage disruptions. Working out contingency plans with workers and suppliers may make more commercial sense than paying the price of disbanding large segments of a workforce that took years to build and train.

Businesses that put in place effective continuity planning, taking into account the range of RBC issues related to the crisis, including related to avoidance of layoffs and maintaining wage payments, may be better placed to access fresh capital, special emergency funds and relief programmes, regardless of any conditions that may or may not be included (OECD, 2020e). For example, the EUR 5 million emergency cash fund “Myan Ku” established by the EU to support Myanmar workers who have lost their jobs due to COVID-19 considers RBC aspects.² Having a more sophisticated RBC lens is also a strategic orientation that can encourage a more systemic and dynamic crisis response and discourage a ‘go-at-it-alone’ position (Barry, 2020). Furthermore, it can also contribute to disaster preparedness and resilience overall, which is especially useful considering the risks of disruptions by climate change.

The COVID-19 pandemic may also work to reinforce some policy recommendations advanced here for the longer-term. For instance, measures taken by governments to protect their societies and economies during the pandemic may disproportionately affect some companies and investors. Investment treaties should thus allow governments sufficient policy space to respond effectively to crises such as the current COVID-19 one and to take vital measures such as securing quick access to essential goods and services (see Chapter 2). Older-style investment treaties concluded by Myanmar in the past contain vague, unqualified provisions that may in certain circumstances fail to appropriately safeguard the government’s right to regulate and may end up attracting undesirable interpretations in eventual ISDS disputes.

The crisis may also put on-going and planned infrastructure projects in considerable distress (e.g. loss of revenue due to lower demand levels, disruptions to projects under construction due to supply-shocks, adverse impact on access to finance etc.), which reinforces the importance of strengthening the framework for public and private investments in infrastructure (see Chapter 5). Many aspects of such frameworks are likely to be put to test, including the framework for re-negotiations, early termination and other provisions such as force majeure, compensation and change in law (World Bank, 2020b). Beyond their critical role in the immediate response to COVID-19 (e.g. emergency procurement of health products and expansion of healthcare facilities), procurement and infrastructure investment will play a critical role during the recovery

as governments try to rapidly activate infrastructure projects in the pipeline to provide a further boost to the recovery. An enhanced public and private investment framework will be critical to ensure that mobilised resources continue to meet value-for-money expectations under the new economic circumstances.

In the same vein, the crisis also offers an opportunity to reconsider development priorities and place greater emphasis on green growth objectives (see Chapter 6). Unchecked, global environmental emergencies such as climate change and biodiversity loss could cause social and economic damage far larger than any caused by COVID-19 (OECD, 2020f). Economic recovery packages should thus strive for more than simply restoring economies and livelihoods quickly, but also seek to accelerate investments and behavioural changes that will reduce the likelihood of future environment-related shocks and increase society's resilience to them.

The contribution of FDI to sustainable development in Myanmar

Foreign investment can benefit a host economy beyond raising its stock of capital. Under the right conditions, FDI can enhance growth and innovation, create quality jobs, develop human capital, and raise living standards and environmental sustainability. In other words, FDI can generate positive socio-economic and environmental benefits in Myanmar that help make progress towards the SDGs.

Realising these gains is not a given, however. While, in principal, FDI has the potential to advance sustainable development, private sector incentives and the policy context play a critical role in realising this potential. Different chapters of this *Review* examine how reforms in various policy areas can promote investment and, through investment, structural transformation in Myanmar. This section takes a broader view of FDI impacts, and examines new OECD indicators that link FDI to productivity, innovation, job quality, skills, gender equality, and energy efficiency (Box 1.4).

Box 1.4. The OECD FDI Qualities Indicators

FDI Qualities Indicators describe how FDI relates to specific aspects of sustainable development in host countries. They are structured around economic, social and environmental sustainability. An in-depth assessment of all 17 SDGs, and their corresponding targets, was undertaken to identify the full spectrum of FDI Qualities – that is, areas where FDI may contribute to achieving the SDGs. This assessment further considers the extent to which FDI potential for advancing the SDGs is reflected in the OECD Policy Framework of Investment, including related frameworks and guidelines, such as the OECD Guidelines for Multinational Enterprises and the OECD Policy Guidance for Investment in Clean Energy Infrastructure.

The FDI Qualities Indicators focus on five clusters: productivity and innovation, employment and job quality, skills, gender equality, and carbon footprint. For each cluster, a number of different outcomes are identified and used to produce indicators that relate them to FDI or activity of foreign MNEs, allowing for comparisons both within and across clusters so as to identify potential sustainability trade-offs.

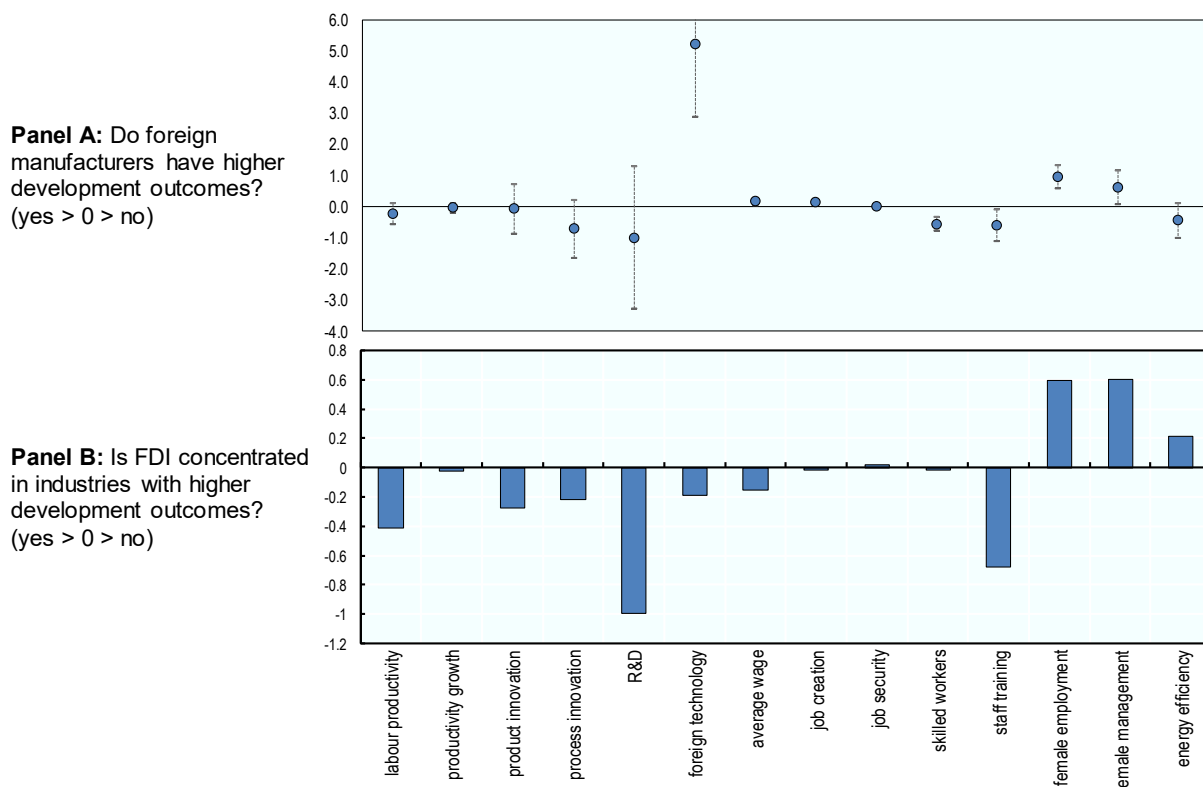
Taking into account the country-specific context, policymakers can use FDI Qualities Indicators to assess how FDI supports national policy objectives, where challenges lie, and in what areas policy action is needed. Indicators also allow cross-country comparisons and benchmarking against regional peers or income groups, which, taking into account the country context, can help to identify good practices and make evidence-based policy decisions.

Source: OECD (2019)

Foreign investors in Myanmar are for the most part not inherently different from their domestic counterparts in their socio-economic and environmental contributions (Figure 1.4, Panel A). Moreover, they tend to operate in industries with lower development outcomes, particularly in terms of labour productivity, innovation and skills development (Figure 1.4, Panel B). This is perhaps because one of Myanmar’s main attractions to investors is its abundance of young and relatively cheap labour, which is an asset for labour-intensive and low-skilled light manufacturing activities.

One aspect where foreign manufacturers distinguish themselves is in their contribution to reducing the gender employment gap: foreign firms both employ significantly more women than domestic peers and are more likely to empower women to assume top managerial roles. This may be partly because their operations are prevalently in female-dominated industries with a higher incidence of female top managers, like garment manufacturing. While intensive female employment in these industries has been an important avenue for women to enter the labour force in many developing countries, the development of these industries may exacerbate the gender gap if it perpetuates gender-specific labour roles, with women participating only in low-skill low-wage jobs, by deterring government action to promote gender equity in higher-wage jobs. This may warrant policy action to support training and skills upgrading opportunities in the garment industry, particularly as foreign firms are found to employ relatively less skilled labour than domestic peers, and in industries that underperform with respect to offering training opportunities. The fact that foreign firms are more likely to employ female top managers, nevertheless, suggests that they may already be investing in developing managerial skills of women employed in the garment industry.

Figure 1.4. FDI and sustainable development outcomes in Myanmar



Note: Panel A includes confidence intervals that indicate statistical significance at the 95% level. If the confidence interval crosses the zero line, the difference between foreign and domestic firms is statistically insignificant. For further details, see OECD (2019).

Source: OECD based on FDI Qualities Indicators

FDI qualities in Myanmar are comparable to those of regional peers at a similar stage of economic development, like Lao PDR and Viet Nam, and somewhat higher than Cambodia (Table 1.1). A notable difference in Lao PDR and Viet Nam is the relatively higher labour productivity associated with foreign investors relative to domestic firms, possibly due to FDI shifting to higher-value added and less labour-intensive activities as a result of rising wages in these countries. In Myanmar, instead, the main sustainable development contribution of foreign investment remains in the area of employment generation, with foreign firms offering somewhat higher compensation to workers. In more advanced countries like Thailand, Indonesia and Malaysia, foreign activity is associated with significantly higher innovation outcomes, particularly investment in R&D.

An area in which there is room for improving FDI qualities in Myanmar is that of environmental impact, and specifically energy efficiency. In most countries in the region, both more advanced and less advanced, foreign manufacturers are considerably more energy efficient than their domestic peers, possibly due to use of more sophisticated, cleaner or energy-saving technologies. In Myanmar, this is not the case, and policies to promote investment in cleaner technologies may be justified.

Table 1.1. Overview of FDI qualities in Southeast Asia

Outcome	IDN	KHM	LAO	MMR	MYS	PHL	THA	VNM
labour productivity	+		+		–		+	+
product innovation	+				+	–		–
process innovation	+					–		
R&D	+				+		+	
foreign technology	+		+	+		+	+	+
average wage	+		+	+	–			
job creation	+			+	–	–		
job security	+				–			+
skilled workers				–	–	–	+	
staff training	–	N/A	N/A	N/A	+		–	N/A
female employment	+	N/A	N/A	+	N/A	N/A	N/A	+
female management	+		–	+	+	–	–	–
energy efficiency	+	+	+				+	+

Note: A '+' sign indicates that foreign firms have higher development outcomes, while '-' indicates that domestic firms have higher development outcomes.

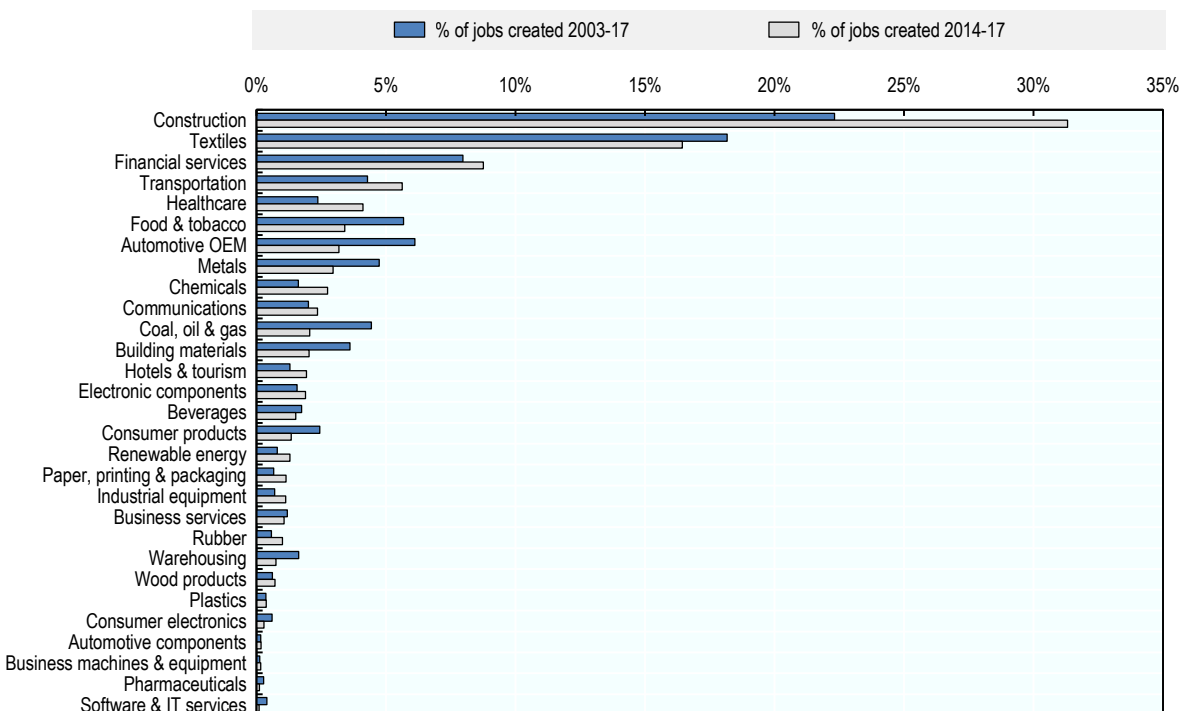
Source: OECD based on the FDI Qualities Indicators (2019).

A closer look at FDI and job creation

Greenfield FDI created over 55 000 jobs between 2014 and 2017, more than the 46 000 jobs created in the previous ten years. The majority of jobs remain heavily skewed toward low-skilled and labour-intensive activities like construction and textiles (which account for 31% and 16% of jobs created, respectively) (Figure 1.5). However, industries that require more technical skills, such as chemicals and electronic components, are beginning to attract more FDI, and account for growing shares of job creation.

Lastly, while foreign investors outperform domestic peers in terms of creating new employment opportunities, jobs created per dollar invested remain low compared to regional peers, particularly for manufacturing investors (Figure 1.6).

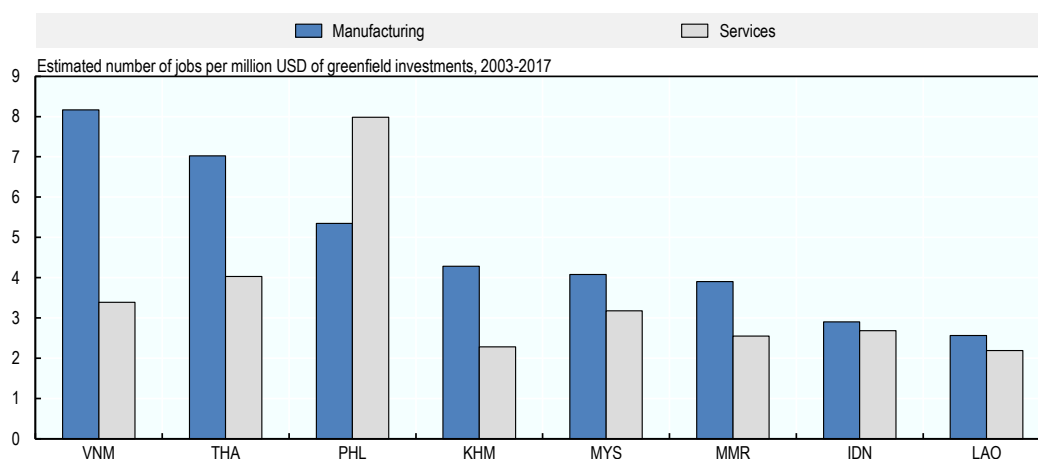
Figure 1.5. FDI and job creation by industry



Note: Industries that account for less than 1% of jobs created are omitted. Number of jobs are based on announced FDI projects over 2003-2017. Source: OECD based on Financial Times' fDi Markets database.

Figure 1.6. FDI and job creation in Southeast Asia

Estimated number of jobs per million USD of greenfield investments, 2003-17



Note: Greenfield FDI is defined as capital expenditure (capex). Number of jobs and capex are based on announced FDI projects between January 2003 and December 2017. Source: OECD based on Financial Times' fDi Markets database

National strategies and development plans

As stated in the MSDP, Myanmar has myriad sectoral, ministerial and sub-national plans. A selection of these having an impact on private sector development is listed in Table 1.2. The MSDP is intended to provide an overall framework for coordination and cooperation across all ministries and all states and regions and is presented as a way to “reinvigorate reform”. It links action plans and strategic outcomes with relevant SDG targets, all structured around three pillars: peace and stability; prosperity and partnership; and people and planet.

Table 1.2. Myanmar strategic and sectoral plans

Selection of official guiding documents affecting private sector development
Myanmar Sustainable Development Plan, 2018-30
Industrial Plan 2016-22
Private Sector Development Framework and Action Plan
National Export Strategy 2015-19
Myanmar Investment Promotion Plan
12-point Economic Policy, 2016
Rule of Law Strategic Plan 2015-19
Myanmar Industrial Policy 2016
SME Policy 2015
Myanmar National Climate Change Policy 2017-30
Myanmar Energy Master Plan 2015
National Land Use Policy
Myanmar Agricultural Development Strategy 2018/19-2022/23

Legislative reform

The first OECD *Investment Policy Review of Myanmar* already noted the urgency of the former government to reform the legislative framework. Many laws dated to colonial times, while others were developed under military governments and were often ill-suited to an open economy and not in conformity with international standards. A number of important laws date from this first period of post-2011 reform, including the revised Foreign Investment Law and the Environmental Conservation Law.

Table 1.3. The legislative framework for investment has improved significantly

A selection of recent legislative reforms
Myanmar Investment Law 2016
Myanmar Investment Rules 2017
Companies Law 2018
Special Economic Zones Law 2014
Financial Institutions Law 2016
Competition Law 2015
Union Tax Law 2017
Arbitration Law 2016
Condominium Law 2016

Legislative renewal has continued under the NLD government, including the enactment of new laws which were initiated by the previous government. Table 1.3 lists some of the most recent laws having a direct impact on the investment climate. The new Myanmar Investment Law (2016) and the Companies Law (2018) described in more detail below are both modern and comprehensive frameworks and represent a substantial improvement over what preceded them. But not all new laws have gone through as broad and

inclusive a drafting process and as a result are not always unequivocally better than what went before, as will be discussed later.

Myanmar Investment Law

At the time of the first OECD *Investment Policy Review* (OECD, 2014), investment was governed by the Foreign Investment Law (2012), the Myanmar Citizens Investment Law (2013) and the Companies Law from 1914. The Thein Sein government had just revised the 1988 foreign investment law as a signal to investors that Myanmar was open for business, but the 2012 revision still left many questions unanswered and was a long way from good practices in peer countries. The approval system through the MIC was highly cumbersome, key provisions of the investment law were not clearly defined, and Myanmar remained one of the most restrictive countries to foreign direct investment. Many of the recommendations from the first review were incorporated in the 2016 Investment Law (Table 1.4).

Table 1.4. Some key recommendations from the 1st OECD Investment Policy Review

General	<ul style="list-style-type: none"> • Develop an all-encompassing investment regime covering both foreign and domestic investment under the same regulatory framework • Establish the principle of non-discrimination • Prepare the new law through an inclusive process, with broad public consultations
MIC screening	<ul style="list-style-type: none"> • Streamline screening to focus on only the largest, most important projects • Simplify criteria • Increase transparency • Minimise discretion • Allow appeals of decisions • Monitor compliance of investors with their commitments • Require investors obtaining an MIC permit to commit to principles of responsible investment
Investor protection	<ul style="list-style-type: none"> • Further clarify legal provisions on investment protection as to the scope and level of protection they provide • Align the expropriation regime with international standards
Grievance mechanism	<ul style="list-style-type: none"> • Establish grievance mechanism, incl. for stakeholders
Investment incentives	<ul style="list-style-type: none"> • Reduce scope for investors to benefit from incentives
Market access	<ul style="list-style-type: none"> • Review the extensive sector- and product-based restrictions to assess their impact not only on the competitiveness of the individual sectors but also on the overall investment climate itself. • Consider further liberalisation to approach levels of openness found elsewhere in the region and in peers worldwide

Source: OECD (2014).

The new Myanmar Investment Law (MIL) was designed to address these shortcomings and has done so to a large extent (Table 1.5). Most importantly, it unifies the domestic and foreign investment laws which is now common practice in ASEAN and increasingly worldwide for those countries which have an investment law. Together with the Myanmar Investment Rules (2017), it puts responsible investment front and centre, streamlines and improves procedures, embeds national treatment and, together with the Companies Law, significantly liberalises the regime for foreign investment.

The first objective of the new Investment Law is “to develop responsible businesses which do not cause harm to the natural environment and the social environment...”, while another is to develop businesses that meet international standards. This emphasis on responsible investment is echoed in the duties of the Myanmar Investment Commission which must assess whether the investor has demonstrated a commitment to carry out the investment in a responsible manner. Chapter XVI is devoted to the responsibilities of investors and goes beyond what is commonly found in most recent investment laws. Investors “shall abide by applicable laws, rules, procedures and best standards practiced internationally for this investment so as not to cause damage, pollution, and loss to the natural and social environment and not to cause damage to cultural heritage”.

Table 1.5. Brief comparison of the new Myanmar Investment Law (2016) and previous Foreign Investment Law (2012)

Key provisions	2012 FIL	2016 MIL
Unified regime for foreign and domestic investors	∅	✓
Environmental & social concerns	∅	✓
Investment Screening & Approval	∅ (wide scope; centralised)	✓ (narrower scope; decentralised)
National Treatment	∅	✓
MFN	∅	✓
FET	∅	✓
Expropriation	✓ (weak)	✓
Transfer of Funds	✓ (weak)	✓
Alternative Dispute Resolution	✓ (weak)	✓
Grievance mechanism	∅	✓

Note: ✓ covered/improved; ∅ absent or incomplete/weak;

Source: author's elaboration.

The new law also revised the role of the MIC to make it more focused on projects of strategic importance, including those which are large and capital-intensive and those likely to cause a large impact on the environment and the local community. Smaller projects under USD 5 million are now handled by State and Regional Investment Committees. The overall approval process has also been expedited and the provision of incentives is now separated from the approval process itself, allowing all investors passing through the MIC to enjoy certain non-tax benefits. Another change in the Investment Law which was further accentuated by the new Companies Law was a substantial clarification and liberalisation of the regime governing foreign investment (see section below for a detailed discussion).

Institutional innovations in the new law include an Investment Monitoring Division to ensure investors' compliance with commitments and a newly implemented Investment Grievance Committee which receives investor grievances for investments made under the MIC and conciliates for grievances between investors and the state with the goal of preventing them from escalating to legal proceedings. The grievance mechanism was established in April 2020 by the Myanmar Investment Commission Notification No. 9/2020 and is being implemented with assistance from the IFC (see Chapter 2 for more detailed information).

Companies Law

The principal companion to the Investment Law in terms of investment climate reforms has been the recent reform of the Companies Law. Like the MIL, the new Companies Law (2017) has generally been well-received. Developed with the assistance of the Asian Development Bank, it is reportedly modelled on Australian corporate law. It facilitates incorporation, reduces the compliance burden for SMEs, and improves corporate governance generally, including through greater transparency, introduces a new electronic registry system, strengthens minority shareholder rights and provides for greater scope for foreign investment throughout the economy. Further elements include: more freedom for companies to carry out other lines of business; no authorised share capital limit; no restrictions on the transfer of shares between local and foreign shareholders; the removal of the requirement for company seals; and new solvency test safeguards (DICA, 2018).

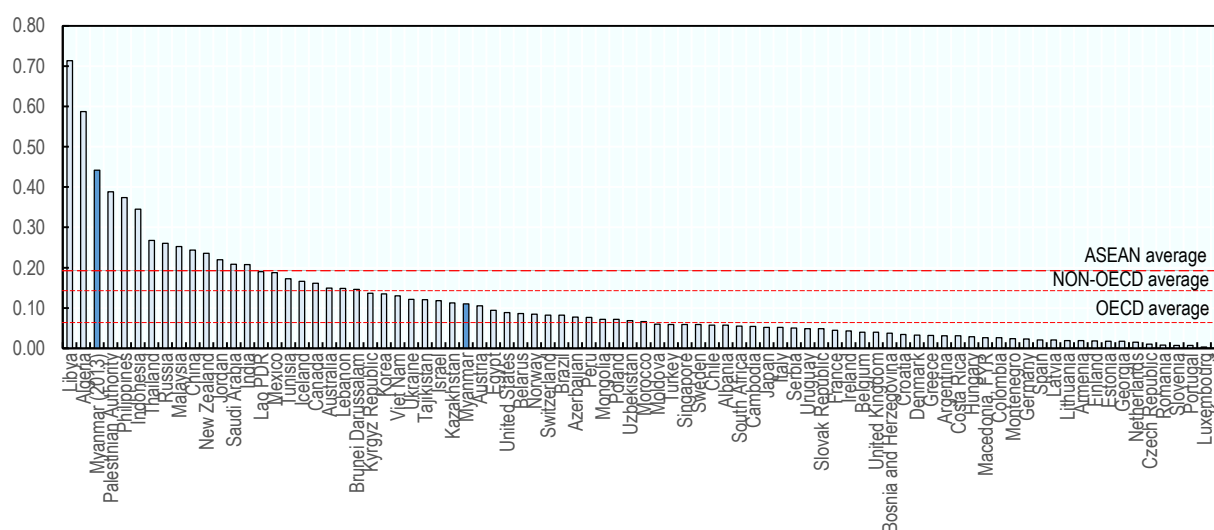
A key element of the new law from the point of view of potential investors is the definition of a foreign company as "a company incorporated in the Union in which an overseas corporation or other foreign

person (or combination of them) owns or controls, directly or indirectly, an ownership interest of more than thirty-five per cent". This change establishes a minimum threshold below which foreigners may invest throughout the economy, except in sectors where separate restrictions apply. Not only does this create more opportunities for foreigners to invest in Myanmar, it also helps to alleviate the problems caused by the prohibition of foreign ownership of land which also previously restricted the possibility for foreign investors to acquire stakes in local companies. Greater protection of minority shareholders also gives foreign investors more confidence when taking minority shares in local companies.

FDI liberalisation

The Myanmar Investment Law and Rules, together with the Companies Law and various sectoral reforms, have allowed Myanmar to move from being the most restrictive country out of almost 70 surveyed in the OECD *FDI Regulatory Restrictiveness Index* at the time of the first review to being one of the most open in Southeast Asia and in line with the performance of other non-OECD economies in this regard (Figure 1.7). This degree of statutory liberalisation in only five years is almost unprecedented and could have a substantial impact on FDI inflows over time – assuming that political conflicts are satisfactorily resolved and other key business conditions do not deteriorate.

Figure 1.7. OECD FDI Regulatory Restrictiveness Index, 2019 (open=0; closed=1)



Note: The OECD FDI Regulatory Restrictiveness Index covers only statutory measures discriminating against foreign investors (e.g. foreign equity limits, screening & approval procedures, restriction on key foreign personnel, and other operational measures). Other important aspects of an investment climate (e.g. the implementation of regulations and state monopolies, preferential treatment for export-oriented investors and SEZ regimes among other) are not considered. Data reflect regulatory restrictions as of end-December. See Kalinova et al. (2010) for further information on the methodology.

Source: OECD FDI Regulatory Restrictiveness Index, <https://www.oecd.org/investment/fdiindex.htm>.

The antiquated banking sector has gradually been opened to foreign investors, initially limited to providing financial services to foreign investors and to offering export financing to local firms. Foreign investment is now allowed without discrimination in domestic banks (up to 35% foreign ownership). Beyond that, foreign banks are allowed to provide a full range of services to local firms in both foreign currency and kyat. Retail banking to physical persons remains closed until 1st of January 2021 as announced by the Central Bank on 7 November 2019. As of February 2020, 13 foreign banks – all from Asia – had been granted licences to operate branches in Myanmar under the previous two rounds of foreign bank licensing conducted by the Central Bank in 2014 and 2016. A third round is planned for 2020 by the Central Bank and will accord

foreign banks the right to establish subsidiary banks in addition to branches as in the past ones. The announced reform aligns with the diagnostic established in the MSDP: “capacity constraints experienced by our domestic financial institutions, as well as conditions imposed on foreign bank branches operating in Myanmar continue to pose challenges. It is therefore imperative that the banking and financial services sector be further liberalised” (MOPFI, 2018, p. 33)

Other examples of partial or full sectoral liberalisation include: insurance, which was formerly the monopoly of Myanma Insurance, a state economic enterprise; large-scale wholesale and retail distribution; education services; agriculture; and condominium units. The telecommunications sector was already opened to foreign investment in 2014. In some of these sectors, minimum capital requirements for foreign investors and other forms of discrimination remain but reforms nevertheless allow ample scope for foreign participation.

The challenge of effective governance

Rule of law

“The rule of law is the fundamental principle which underpins democratic governance. In Myanmar, weaknesses in the rule of law place a heavy burden upon our people, particularly those who are poor and vulnerable and present institutional barriers to achieving durable peace, stability and other goals of sustainable development.”

(MOPFI, 2018, p. 12)

The first OECD *Investment Policy Review of Myanmar* highlighted the obvious challenge of governance in Myanmar, not just as a least developed country but also because of the legacy of military rule (OECD, 2014). Reforms in Myanmar have been impeded by weak capacity within government, particularly acute at the local level, institutional fragmentation and poor inter-ministerial coordination, and a lack of standardised procedures for both drafting and implementing new laws.

The following description from the first Investment Policy Review (OECD, 2014) is still relevant today:

Many international observers have expressed the concern that the government’s haste to provide a modern legislative framework may come at the expense of laws that are suitable, credible and able to be implemented given the existing capacity levels within government. The UN Special Rapporteur reported in 2012 that “there remains no clear and comprehensive strategy for legislative reform, resulting in a somewhat ad hoc and uncoordinated process [...] the legislative reform process should allow for proper consideration by the parliament, and for systematic consultation and discussion with relevant stakeholders, including civil society” (UN, 2012).

An inevitable tension arises between the urgent need to update the legislative framework and the slow process of building capacity within government to draft and review laws and by-laws. Without improved capacity and more standardised procedures for adopting new legislation, there is a risk that heightened drafting activity will simply exacerbate the existing lack of capacity within government without providing the expected benefits to citizens and businesses. Development partners can assist with this process, but without adequate local participation this can lead to laws which lack local ownership and may not be sufficiently adapted to the situation in Myanmar.

When drafting legislation, ministries tend to operate in silos, with little reference to existing statutes elsewhere, and with little public consultation or review of what it done in other countries. According to one commentator:

“the NLD government and Hluttaw must move away from the misconception that the Myanmar legal system can be rebuilt, and the economy strengthened, simply by the passage of new laws...At present, legislation...is usually prepared by government officials with no legal expertise or legislative drafting skills. There is poor coordination between government ministries in developing new legislation and no uniform procedure for public consultations on draft legislation” (Thet Tun, 2017).

Resolving these challenges will require improvements in many areas of governance: transparency, public consultations, inter-ministerial coordination and regulatory impact assessments. There is a clear need to build capacity within the government to draft and review legislation. The Union Attorney General's Office prepared a strategic plan for 2015-19 with the help of UNDP as an important milestone on the path to updating Myanmar's legal system (UAGO, 2015). The plan is candid in its assessment of the UAGO's capacity to perform its oversight role: "we face some difficulties in completing and delivering our work in a timely manner in light of competing demands", requiring both technological upgrading and training.

These reforms will take time but examples both from within Myanmar and from many other countries attest to their importance in improving the quality – and hence the impact – of legislation. These areas are all discussed in more detail below.

Myanmar's governance performance

Comparing the quality of governance across countries is difficult. Rankings are often based on surveys of local perceptions, and how problems are perceived may be idiosyncratic across countries. Table 1.6 shows selected governance indicators which relate to the areas discussed here, notably open government and regulatory enforcement. As a least developed country, Myanmar naturally ranks low in the index. What is most interesting is the variation across measures within Myanmar. It ranks particularly poorly in terms of transparency, but also in terms of civic participation and access to remedies.

Table 1.6. Selected governance indicators for Myanmar

(Ranking and Score 0–1 = best performer)

	Global rank	Rank in Asia	Lower middle income rank	Score
Open government	114/126	14/15	24/30	
- Publicised laws and government data				0.20
- Right to information				0.35
- Civic participation				0.42
- Complaint mechanisms				0.42
Regulatory enforcement	85/126	13/15	12/30	
- Effective regulatory enforcement				0.49
- No improper influence				0.61
- No unreasonable delay				0.50
- Respect for due process				0.38
- No expropriation without adequate compensation				0.34

Source: World Justice Project (2019)

Regulatory impact assessments

Ultimately, improved legislation will require the introduction of regulatory impact analysis (Box 1.5). Myanmar currently has no specific body responsible for RIA, unlike in Cambodia and Lao PDR which have both set up an Office on RIA. The experience in Cambodia suggests that this will need to be done incrementally so as not to further exacerbate existing capacity constraints in the short term which risks turning RIA into a largely pro forma exercise heavily dependent on independent consultants. In Cambodia, RIA was introduced progressively, allowing time to build capacity before fully mandating the implementation of RIA for all regulations. As part of this progress, a Regulatory Executive Team was established at the Council of Ministers "to provide advocacy information to line ministries on principles of good practice in the regulation making process, assist with training on RIA methodology, and support line ministries in their implementation of the RIA process" (OECD, 2018b).

Box 1.5. What are regulatory impact assessments?

Regulatory impact assessment is a cornerstone of evidence-based policy making and one of the most adopted regulatory policy tools by OECD member countries for the past 20 years. RIA is a crucial element of the regulatory governance cycle and is used to develop or strengthen regulatory policy. It is defined as a systematic process of identifying and quantifying the likely benefits and costs from regulatory or non-regulatory options for a policy under consideration and may be based on benefit-cost analysis, cost-effectiveness analysis or business impact analysis (OECD, 2015).

The Recommendation of the OECD Council on Regulatory Policy and Governance encourages countries to integrate RIA into the early stages of the policy process for formulating new regulatory proposals: identifying policy goals, evaluating if a regulation is necessary and how it can be most effective and efficient in achieving these goals, considering means other than regulation and identifying the trade-offs of different approaches analysed to identify the best approach. More specifically, governments should adopt ex ante assessment practices that:

- Are proportional to the significance of the regulation;
- Include cost benefit analyses that consider the welfare effects of regulation taking into account economic, social, and environmental impacts including the distributional effects over time, identifying who is likely to benefit and who is likely to bear the costs;
- Identify the specific policy need and the objective of the regulation, such as the correction of a market failure or the need to protect citizen's rights that justifies the use of regulation;
- Consider both the no-action option or baseline scenario as well as alternative ways of addressing the public policy objectives, including regulatory and non-regulatory alternatives to identify and select the most appropriate instrument, or mix of instruments to achieve policy goals;
- Identify approaches likely to deliver the greatest net benefit to society, including complementary approaches such as through a combination of regulation, education and voluntary standards
- Provide qualitative descriptions of those impacts that are difficult or impossible to quantify, such as equity, fairness, and distributional effects. When regulatory proposals would have significant impacts, ex ante assessment of costs, benefits and risks should be quantitative whenever possible. Regulatory costs include direct costs (administrative, financial and capital costs) as well as indirect costs (opportunity costs) whether borne by businesses, citizens or government;
- Make assessments publicly available as far as possible, along with regulatory proposals, prepared in a suitable form and with adequate time for inputs from stakeholders and assist political decision making; and
- Use RIA as part of the consultation process where possible;
- Indicate that regulation should foster, not deter, competition and consumer welfare;
- Explore ways to limit adverse effects and carefully evaluate them against the claimed benefits of the regulation;
- Consider whether the objectives of the regulation cannot be achieved by other less restrictive means.

Source: OECD (2012), OECD (2015).

In general, there is a need to improve regulatory governance. Understanding the stock of regulations impinging on businesses (and beyond) and having a clear process for the review of existing regulations as well as developing new ones is vital to policy development. In the absence of such understanding, there is a risk that obsolete regulation stays in place and that new regulation gets enacted without a formal process that clearly identifies the reason for its introduction and what problem it is intended to address. Also, the anticipated burden on the system created by the new regulation ought to be assessed (see Chapter 8 for a related discussion in the context of land-related legislation).

Improving the quality of the regulatory environment provides a real opportunity to stimulate economic activity, unlock productivity and growth, and foster inclusiveness of SMEs, as larger firms suffer less from heavy public bureaucracy than smaller firms with limited capacity to deal with regulatory demands.

Public consultations

The MSDP calls for strengthening civic engagement and public consultation processes with respect to policy-making at all levels. Myanmar has had some very good experiences with public consultation, such as with the Myanmar Investment Law and the Land Use Policy, but as a rule such consultations are neither mandatory nor systematic, nor do they follow standard procedures. Box 1.6 provides some good practices for public consultations. To a great extent, the problems raised in the first OECD *Investment Policy Review* in this area have not gone away: a hyperactive government and a newly empowered and assertive parliament, together with insufficient public consultation, mean that draft laws are not adequately vetted.

Public consultation is partly a way of ensuring more effective laws by bringing to light at the earliest stage any possible adverse implications or inconsistencies. By involving stakeholders from the beginning, it also creates greater buy-in and public understanding of the new or amended legislation which will assist in implementation and enforcement (OECD, 2014). While public consultations are neither a panacea nor cost-free from the perspective of administrative sources, they can provide vital feedback on draft laws which can help to improve consistency with other legislation and avoid any unintended consequences. In this way, effective public consultations can help to fill the gap in public governance while the administration develops the necessary tools such as regulatory impact analysis.

In this respect, the Ministry of Investment and Foreign Economic Relations could, for instance, through the recently created Investment Promotion Committee it chairs (see below), take the lead in establishing a formal public consultation process for business related legislations in order to systematically collect inputs from Myanmar business associations, such as the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) and the Young Entrepreneur Association (YEA), and the various foreign chambers operating in Myanmar.

Box 1.6. Good practices for public consultations

- Have systematised procedures to provide greater clarity and certainty;
- Provide equal access to all stakeholders;
- Allow sufficient time to respond (30-60 days);
- Provide feedback to stakeholders on the outcome of the consultations;
- Consider white papers or RIA as part of the consultations;
- Include IT-based consultations, such as a central web portal.

Source: Jacobs (2015)

Public-private dialogue

Beyond public consultations on draft laws and strategic plans, regular public-private dialogue on investment climate challenges is essential in order to feed in private sector views into policy design and to improve implementation. Many of the bodies involved in investment climate improvements engage in some dialogue with the private sector, as shown below. While there is ample scope for a variety of approaches at different levels, too many platforms for dialogue may serve to dilute the signal on needed reforms and reduce the potential impact of policy advocacy within government. What is most important in this context is the mechanism through which comments from the private sector and other stakeholders feed back into policy design and implementation.

- **Investment Promotion Committee** proposed under the Myanmar Investment Promotion Plan (MIPP) and established in May 2019: cross-ministerial coordination mechanism which will also gather opinions on policies and planned measures from the private sector through a regular dialogue, including with foreign investors.
- **Investor Assistance Committee** and **Investor Grievance Mechanism** under the MIL to respond to complaints and grievances from investors and stakeholders.
- **Private Sector Development Committee** and **Myanmar Special Task Force for Business and Trade Promotion** both aim to promote dialogue with the private sector. The PSDC is chaired by the Vice President. Under the PSDC is the **Improving Myanmar's Doing Business Ranking Working Group** chaired by the Deputy Minister of Commerce.
- **Myanmar Business Forum (abolished in 2017)**: developed by IFC, along the lines of similar bodies established by the IFC in Viet Nam and Lao PDR. It is not clear why this initiative has stopped in Myanmar. Elsewhere, these forums have been generally quite successful as a policy dialogue channel between the government and the business community.
- **Myanmar-Japan Joint Initiative** (and other bilateral consultation mechanisms)

Inter-ministerial co-ordination

Institutional reforms can also help to improve inter-ministerial co-ordination and the effectiveness of government. The first OECD *Investment Policy Review* described a government with over 30 ministries with sometimes overlapping responsibilities and poor inter-ministerial co-ordination. It suggested that in the longer term the government should consider merging certain ministries and streamlining responsibilities. Institutional changes in 2016 reduced the number of ministries from 36 to 21.

Institutional innovations are common within many governments as the boundaries of different policy areas shift and become more fluid. Although there are sometimes good arguments for combining certain functions within one ministry, the exact division of responsibilities among ministries inevitably differs across countries. But institutional changes are only a means to an end and may not be sufficient by themselves to overcome the silos and poor co-ordination across government which is endemic in Myanmar. In the previous government, there were six ministers responsible for various aspects of co-ordination but this approach was not retained by the new government after 2016.

A National Economic Co-ordination Committee has been created to implement the MSDP, chaired by the State Counsellor. For investment matters, an Investment Promotion Committee was created in May 2019 to serve as a cross-ministerial co-ordination mechanism as suggested in the Myanmar Investment Promotion Plan (MIPP).

One prominent merger was the Ministry of Finance and the Ministry of Planning and Economic Development which became the Ministry of Planning and Finance (MOPF), recently transformed into the Ministry of Planning, Finance and Industry (MOPFI) after merging with the Ministry of Industry in late 2019. Part of the responsibilities of MOPF were hived off to create the new Ministry of Investment and Foreign

Economic Relations (MIFER) in November 2018. The new ministry is intended to focus on an investment enabling environment, as well as enhancing the quality and effectiveness of Myanmar's co-operation and co-ordination with development partners and international organisations – two functions which are also combined in Cambodia.

Each government must decide on its own division of institutional responsibilities; no single approach is suitable in all cases, and other ASEAN Member States have adopted a variety of approaches. In Cambodia, SEZs fall under the overall authority of the Council for the Development of Cambodia (CDC) which is the prime body under the Investment Law responsible for investment promotion. The same is true in Lao PDR while in the Philippines the Board of Investment is separate from the Philippine Export Zone Authority which manages the extensive network of zones.

Decentralisation as a political imperative

Partly as a legacy of autocratic rule, Myanmar has historically been a highly centralised economy. In spite of some efforts at decentralisation after 2011, the central government still accounts for 91% of total budgeted expenditure – far higher than in other countries in the region (Minoletti and Sandi, 2018). Further political and administrative decentralisation is a core component of the peace process.

Decentralisation can empower local governments to provide public services which are better adapted to local conditions and to experiment with reforms that can then be applied elsewhere. It moves government closer to the people, including the marginalised, and can encourage local administrations to improve their effectiveness in order better to attract and retain people and businesses. It also gives local authorities more of a role in managing the exploitation of natural resources in their territories. In the best of cases, it provides a much-needed boost to territorial development to ensure that no region is left behind.

In practice, however, decentralisation is challenging and may not immediately provide the expected development gains. The short term impact may be to weaken overall governance by transferring responsibilities to areas with the least capacity and by adding another layer of necessary co-ordination to an already fragmented governance setting. Weak local governments are also open to capture by local elites and by foreign investors which can multiply the opportunities for corruption and raise the possibility that environmental and social standards are not properly enforced. Outcomes will also depend strongly on how fiscal revenues are shared between the centre and the provinces. Different countries will opt for different degrees of decentralisation, but OECD country experience suggests that some central co-ordination is essential for successful regulatory governance (OECD, 2015). Lessons from the Indonesian experience are shown in Box 1.7.

Beyond questions of the division of administrative responsibilities, widely dispersed territorial development is one of the key challenges in ensuring inclusive growth within both developed and developing countries. As stated in the Myanmar Investment Promotion Plan, “reducing inequality of economic development and income levels between states and regions is an urgent issue for Myanmar”. Many countries face wide variations in the quality of the investment climate at provincial level which further perpetuates regional inequalities. Many larger investors would often prefer to go through the central approval mechanism or through the SEZ authority rather than dealing with local administrations, as has been found in Cambodia and the Philippines, for example. The question of how best to promote investment in the regions is discussed further below.

Box 1.7. Decentralisation in Indonesia has been a learning process

Indonesia undertook “big bang” decentralisation after the Asian financial crisis, transforming rapidly from one of the most centralised economies into a highly decentralised state. Decentralisation was seen as a vital complement to the democratisation process under way and a reaction to the inherently centralised approach of the previous autocratic government. Beyond the benefits from greater democratic accountability in a country with over 16 000 islands and strong cultural and linguistic diversity, as well as stark regional inequalities, decentralisation was also intended to put an end to separatist movements.

Local governments were handed substantial responsibilities for providing public services, along with extensive fiscal transfers and the large-scale migration of over two million civil servants to the regions. Revenue sharing between the centre and the regions included rents from natural resources. Most of the responsibilities were transferred to the district level rather than to the provinces, ostensibly as a way of weakening the potential for separatist movements by the provinces (Hofman and Kaiser, 2002).

The centre retained responsibility for certain key functions such as defence, justice, planning and police, with most other functions transferred to local authorities. This approach placed a premium on coordination in order to ensure that local initiatives, such as with infrastructure, were consistent with national plans. Fiscal transfers with weak accountability have only served to swell the ranks of officials in sub-national administrations and, without the ability to raise taxes on their own, local governments have relied heavily on user fees and charges which have served to undermine any attempts to improve local business climates and promote regional development (Lewis, 2015).

An OECD study concludes that “there still remain unclear lines of responsibility for the delivery of public services across levels of government...The central government should be more explicit in setting norms, standards, procedures and criteria for local government service delivery responsibilities and provide guidance and supervision. Likewise, minimum service standards should be better monitored and enforced” (OECD, 2016). This uncertainty is mirrored in regulatory overlaps, greatly adding to the complexity of investing. To overcome this burden, almost all regencies and cities have set up a one-stop-shop but with little evidence to suggest that this has encouraged business registration or led to an increase in formality.

Not all the economic experience has been disappointing, however. Some local governments have done well in fostering a good investment climate while others have struggled – a situation which can be found even in highly centralised economies. According to Doing Business indicators at a sub-national level in Indonesia, the cost of obtaining a construction permit as a share of city income per capita varies by a factor of four across Indonesia, with some regions greatly outperforming the national average. The challenge for the central government is to bring the lagging regions up to the national standard through continued fiscal equalisation measures combined with steps to strengthen local accountability and accompanied by capacity building and continued monitoring.

Whatever the political benefits, many studies suggest that “regional autonomy has not delivered the improvements that were expected...in terms of the provision of public services or in the management of natural resources” (OECD, 2016). The pace of decentralisation was dictated by a political imperative which in retrospect may have been too swift given the lack of capacity at local level and the need to develop mechanisms for coordination across different layers of government.

Improving the investment climate in Myanmar

this section provides an assessment from each of the policy chapters discussed in this review. The numerous policy recommendations mix concrete measures which can be implemented relatively quickly and more aspirational recommendations which will require more fundamental changes in the way the government goes about its business. Some measures can only be implemented over a long time horizon, while others are already being considered by the government. The aim is not to overwhelm the Myanmar government with recommendations but rather to provide a list of policy options in each area of the PFI for the government to consider as the reform process gathers momentum

Investment policy

As alluded to earlier, at the time of the first OECD *Investment Policy Review of Myanmar* (OECD, 2014), there was a sense of urgency for reforming the investment policy framework. Many laws dated from colonial times, while others were often ill-suited to an open economy and not in conformity with international standards. The investment regime was scattered across multiple laws, in many instances outdated and incomplete. Investment procedures were cumbersome and sometimes unwarranted and some were particularly prone to discretionary abuse by authorities. Myanmar also remained largely closed to foreign investments, being assessed at the time the second most restrictive economy to foreign direct investment (FDI) according to the OECD *FDI Regulatory Restrictiveness Index*.

This second OECD *Investment Policy Review of Myanmar* takes place in a substantially different environment. Many of the policy recommendations made in the first review were instrumental to a series of important reforms implemented subsequently and that have significantly improved the investment climate. Myanmar has adopted a modernised investment and corporate framework for both domestic and foreign investors, pioneering explicit investors' obligations to act responsibly and reducing considerably the level of discrimination against FDI. Although a significant number of sectors are still partly off limits to foreign investors, Myanmar no longer features among the top most restrictive economies under the *Index*.

Despite considerable progress over recent years, the reform momentum needs to be sustained and even deepened for the benefits of investment reforms to be shared widely and growth to be environmentally sustainable. Only in this way can the positive effects of investment more effectively contribute towards improving the lives of Myanmar people and meeting the Sustainable Development Goals (SDGs).

The foundations of an enabling investment environment have been laid down to a great extent with the new Myanmar Investment Law (MIL) (2016) and the new Companies Law (2017). New laws concerning intellectual property (IP) rights and arbitration are laudable achievements as they bring Myanmar's legal framework broadly in line with international standards in these two important areas. However, a number of challenges for complementary policies and implementation capacity on the ground remain to be addressed. The success of these recent developments in the legal framework also hinges on ongoing efforts to improve the independence and competency of the judiciary and the Myanmar courts, which will have a crucial impact on investors' confidence in the effectiveness of these new laws in practice.

Myanmar is also at an important juncture in terms of its approach to investor protection in investment treaties. With only 14 investment treaties in force today, Myanmar is in a favourable position to review its approach to investment treaties. Treaties with vague, unqualified provisions may attract undesirable interpretations in investor-state dispute resolution (ISDS) cases and, in some instances, overlap with newer investment treaties with the same partner countries. Overlaps between older bilateral investment treaties (BITs) and newer treaties with the same partners may raise issues of coherence between them which could potentially be exploited by investors to circumvent the newer, more nuanced investment treaties and thereby undermine reform efforts.

The investment policy chapter looks closely at the core investment policy issues – the non-discrimination principle, the degree of openness to foreign investment, the protection of investors’ property rights and mechanisms for settling investment disputes – that underpin efforts to create a quality investment environment for all. It takes stock of recent related reforms and examines the quality of government policies currently in place.

Main policy recommendations

- Evaluate the costs and benefits of remaining restrictions to foreign investment in manufacturing sectors with no bearing on national defence and security and that remain partly restrictive to foreign investors due to joint-venture requirements.
- Evaluate the costs of remaining restrictions to foreign participation in services sectors, such as in financial, construction and retail distribution services, which provide critical backbone services to all economic sectors. All these sectors are largely interlinked with market and efficiency-seeking manufacturing investments that Myanmar aims to attract. Cross-country evidence shows that these restrictions typically add costs to entire value chains, including in manufacturing sectors, by restraining potential competition among services input providers. This not only hinders a country’s investment attractiveness, it may also end up hurting consumers’ choices and purchasing power.
- Make sure that foreign investors are capable of registering long-term land leases in accordance with the MIL. For this, the government may want to issue clear instructions and procedures for the relevant land-related agencies to efficiently implement the MIL. Similarly, it should clarify that pursuant to the new Companies Law, Myanmar companies with up to 35% foreign ownership are allowed to own land under the same terms as wholly-owned Myanmar companies. The private sector has reported repeated difficulties in registering long-term leases of foreign investors with the Office of Registration of Deeds, because of the lack of clarity on the relationship of the MIL with the Transfer of Property Restriction Act of 1987 (TIPRA). Similar concerns have also been raised with regards to the relationship of the Condominium Law of 2016 and the TIPRA. The MIL’s provision allowing all foreign investments in Myanmar to obtain longer terms leases (up to 50 years renewable) is one of its main achievements and a key improvement to the business environment in comparison to the past. Access to land on a longer term basis is a critical condition for all businesses, and especially for infrastructure projects and land-based investments which require debt financing.
- Clarify the ‘negative list’ status of the list of restricted investment activities issued by the Myanmar Investment Commission as mandated in Art 42-43 of MIL. This would require strong co-ordination within government but would add great clarity to the investment regime going forward, notably to potential foreign investors. At this stage, there may be little inconsistency between the current list (Notification 15/2017) and applied restrictions, but such clarification is particularly important to avoid a widening dichotomy in the future. To date, only security services activities seem to be restricted and not listed in the Notification 15/2017, but such inconsistency generates uncertainty as to whether there are more restricted activities that are not listed or whether the list will be constantly updated to reflect changes in underlying regulations.
- Do not allow representatives from State-Economic Enterprises to take part in Proposal Assessment Teams involved in assessing projects in sectors and segments related to the SEE operations. The potential conflict of interest arising from their involvement in the process generates uncertainty and might result in non-competitive approval conditions.
- Continue to prioritise efforts to establish a functionally independent judiciary and improve legal certainty under the Myanmar court system. These challenges have been consistently identified as some of the most important for Myanmar in its democratic transition. The government should continue to pursue, together with external experts and other stakeholders, initiatives that aim to build trust in the independence of the judiciary, increase resources available for training a new

generation of judges and lawyers and promote access to justice programmes at the community level to provide dispute resolution alternatives to the court system.

- Design, draft and implement subsidiary regulations to accompany recent laws on IP rights and arbitration. The enactment of these new laws is a laudable achievement, but dedicated IP courts and authorities to supervise the administration, registration and enforcement of IP rights also need to be established before investors will be able to have confidence in their rights under the new IP laws. Similarly, the government should consider encouraging the development of dedicated commercial courts and building capacity within the judiciary to promote effective enforcement of rights granted under the new Arbitration Law.
- Review and consider possibilities for renegotiation and clarification of older-style investment treaties. These treaties should be calibrated to reflect the appropriate balance of preserving the government's right to regulate while contributing to Myanmar's efforts to attract FDI. The government's experiences with the COVID-19 pandemic may shape how it views key treaty provisions or interpretations as well as the appropriate balance in investment treaties. Vague, unqualified provisions in treaties concluded by Myanmar in the past may not appropriately safeguard the government's right to regulate and may end up attracting undesirable interpretations in ISDS disputes. Some of these older-style treaties also overlap with newer, more nuanced investment treaties concluded with the same partner countries. Myanmar, therefore, may wish to consider taking steps to update these treaties and its approach to future treaty negotiations to ensure the agreements appropriately safeguard the government's right to regulate. It may be possible to achieve updates to some existing treaties through treaty amendments or joint interpretations agreed with treaty partners. The government may also wish to engage with treaty partners with whom Myanmar has two or more investment treaties in force concurrently to review whether overlapping treaty coverage reflects current priorities.
- Manage potential exposure under existing investment treaties proactively. The government should continue to develop ISDS dispute prevention and case management tools. Myanmar may also wish to consider efforts to raise awareness about its investment treaties and the significance of its international obligations under these investment treaties for the day-to-day functions of different government agencies and officials that regularly interact with foreign investors, including at state and regional government level as they are often the ones more directly involved in the implementation of policies.

Investment promotion and facilitation

Myanmar's investment promotion and facilitation framework has also evolved considerably since the first review. On the institutional side, a new Ministry for Investment and Foreign Economic Relations (MIFER) has been established to steer investment policy and deepen investment climate reforms. Important strides have been made with regards to investment facilitation, notably the streamlining of procedures for establishing a business, obtaining investment approvals and other needed licences with the one-stop-shop (OSS), although there is still much room for improvement with regards to the latter. The Directorate for Investment and Company Administration (DICA) – Myanmar's Investment Promotion Agency (IPA) – has been strengthened to deliver on its mandate and has asserted itself as a leading reformist agency in the government. Myanmar has also established a long-term investment promotion plan – the Myanmar Investment Promotion Plan (MIPP) for 2016-2036 – which sets out an ambitious agenda and strategies for promoting further domestic and foreign investments.

This makes it timely to take stock of recent investment promotion and facilitation reforms and to provide possible directions for the government's ambitious agenda to attract investment for sustainable development. The OECD's survey of IPAs, which Myanmar also completed in the context of this review, allows for some benchmarking of country experiences across regions and provides additional insights on how best to organise Myanmar's promotional and facilitation efforts going forward.³

Much of the analysis in this chapter concerns investment facilitation, partly because investment promotion activities remain rather embryonic in Myanmar.⁴ Apart from trips abroad where Ministers and the Director General of DICA meet potential investors and business groups and establishing a list of priority sectors for investment, investment promotion in Myanmar is still in its early stages. This is understandable given the weaknesses of the business environment that prevailed just after Myanmar's economic transition in 2011. Investing heavily in investment promotion and branding activities before building the foundations of a good investment climate would have likely been a waste of resources.

DICA has, therefore, wisely focused its efforts on facilitating investments and has gone a long way in this regard as noted above. Focusing on easing regulatory bottlenecks is also indirectly a valuable investment promotion activity as it increases the attractiveness of Myanmar as an investment destination. There is still much room for improvement in investment facilitation nonetheless. To some extent a first tier of business reforms have been achieved with the new Investment and Companies Laws, but reforms to second tier levels of regulations are still much needed. Investors still complain about the unclear and burdensome procedures for obtaining ministerial licences and permits necessary for conducting their businesses. The OSS still operates more as a centralised information centre than as an actual single window agency with authority to issue permits and licences on behalf of the various ministries and agencies represented there. This is in clear contrast to the OSS at Thilawa SEZ where officials have autonomy to take decisions on behalf of their ministries, rendering the process much less burdensome for investors.

Myanmar's investment framework has also reached a level of development that now allows DICA to take a more strategic look and graduate to more sophisticated investment facilitation and promotion activities. These include being more involved in the development of capacity building programmes for domestic firms and industries, as well as being more active in facilitating business linkages with foreign investors. Co-ordination with other major actors active in promoting investments and private sector development in Myanmar, such as special economic zones (SEZs) and the SME Centre under the Ministry of Planning, Finance and Industry, could be strengthened for these purposes, although wide capacity gaps between domestic and foreign firms still remains a major barrier to greater linkages.

DICA has, nonetheless, developed a good reputation and reach with the business community and has an ample understanding of investors' interests and concerns. This can be leveraged in co-ordination with other relevant actors to build industry capacity building programmes and 'first-stage' linkages between domestic and foreign investors. Investment promotion activities could also be strengthened in alignment with these objectives, for instance by targeting investors in activities and segments with a greater propensity to integrate with the domestic economy.

Main policy recommendations

- Strengthen investment promotion activities, while continuing to improve investment facilitation:
 - Myanmar has made big strides in improving the legal and regulatory framework for investor entry and establishment, including through institutional restructuring and the establishment of adequate mechanisms, like one-stop shops and an online business registration system. DICA may now start to scale up its investment promotion measures. This would require significant institutional adjustments, both within DICA (see the next recommendation) and in terms of co-ordination across different actors undertaking their own promotional activities, such as the Thilawa Special Economic Zone.
 - Developing its investment promotion functions may require strengthening and clarifying its legal mandate, which today is submersed in functions of the Myanmar Investment Commission, as well as possibly an institutional and budget rearrangement. The government should consider what would be the best organisation design for delivering on such a mandate. This may imply designing a new strategy to re-position the investment promotion branch of DICA, either remaining as part of a larger ministry or becoming more autonomous.

- Commission a feasibility study by an independent body to analyse various institutional options for DICA, such as those proposed in the MIPP. Decisions on institutional arrangements and the status of the IPA in this regard requires careful analysis of the expected outcomes of any reforms and the consequences on the budget, human resources and the overall effectiveness of investment promotion and facilitation.
- Explore concrete opportunities and activities to foster MNE-SME linkages. DICA has the unique advantage of being close to foreign investors from the establishment phase and should thus seek to promote partnerships with local enterprises early on. This could extend to piloting initiatives in SEZs and industrial zones. Generally, the government should maintain efforts to strengthen the SME sector as a viable source of linkages with MNEs and for inclusive growth in Myanmar, while encouraging the private sector to establish its own industry-specific business development services.
- Considering their institutional independence (reporting to different branches of the government), careful co-ordination between DICA and the other investment promotion agents in the country, such as special economic zones, is needed to avoid policy misalignment, duplication and wasted resources. This is particularly important when it comes to the use and management of investment promotion instruments that have an impact on public revenue, such as fiscal incentives. Fiscal and non-fiscal incentives for firms locating inside the zones are particularly aggressive vis-à-vis the applied regime outside zones. Co-ordination is therefore needed to avoid an unwarranted expansion of zones and the adequate phasing out of some of the excessive fiscal incentives available to firms inside zones, while at the same time seeking greater alignment of the outside regime with the non-fiscal regulatory innovations and improvements available to firms inside the zones (see Chapter 7 for a detailed discussion on how to improve industrial and economic zones policy).
- In terms of investment facilitation, priority should be given to enhancing the effectiveness of the DICA OSS, as well as intensifying support and co-operation with other ministries and agencies to streamline and improve second-tier regulations affecting business operations beyond establishment:
 - Enhancing the effectiveness of the DICA OSS could be achieved by (1) integrating other licences and permits processes into the OSS, including by securing autonomy of OSS officials to decide on behalf of the various ministries and agencies they represent, similarly to current practice in the Thilawa One-Stop-Services-Centre (OSSC); and (2) by exploring further digital solutions for managing applications at the OSS. Moving away from the current paper-based system to digital record keeping not only provides documentation security, but can also allow for faster and more efficient analysis of the data. This could eventually be linked to a customer relationship management system that should be hosted at DICA, building on the customer service training DICA staff is already receiving through donor co-operation programmes.
 - An area requiring particular attention is the co-ordination between DICA and the Environmental Conservation Department (ECD), responsible for Environmental Impact Assessments. Because of the current dual approval process in place, investors with potentially poorly sited or designed projects may be led to believe that they have been given a green light to proceed from DICA, while this is not the case. In such situations, investors sometime seek to ignore or resist implementing ECD's recommendations. Conversely, investors may be equally concerned that implementing ECD's recommendation will invalidate their MIC permits. Expectations must be clarified at the outset to avoid frustrations and facilitate compliance with standards, which could be made easier if the two processes were integrated as recommended above.
 - Concerted efforts are still need in improving and streamlining regulations affecting business operations beyond establishment. The MIC's request to the relevant ministries to develop Standard Operating Procedures (SOPs) is a welcome initiative. The ministries should be

- assisted in developing the SOPs to ensure alignment around common objectives, which should be part of an overall strategy for regulatory improvements, inter alia, supporting the development the National Single Window.
- Consider the distance to the frontier when embarking on continued efforts to improve on the Doing Business rankings. While Myanmar made impressive strides in some categories, such as in starting a business, future efforts could be targeted at categories where Myanmar lies far from the top frontier, such as in the areas of contract enforcement, getting credit, protecting minority investors and resolving insolvency.
 - Strengthen its role in policy advocacy and support for good regulatory governance in business related areas:
 - Take advantage of the agency's strong links and frequent interactions with the private sector to involve them more systematically in defining and revising investment policies and priorities, including investment promotion strategies.
 - Continue implementing good regulatory practices in DICA and aim to pilot ex ante regulatory impact assessments. In the absence of a central government unit overseeing regulatory policy and implementation, including ex ante and ex post regulatory reviews, competent government units should seek international support and advice in undertaking reviews and assessments in policy areas within their remits. These experiences can offer valuable lessons for broader reviews of the stock of regulation in Myanmar and to optimise the regulatory framework, particularly as regards second tier regulations. In the near-to-medium-term, however, a central government unit with a mandate for regulatory oversight should be established.
 - Enhance DICA's operational, accountability and transparency framework:
 - Launch the process of developing an operational strategy in DICA to define targets, core objectives, key performance indicators and budgets, as well as a sound monitoring and evaluation (M&E) system. Such a strategy is a key step in designing the institutional set up for investment promotion in the medium term.
 - Strengthen the quality of DICA's annual report, highlighting its progress vis-à-vis core objectives, and make it public, including in English. This could be inspired by the reports of some leading IPAs and would form an integral part of the M&E system mentioned above.
 - DICA is also well-placed to develop an M&E system that monitors and reports on proposed, approved and endorsed projects obligations, including on responsible business conduct commitments (see Chapter 4 for a more detailed discussion). The new online portal (MyCo) should facilitate publishing information concerning project proposals summaries, including before MIC approval, as well as ensuring and monitoring MIC-permitted and endorsed companies' compliance with their annual reporting obligations under the Myanmar Investment Rule (MIR) 196, including with respect to commitments made in the context of the their Initial Environmental Examination or Environmental Impact Assessments (see Chapter 6 for more information). In this respect, DICA could also propose a standardised template for investors to facilitate reporting, assessment and future policy orientations. For educational and transparency purposes, DICA could make public in its website all the non-confidential and not materially sensitive information reported by investors.
 - Continue the on-going efforts to strengthen the 15 DICA branch offices. Beyond company administration tasks, these branches are key nodes for identifying upfront potential investor grievances, as well as for monitoring and ensuring investors' compliance with obligations in their permits and endorsements.

Promoting and enabling responsible business conduct

Promoting and enabling responsible business conduct (RBC) is of central interest to policymakers wishing to attract quality investment and ensure that business activity in their countries contributes to broader value creation and sustainable development. RBC principles and standards set out an expectation that all businesses avoid and address negative impacts of their operations, while contributing to sustainable development where they operate.

RBC expectations are affirmed in international principles and standards and increasingly in legislation. Recent years have seen a proliferation of high-level statements, including at G7 and G20 forums, national legislation, economic instruments and industry initiatives on RBC. All recent ASEAN Blueprints include references to RBC. In particular, policy action has focused on promoting the integration of RBC in core business operations, including also in how companies manage and deal with their supply chain. Any company that wishes to integrate in the global economy and participate in trade and investment must be aware of the fact that their buyers, clients, and partners may have various obligations when it comes to RBC. Broadly speaking, RBC is also an entry point for any company that wishes to contribute to the Sustainable Development Goals (SDGs) or to achieve specific economic and sustainability outcomes.

Myanmar's liberalisation process initiated in 2011 has enabled greater integration in global supply chains, strengthened the rule of law, and enhanced civil society participation. The first OECD *Investment Policy Review of Myanmar* highlighted the progress made in these areas and proposed options to leverage this context of reforms to promote and enable RBC (OECD, 2014). A number of policies and initiatives have emerged since then in support of RBC. The adoption of the Myanmar Investment Law, which includes explicit references to responsible investment, as well as the related legislative initiatives, was an important step in that regard. RBC commitments and provisions are also embedded in various national policies, strategies, and legal documents. The Myanmar Sustainable Development Plan 2018-2030 includes objectives for the expansion of the private sector as the engine of environmentally conscious and socially responsible growth. Promotion of responsible investment is also embedded in the vision of the Myanmar Investment Promotion Plan (MIPP) for the period 2016/17 – 2035/36.

Various initiatives have been spearheaded by international organisations, civil society and businesses. The UN Global Compact Myanmar chapter established in 2012 counts 126 participants in 2019. The Myanmar Centre for Responsible Business (MCRB), created in 2013 as a joint initiative of the Institute for Human Rights and Business and the Danish Institute for Human Rights, has become an important player for the promotion of RBC in the country. Business networks and associations such as the ASEAN Corporate Social Responsibility Network, UMFCCI, the American Chamber of Commerce and EuroCham organise regular events and make resources on RBC available to the public. The government and international organisations have collaborated with business networks to promote RBC on various occasions.

With Myanmar's greater openness and integration in global supply chains has also come increased international scrutiny. In a context where demands on RBC are rising globally, the recent political and humanitarian situation has attracted significant international attention and affected global perceptions on Myanmar, with direct and indirect economic impacts on investment and trade as well as sectors such as tourism. Since 2018, the EU has enhanced its engagement with Myanmar in relation to the EU Everything But Arms (EBA) arrangement, which guarantees preferential access to the European market for all exports except for weapons and ammunition, due to alleged shortcomings in respecting core human rights and labour rights standards (EU, 2019).

To address reputational issues, support productivity gains and achieve its objective to attract responsible investments, Myanmar has every interest in working toward alleviating the concerns of investors and trade partners. This implies sustaining efforts to address human rights issues, minimise businesses' exposure to RBC risks and strengthen the enabling framework for RBC. The government could also directly support

businesses in implementing RBC principles and standards, and help them navigate RBC risks. Communicating clear expectations and providing guidance as to what business responsibility entails, as well as disseminating and supporting implementation of relevant due diligence instruments in targeted sectors such as raw materials and the garment industry, could be particularly effective. The government also has a role to play in providing strategic directions for RBC at country level and ensuring that all stakeholders work jointly toward the same goal and consistently contribute to national efforts to promote and enable RBC.

The RBC chapter takes stock of the initiatives and various advances made in relation to RBC since the first OECD *Investment Policy Review of Myanmar*, outlining steps taken by the government to promote and enable responsible business practices. Environmental considerations, as well as aspects related to land and SEZ are addressed in more detail in Chapters 6, 7 and 8, respectively. This chapter also highlights opportunities for the government to further support businesses in implementing RBC principles and standards in Myanmar's current context, as well as to drive national efforts to promote RBC.

Main policy recommendations

- *Communicate clearly to businesses and investors what business responsibility entails in practice.* The government could ensure that international RBC standards are explicitly cited in relevant strategies, policies and laws and strengthen the review and approval processes on RBC for businesses falling under the scope of the Investment Law. A first step could be to issue, drawing on the example of the Thilawa SEZ's Notice No. 4/2015, a notification clarifying what is expected from investors in terms of responsible businesses conduct.
- *Support, enable and promote RBC due diligence among businesses.* Myanmar should promote broad dissemination and implementation of the relevant RBC international standards, notably the OECD due diligence instruments, and explicitly support collaborative industry initiatives.
- In particular, the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* provides a useful framework to help businesses identify and address human rights risks in the minerals and other raw materials sub-sectors, and avoid directly or indirectly financing or fuelling conflicts.
- Leveraging existing industry initiatives to promote and disseminate the *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* could enhance industrial relations and support trade and investment in the garment sector.
- *Pursue and intensify efforts to enhance transparency in extractive industries*, in particular and starting with state-owned enterprises. Due to their importance in Myanmar's economy, including in high-risk sectors and the government's significant leverage and ownership role, this could be a particularly effective way to help address and mitigate RBC impacts in Myanmar and foster better business practices in the market.
- *Develop a National Action Plan on RBC, in line with international best practice and in wide consultation with stakeholders.* A NAP process would help ensure that all actors are working in a consistent manner to contribute to the national RBC agenda. The process of developing the NAP could also support broad engagement with a wide range of stakeholders and contribute to building a national consensus on RBC priority issues and actions.

Infrastructure connectivity

Myanmar has come a long way in improving the investment climate in recent years, notably by laying down the basic legal foundations for a thriving business environment to emerge with the new Investment and Companies Laws, as well as the Special Economic Zones law. While these reforms are important building blocks, they are not sufficient to fully deliver upon expected investment attraction and development

objectives. Policy complementarities play a critical role in nurturing an enabling environment for investment and for sharing the benefits with society at large.

A few high-priority issues have already been prominently addressed in other chapters, such as investment promotion and facilitation, special economic and industrial zones, responsible business conduct, green growth and land tenure and administration. Infrastructure connectivity is another equally important area requiring particular attention from the authorities as it plays a critical role in building a thriving business environment, supportive of linkages between incoming foreign investments and the local economy.

Myanmar's political transition has been accompanied by substantial economic reforms to open the economy and to build a growth trajectory based on export-led development fuelled in part by foreign investment. The Myanmar Sustainable Development Strategy (MSDP) 2018-2030 clearly attests to this objective by embracing a private sector-led growth strategy and recognising its role as a potential engine of environmentally conscious and socially responsible economic growth. Acknowledging Myanmar's current economic structure, the MSDP gives priority to supporting the development of agriculture and small-medium enterprises (SMEs). In conjunction, the government aims to promote manufacturing, industrial and service sectors development to induce faster structural transformation and generation of higher quality jobs, as well as to facilitate the transition to a digital economy in the future.

A critical ingredient for attracting export-oriented manufacturing investments and improving agricultural development as sought in the MSDP is access to markets and good international gateway conditions. Better transport infrastructure connectivity can help ensure more efficient and reliable supply chain networks, raising opportunities for firms to integrate global value chains (GVCs) and for countries to reap the benefits of participation.

This calls for integrated strategies that combine investment, trade and infrastructure policies. Investment promotion and facilitation policies, for instance, need to go hand-in-hand with trade and infrastructure policies to be effective. This is equally the case for infrastructure. The quality of hard infrastructure is enhanced when an efficient soft infrastructure system is in place, including in terms of trade facilitation and logistics services. There are often cases where hard infrastructure has been developed without accompanying trade and business regulatory reforms or where it lacked the necessary multi-modal approach to deliver the expected results. Overcoming a fragmented approach is thus critical for strengthening the investment climate and leveraging positive spill-overs and complementary effects.

Since the lifting of economic sanctions, Myanmar has drastically expanded its trade, with exports and imports growing by 82% and 362%, respectively, between 2010 and 2017 (Central Statistics Office Myanmar 2019). A large and growing population fuels demand for imports while abundant labour and natural resources provides a fertile supply of its exports. Its geographic position also benefits overall trade, strategically located between some of the world's fastest growing economies: India, China and ASEAN countries. Infrastructure connectivity and expansion of logistics networks are therefore indispensable to Myanmar's sustained economic growth through greater integration into the world economy and to the rising of living standards of urban and rural population.

Current transport infrastructure connectivity in Myanmar is still underdeveloped and fails to keep pace with pressing demands. With just over a third of its roads paved and port capacity limited, quality of hard infrastructure can be considered poor within the region (ADB, 2014). A high concentration of transport on roads and lack of multimodality infrastructure contribute to relatively high transport costs (ADB, 2016b). Overall Myanmar's logistics performance is said to significantly lag behind the performance of its regional peers, especially with regards to trade-related infrastructure (World Bank 2014). Limited transparency and predictability in border procedures further add to the cost of doing business in the country by making it more burdensome to move goods across the border (OECD, 2018c). Stakeholders consulted during this review also complained about the presence of various formal and informal toll gates across important routes, such as along the major road from Yangon to Hpa-An (part of the East-West Economic Corridor), adding further costs and delays to transport.

There is a dire need for domestic connectivity to be improved through increasing transport investment from the current level of 1%-1.5% of GDP. China, Thailand and Viet Nam spend in comparison over 4% of their respective GDP on transport. The ADB (2016e) advocates that Myanmar should also aim to increase its transport investments to 3–4% of its GDP annually, suggesting that this can be done by increasing user fees in line with operational expenses, nudging SOEs to reach financial sustainability and actively involving private sector participation through concessions and PPPs.

Infrastructure investment planning and delivery would need a real boost to enable more efficient and sustainable expenditure on infrastructure. Transport infrastructure governance would generally benefit from the consistent use of proper feasibility studies, stakeholder consultation and project appraisal frameworks, taking into account any potentially negative social and environmental externality up-front, as well as from the introduction of long-term transport investment programmes and better monitoring and reporting (ADB 2016a). More efficient planning and delivery, such as strengthening governance in project selection, delivery and maintenance, can help to significantly save in infrastructure spending (McKinsey 2016).⁵ In doing so, the government should give particular attention to modernising the use of its road assets, by improving efficiency, such as allowing trucks on the Yangon-Mandalay expressway or increasing its legal axle loading, as well as by improving main trade corridors, such as the Greater Mekong Subregion North Road corridor to China and the GMS East-West Road corridor to Thailand (ADB 2016b).

Trade facilitation also remains weak within the region and will need to be strengthened. Myanmar can better facilitate trade through introducing the possibility to request advance rulings about the customs treatment of goods prior to their importation and reducing formalities at the border, in particular promoting automated processing for customs across all major border points, reducing the number of documents required for trade, and simplifying procedures in terms of associated time (OECD 2018).

The government is, nonetheless, stepping up efforts to tackle these connectivity deficiencies. It has established overarching goals and strategies in the MSDP and in the new National Logistics Master Plan 2018-2030. In 2019, it passed the regulation which will permit investments in much needed bonded warehouses. The government has also introduced a project bank of prioritised public investments which will facilitate co-ordination of donor support and the participation of the private sector. At the moment, Myanmar is already benefiting from support from the Asian Development Bank and JICA for the improvement of the main corridors. Their support is needed to scale up and upgrade existing transport connectivity infrastructure and, consequently, for attracting export-oriented investments that can better spur linkages with the domestic economy.

Main policy recommendations

- Increase investments in transport and logistics infrastructure: raise additional funding through adjusting user fees in line with operational expenses where affordability assessment allows, addressing the financial health of state-owned infrastructure companies and encouraging private sector participation.
- Further improve infrastructure investment planning and delivery, though strengthened feasibility and appraisal frameworks, taking into account potentially negative social and environmental externalities up-front, stakeholder consultations, long-term infrastructure programmes and appropriate monitoring of projects.
- Modernise the existing infrastructure assets, with particular focus on the main trade corridors, such as the Greater Mekong Sub-region North Road corridor to China and the GMS East-West Road corridor to Thailand.
- Make more efficient use of existing infrastructure assets, for instance, by allowing trucks on the Yangon-Mandalay expressway or increasing its legal axle loading.
- Strengthen trade facilitation and other soft infrastructure, through reducing formalities and upgrading trade supporting facilities.

Investment framework for green growth

Green growth offers Myanmar an opportunity to foster economic growth and development while ensuring that natural assets continue to provide the resources and environmental services on which the well-being of its people relies. A critical aspect of green growth is catalysing investment and innovation in environmentally sound technologies and infrastructure which both helps to sustain growth and gives rise to new economic opportunities (OECD, 2011). In addition, with the increasing need for global action to address climate change, investment for green growth must promote a transition to a low-emissions, climate resilient development pathway (OECD, 2017). Investment for green growth includes, among other things, investment in infrastructure – such as renewable energy, energy efficiency, water purification and distribution systems, transport and housing – as well as in conservation and efficient usage of natural resources, and waste management (OECD, 2015b).

A green investment framework has much in common with a general policy framework for investment, but an investment-friendly policy framework does not necessarily result in green investment unless certain elements are also in place. These include: a strong governmental commitment at both the national and international levels to support green growth and to mobilise private investment for green growth; policies and regulations to provide a level playing field for more environment friendly investments; policy and planning systems that screen all investments at an early stage to ensure environmental sustainability is taken into account; policies to encourage more environmentally responsible corporate behaviour; an institutional capacity to design, implement and monitor policies to foster green growth objectives; financial mechanisms for green investment (OECD, 2015b).

This chapter describes Myanmar's policy framework in these areas, providing an overview of the state of play and progress made in supporting green investment. It reviews the current policy framework in place to promote green growth and climate change (including policies that help to improve the environmental quality of investments in general), examines in greater depth existing efforts and the potential to engage the private sector to scale up investment in renewable energy, and highlights issues related to financing green projects in the country. It is structured around the questions on green growth and investment raised in the updated *OECD Policy Framework for Investment* and the *OECD Policy Guidance for Investment in Clean Energy Infrastructure*. It also builds on the discussions on policy choices to support the transition to a low-emissions, climate-resilient economy in OECD (2017) *Investing in Climate, Investing in Growth*.

Currently, Myanmar is facing several environmental and development challenges. It has seen year on year economic growth since its transition to a democracy, but the unsustainable use of natural resources is exacerbating development challenges. Primary sectors support employment and GDP growth, and the poorest populations live in rural and remote areas where livelihoods are reliant on small-scale agriculture, fisheries and use of forest resources. Illegal logging and other economic activities have resulted in widespread degradation of natural resources, with Myanmar estimated to have lost 10 million hectares of forest cover between 1990 and 2015 (Fodor and Ling, 2019). Increasing air and water pollution in urban areas is exacerbated by poor waste management, including of hazardous waste in industrial zones, uncontrolled construction activities and growth in vehicle usage. Myanmar is also one of the most vulnerable countries globally to climate change.

Promoting green investment is an opportunity for Myanmar to avoid locking in environmentally and economically unsustainable development. The country faces a major gap in infrastructure provision, with an estimated 40% of its roads being paved (Asian Development Bank, 2017a) and little more than 50% of the population having access to electricity as of December 2019 according to the authorities. These gaps present an opportunity for Myanmar to invest in greener infrastructure alternatives and avoid locking-in environmentally unsustainable infrastructure for the next two decades. Off-grid renewable energy can support increased access to energy while grid expansion takes place, and utility scale, on-grid renewables can help reduce the carbon intensity of the electricity supply.

The government has taken steps towards promoting green investment, with several new strategies and actions being put in place in the last year. The Myanmar Sustainable Development Plan 2018-2030 clearly integrates environment and climate change as one of five pillars for development. The country's Climate Change Strategy and Action Plan 2018-2030 promotes climate action, and Myanmar's Nationally Determined Contribution outlines mitigation and adaptation priority actions. The National Environment Plan 2018-2030 promotes integration of environmental issues across sectors, and the Environment Conservation Law 2012, underpinned by the Environment Conservation Rules 2014 and other regulations, promotes the greening of investments by assessing and mitigating against negative environmental impacts.

Taken together these policies represent a solid, and coherent framework for green growth in Myanmar, however, inclusion of targets or clear goals on specific areas relevant to green growth (e.g. renewable energy, emissions reductions) could present a stronger signal to investors. Further, significant efforts will be needed to implement these policies, and to raise public and private resources for green investments. All government agencies, and especially those in close contact with investors, such as the Directorate of Investment and Company Administration (DICA) among others, need to be well-aware and educated about these strategies, as well as disseminate them and integrate them early-on in their services and interactions with investors. This helps to clarify expectations and facilitates policy implementation and compliance.

Main policy recommendations

- Ensure that environmental considerations are included in early screening of proposed investments by MIFER, MONREC and line ministries, and that this is a joined up process involving all relevant Ministries (see related recommendation in Chapter 3).
- Promote the greening of investments by continuing to strengthen the implementation of environmental impact assessment (EIA) systems, including by building capacity at national and subnational levels to review EIAs and reduce delays in this process, and improving the transparency and information systems supporting EIAs. In order to strengthen compliance and accountability, the government may also consider creating an online database of approved EIA reports. This could help to educate investors and improve the quality of future EIAs, as well as contribute to enhancing monitoring and compliance pressures by stakeholders.
- Integrate environmental criteria in the future development of Myanmar's project bank. Myanmar is developing a project bank to prioritise investments in infrastructure and attract investors. In the future, integrating environmental considerations into the identification of projects, including through strategic environmental assessments, could help catalyse investment for greener projects.
- Promote utility-scale solar and wind-based electricity generation more aggressively within the country's energy plans, including through the formal recognition of the role of non-hydro renewables in the countries power expansion plans, the introduction of standardised power-purchase agreement templates, facilitating the land acquisition process etc.
- Support roll-out of off-grid renewable energy solutions, including by promoting opportunities for private companies and impact investment.
- Improve access to climate finance and other concessional environment-related finance, and target the use of these strategically to develop projects and build capacity for green investment, and improve climate resilience.

Making the most of economic zones

Following the experience of regional peers, Myanmar is advancing an ambitious programme of special economic zone (SEZs) and industrial zone development, with the aim of attracting investors, creating jobs, and developing industry. Currently there are three SEZs and 19 industrial zones across the country. These

zones impose a cost on society through forgone revenues from tax incentives, duty exemptions and infrastructure investments specific to the zone. In order to justify their establishment, the associated societal gains must outweigh these costs. In principle, zones, particularly SEZs, have the potential to generate long-run spillovers that benefit workers and firms beyond their confines through knowledge transfers, in addition to being a potential source of foreign currency as they typically target more export-oriented industries. In practice, the experience of SEZs as a vehicle for development has been mixed, depending much on the quality of policies and business environment in which they operate. On the positive side, host countries can, to a certain extent, influence the spillover potential of SEZs with appropriate policies and institutions targeting skills and supplier development, and facilitating the exchange of information between SEZ investors and local companies.

Some important differences in the framework for SEZs and industrial zones exist in Myanmar. SEZ programmes are governed by a special regulatory and institutional framework, dealing with trade, investment, land, tax, labour and environmental policy. The main legislation covering the regime for the establishment and operation of SEZs and the rights and obligations of SEZ authorities, developers and users is the 2014 Special Economic Zone Law. Industrial zones, on the other hand, do not offer a special regulatory or customs regime, and have until recently not been subject to dedicated legislation. The government submitted a draft Industrial Zone Law to Parliament in late 2019, enacted in May 2020, with the objective of ensuring a more systematic approach to zone planning and development.

To attract investors, the Myanmar SEZ Law offers a generous incentive package, including a corporate tax holiday of up to seven years, and a subsequent extended period of reduced corporate tax rate, as well as deductions linked to R&D investments and local staff training activities. In addition, the law mandates the establishment of a one-stop shop to access all government services and clearances, and the provision of basic infrastructure and utilities. In return, investors are subject to a minimum investment requirement, restrictions on domestic sales and employment of foreign personnel, and staff training obligations.

Compared to the in-land regime, the 10-year 50% corporate tax rate reduction offers a substantial competitive advantage, which partly justifies the restrictions on domestic sales of free zone investors, as a means of protecting inland investors from unfair competition. However, a less distortionary approach would be to gradually phase out the reduced tax rate, as has been the case in many regional peers, while relaxing the export share requirement, which would allow inland companies to benefit from high-quality goods produced in the zones.

Thilawa SEZ is currently the most advanced SEZ in Myanmar, with high quality facilities, public utilities and transport links. Its Management Committee, the TSMC, established a One-Stop Services Centre that significantly reduces the number of public officials with which investors must engage and offers expedited one-stop clearances for all necessary approvals and registrations. The TSMC is in the process of developing a portal for investors to submit applications and obtain approvals online, and has committed to specific turnaround times for many procedures, on par with zones that are internationally recognised for their good practice in business facilitation. It has also issued a notice clearly stating RBC expectations that apply to all companies doing business in Thilawa. As such, Thilawa can serve as a model for other industrial zones in terms of infrastructure development and zone management, and as a laboratory for policymakers to test new policies, like simplified regulations or RBC policies, before rolling them out to the wider economy. While it is too early to assess Thilawa's wider economic impacts, currently, 74 businesses are operational in the SEZ and account for around 9 000 jobs; a quarter of these businesses have already started exporting. Moreover there is evidence that Thilawa is contributing to skills development, as reported by surveyed zone workers, while the extent of backward linkages with non-zone firms remains limited mainly because of the still limited capacity of domestic firms (IGC, 2018).

The planning and administration of industrial zones is generally less well developed compared to that of SEZs. Until now, management committees have not been subject to rules or standards for developing and managing the zones, and the respective roles of different government bodies in administering zone

development were not clearly defined. The weak and outdated legal framework has resulted in the rapid proliferation of industrial zones with inadequate planning and little assurances on their performance and benefits. Many industrial zones have inadequate infrastructure, unused plots and irregular use of land. Infrastructure investment and maintenance have been insufficient over the years. Roads are in poor condition even in zones surrounding the main urban areas, and drainage and waste management continue to be a concern. The high prices of land in these zones have led many companies to sell their plots and take their operations outside the zones, defeating any strategy behind zone development. The newly enacted Industrial Zone Law of May 2020 sets out that existing zones shall comply with provisions of the new law, including on land use, environmental conservation, and infrastructure provision. If appropriately enforced, this new legal framework is likely to deliver significant improvements in industrial zone performance.

Mingaladon Industrial Park, developed by a public-private joint venture between the Myanmar government and a Japanese trading and investment company is a notable exception to the general shortcomings of industrial zones. It is widely considered to have the most advanced facilities of any industrial zone in Myanmar, which along with its proximity to Yangon are its main attraction to investors. Unlike other industrial zones in the country, Mingaladon is fully operational with some 41 running businesses occupying all available plots, and employing tens of thousands of workers in light manufacturing activities. But business facilitation in Mingaladon is little better than in other zones or in the wider economy. Building on the Mingaladon experience, the Myanmar government is looking to develop other two industrial parks in partnership with the foreign investors, namely with the Thai Amata Corporation and with the Korea Land and Housing Corporation. It is expected that these new zones will set new improved standards for future industrial zones in the country (Myanmar Times, 2019a and 2019b).

The MIPP proposes a set of actions to improve administration policies of industrial zones, including devising a zone allocation plan based on the investment and linkage potential of different regions; clarifying the roles and responsibilities of different institutions; setting the rules and requirements in terms of activities, infrastructure provision and environmental protection; and examining opportunities for streamlining business-related procedures through a one-window service. The government has since enacted a new Industrial Zone Law as mentioned above and is in the process of amending the Private Industrial Enterprise (1990) and the Small and Medium Enterprise Development (2015) Laws, for the purpose of increasing investment, strengthening links with SEZs, upgrading existing industrial zones and developing sustainable industries. If designed appropriately and in the line with the actions proposed by the MIPP, these laws have the potential to support framework conditions that are conducive to new investment attraction and industrial linkage development in Myanmar's industrial zones.

Myanmar is currently able to offer abundant labour to investors at a competitive cost but with an insufficient supply of workers with technical or managerial skills, who are vital for the adoption of new technologies and for effective business management. The combination of tax deductions for training expenses, investor obligations to provide training activities, and gradually increasing restrictions on foreign skilled labour may serve to effectively transfer knowledge to local employees and develop the technical skills base. But restricting foreign personnel without a parallel initiative to develop the local skills base will only serve to discourage potential investors from choosing to locate in Myanmar. In parallel, the education system is undergoing a major overhaul and the MIPP proposes concrete actions to develop human resources for industry, including monitoring private sector needs and facilitating dialogue between government bodies that oversee vocational education and skill development, education and training institutions and private sector representatives. These actions, if implemented, have the potential to foster the sorely needed technical and managerial skills.

Given the limited base of local suppliers, Myanmar is still at an early stage with respect to linkage programmes, and still relies heavily on donor support to develop the necessary framework for integrating local suppliers in the supply chains of foreign investors. Going forward, successful special economic zones and industrial zones, like Thilawa and Mingaladon, offer a good starting point for implementing pilot

linkages programmes. The TSMC could also promote the matching of buyers and sellers by, for example, providing firms in the zone with a list of firms in the Yangon region, and in neighbouring IZs that are producing the relevant inputs or through networking events.

Main policy recommendations

- Align SEZ and industrial zone development and administration with the broader investment promotion strategy, possibly consolidating their oversight under one central authority.
- Consider gradually phasing out excessive fiscal advantages provided to SEZ investors through extended corporate tax reduction (in addition to the tax holiday available to non-zone investors), while simultaneously relaxing the export-share requirement of free-zones, to level the playing field across zone and non-zone investors, reduce government revenue losses, eliminate distortions in investor allocations to domestic and export markets, and grant domestic industry access to free zone goods. Along these lines, also consider extending tax deductions for training expenses available to SEZ investors to the inland regime.
- In line with the goal of attracting and enabling responsible investments into Myanmar, as alluded in the new Myanmar Investment Law, consider adopting the Thilawa SEZ Notice No. 4/2015 on Responsible Investment for the wider economy, and encourage management committees of all zones to adopt it too.
- Resolve the inconsistency between the SEZ Law and the EIA requirements in terms of approval processes and terminology as set out by the 2012 Environmental Conservation Law, by amending the implementing regulations of either law and creating a dedicated EIA regime for SEZs.
- Implement the action plan for improving planning and administration of industrial zones, and ensure that clear rules and requirements in terms of zone allocation, infrastructure provision, business facilitation and environmental protection are embedded in the new Industrial Zone Law.
- Implement the action plan to develop human resources for industry set out in the MIPP. In particular, establish an active dialogue with the private sector on skills needs, facilitate dialogue between relevant policy makers, education and training institutions, and industry, and support the design of curricula that meet the needs of business.
- Support relevant institutions in designing systematic and industry-specific training programmes for supporting industries, in collaboration with donors and the business community. Involve SEZ investors in the design of training curricula and programmes. Focus on key economic sectors, such as those targeted by the MIPP, including textiles and garments, agroindustry and machinery assembly. Food processing could serve as a pilot initiative given the currently higher potential for linkages in the sector.
- Promote the matching of investors and suppliers through networking events, or by providing Thilawa investors with a list of firms in the Yangon region, and in neighbouring industrial zones that are producing the relevant inputs.

Fostering secure and well-defined land rights

Secure and well-defined land rights are a key building block of an enabling investment environment, notably one that supports a more inclusive and sustainable development path. Myanmar still needs to make considerable progress in this respect. The first OECD *Investment Policy Review* (OECD, 2014) already shed light on many land tenure and governance deficiencies affecting the investment climate and sustainable development more widely. The review also recommended a number of reforms that would contribute to strengthening land rights and administration.

Many of the land tenure challenges identified then still persist today, although it is to be hoped that the prospects are brighter for addressing these issues in the near future, given the adoption of the National

Land Use Policy (NLUP) in 2016 (Government of Myanmar, 2016). The NLUP, which was finalised in the waning days of the previous Thein Sein government after extensive stakeholder consultations, represents a rather progressive land policy framework. Among other strategic orientations, it proposes the development of a National Land Law (NLL) to support the implementation of the various NLUP objectives. The current government, which took office in April 2016 subsequent to the NLUP publication, also restated the commitment to addressing land governance and increasing land tenure security in its election manifesto (NLD, 2015).

Subsequent events, however, have led some businesses and civil society organisations (CSOs) to take a more sceptical stance on the ability and willingness of the Myanmar government to pursue the vision established under the NLUP. The somewhat slow progress in advancing with the NLUP implementation – for example, the National Land Use Council (NLUC) charged with the implementation of the NLUP was only established two years later – and some rushed and parallel reforms to key land-related legislations in late 2018, which are inconsistent with the NLUP, have raised concerns of stakeholders. Many CSOs also voiced concerns about the lack of consultation so far around the development of the NLL. It is hoped that this will change after the formation in September 2019 of a dedicated working committee under the NLUC for this purpose and in involving representatives of a wide group of stakeholders.

Concerns have also been raised with respect to the ‘Land and Property Bank’ project announced in late 2019, under which it seems that government entities would list all the plots of land under their control and that could be potentially made available to investment projects. This way investors would have an upfront idea of possible land plots and locations for their projects. At this stage, the lack of official information about the initiative precludes a more thorough assessment of its potential impact, but considering the various deficiencies of the current land information system discussed below, there are likely to be significant risks and challenges in pursuing the initiative.

Until at least some of the core provisions of the NLUP are implemented, land tenure will remain confusing and often insecure for investors, smallholder farmers, communities and other landowners or users. The reasons include *inter alia*: *i*) the fragmented, complex and outdated legal and institutional framework, with dozens of laws in place and multiple agencies involved in land administration; *ii*) weak protection of land tenure rights, particularly of customary land use rights that are predominant in many of the ethnic states in the country; *iii*) inaccurate or absent land information systems (i.e. cadastre and property registry systems); *iv*) complex and burdensome land registration processes resulting in low land registration rates, notably in ethnic upland areas; *v*) absence of land use planning and complex land use change policies; *vi*) overly strict land use policies, including rigid land classifications that are used for land administration interventions including land registration that do not reflect the reality of existing land use on the ground; *vii*) unclear and costly land transfer procedures; *viii*) a poor regime for compulsory land acquisitions by the state; *ix*) weak land disputes resolution system; *x*) challenges in addressing historical land grievances; *xi*) and, until recently, the promotion of large-scale land allocations without adequate safeguards.

The importance of secure access to land and natural resources cannot be overstated in Myanmar: it is the most important resource for rural households comprising two thirds of the population. A stark urban-rural poverty divide remains, with a still significant 23% of the rural population in poverty in 2015, compared to an urban poverty rate of 9% (MOPFI, 2018). This means that millions of people depend on access to farmland and rangelands, to fisheries and forests for their livelihoods. The way the government and society manage those resources has a direct impact on food security, poverty alleviation, investment and environmental sustainability (FAO and EU, 2018). Myanmar has been identified as one of the most vulnerable countries in the world to the effects of climate change, ranking 3rd out of 187 countries from 1998 to 2017 in the Global Climate Risk Index 2019 (Eckstein *et al.*, 2019). As such, effective use of land and the prevention of degradation of land and natural resources must also be factored into long-term land use planning.

With the agreement on the Sustainable Development Goals (SDGs) in 2015, global recognition of the critical importance of tenure, access to resources and their governance for achieving sustainable development has been secured within a broad, comprehensive framework. Within this context, Myanmar adopted its Myanmar Sustainable Development Plan (MSDP) 2018–2030 which consolidates the overarching national development vision and strategy, and serves thereby the purposes of facilitating the alignment of policies, co-ordination and co-operation across all ministries, states and regions (MOPFI, 2018).

Despite explicitly noting that it results from the integration and distillation of existing plans and priorities, the MSDP fails to include a reference to the NLUP, which was dropped from its penultimate draft. The remaining section on land governance usefully focuses on sustainable land management to preserve the country's natural capital but is silent on other relevant land governance dimensions (MOPFI, 2018). This omission adds to a number of confusing signals on the importance the government attaches to addressing the current complicated and conflicting land governance situation as mentioned above.

Anecdotal evidence suggests that the current situation is an important restraining factor on further investment as well as a source of continued frustration for smallholders, communities, and ethnic groups who must live with the vulnerability posed by insecure tenure. Land reform is often one of the most challenging areas of reform a government can face – it is tied up with long-held traditions of customs and use, more mundane but ever-present pushes and pulls of vested interests, both visible and hidden, and laden with economic and political implications. Those challenges are even more pressing in Myanmar given the deeply rooted interlinkages between land governance and the peace process.

Moving forward with this complex and highly contested process of land reform is essential for Myanmar to sustainably benefit from incoming investments that can contribute to improving the livelihood of its citizens.

Main policy recommendations

- Implement the NLUP through a structured and consultative process that involves a wide range of stakeholders and which is set out in a transparent and predictable manner, with a clear planning of activities and schedule for stakeholders participation in the process. The establishment of the working committees under the NLUC for this purpose with participation of stakeholders goes in this direction. They should make sure that their work plans provide *inter alia* the opportunity for advanced considerations of draft documents, opportunities for oral and written input, and full and transparent access to relevant documentation by all stakeholders including beyond its active membership.
- Develop the National Land Law (NLL) and harmonise and rationalise existing land laws with the NLL:
 - Ensure that the NLL recognises and provides for the formalisation of all formal and informal land tenure rights and delineate a streamlined institutional framework and process for land rights registration, transfers and acquisitions; and set this as the framework for the harmonisation and rationalisation of the remaining land laws;
 - Develop a comprehensive land law reform process and proposals that reflect the basic principles of the NLUP and harmonise existing land legislation with the NLL;
 - Take action on an interim basis to halt contentious amendments to the existing laws and regulations, for instance pause implementation of the 2019 Land Acquisition Resettlement and Rehabilitation Law, while adjusting implementing rules where feasible to address identified challenges and seek alignment with the NLUP;
- Develop a single administration system to improve policy and procedural consistency and avoid situations of regulatory and institutional voids as is currently the case. Key considerations are to improve the efficiency and reliability of land-related services (e.g. issuance of land documents,

cadastral survey and mapping and registry services) and enhance land tenure security for all, by taking steps to:

- simplify land categories and allowing all to be registered, including individual and communal claims to customary land;
- promote women's rights over land, including through the systematic registration of conjugal titles under both partner names;
- establish a streamlined process for registering and regularising land tenure rights and transfers;
- establishing a transparent process for the management of public land;
- establish pilot land offices in selected townships with a focus on the delivery of good quality land administration services to experiment and roll-out successful practices to other offices in the medium-to-longer term;
- reform the current inefficient and costly property tax system;
- establish the framework for updating and then digitising existing land records and information with the vision of moving to an unified cadastre and registry system in the future;
- address the necessary institutional arrangement to bring land administration services under a single land administration authority;
- and designate a lead land committee in each chamber of the Parliament to deal with land issues;
- Revise the 2019 Land Acquisition Resettlement and Rehabilitation Law to strengthen the framework and ensure compulsory land acquisitions by the state occur only in a non-discriminatory manner, for a well-delimited public purpose, under due process of law, and against prompt, adequate and fair compensation;
- Develop a land dispute settlement system that is independent, timely, affordable and effective and is widely accessible to all;
- Eliminate or at least restrict criminal sanctions concerning land-related offences to the most severe cases;
- Establish a land use planning framework to support a more sustainable and efficient pattern of spatial development;
- Set up monitoring and reporting mechanisms for large-scale agricultural land allocations to ensure their compliance with agreed performance requirements and allow for more informed policy-making, as well as to transparently respond to stakeholders' concerns about their social, environmental and economic impacts;
- Halt new large-scale land allocations in conflict-susceptible areas until land reforms are in place. Consider them only in areas where the risk of conflict is kept to a minimum, for instance in returned VFV land over which there are no existing claims (including of customary rights holders) or over which land legacy issues can realistically be addressed and there is no risk of infringing on customary rights of indigenous people and local communities;
- Address links to the peace processes/ceasefires, including restitution rights of refugees and internally displaced populations:
 - Land governance in conflict-affected areas, including land restitution, are wide-encompassing challenges, involving issues and policies well beyond the scope of this review. Other fora are more appropriate to discuss solutions to these specific complex matters. Nonetheless, it is important to recognise here that such challenges affect the climate for responsible investment and that an upgrading of the land regime and administration as suggested in this review would need to be carried out in a conflict-sensitive manner, recognising and incorporating land-related matters arising from the evolving peace processes and ceasefire agreements. Any institution and process established to address restitution rights of returning refugees and internally

displaced persons (IDPs) should strive for the highest standard of transparency and accountability, and nurture the involvement of local communities at the policy and implementation level.

Key considerations for responsible investors

- *Detailed due diligence, including consultations and negotiations*: given all the challenges and gaps identified in existing Myanmar law, detailed due diligence is a necessary part of any investment involving land to ensure that investors are not involved in dispossession of existing users that does not comport with international standards. Companies should take a broad view in consulting and negotiating with occupiers and users of land, recognising that potential claimants or occupants may not have full documentation of their tenure rights, nor in some cases, tenure rights that are protected under current law. Ignoring claims based on long-standing occupancy and use, including customary use, or requiring current occupants or claimants to pursue them through the courts, is not a viable alternative for negotiating access to land in Myanmar. It is essential to recognise that even when claims cannot be upheld under existing legislation they are often legitimate for local communities and rural households. Nor is it practical, especially where claimants are already occupying the land. Efforts to involve smallholder farmers in the investor's business plan is strongly recommended, as communities traditionally involved in agriculture may have few other options to restore their livelihoods.

References

- Asia Foundation (2020), "Myanmar Business Environment Index (MBEI): COVID-19 Impact on Businesses - a Survey", June 2.
- Asian Development Bank (2017a), *Country Partnership Strategy 2017-2021: Building the Foundations for Inclusive Growth*, Manila, Philippines.
- Barry, M. (2020), "Shaping a sustainable post-Covid-19 world: five lessons for business", Ethical Corporation, website article, March 27, <https://www.reutersevents.com/sustainability/shaping-sustainable-post-covid-19-world-five-lessons-business> (accessed on 5 June 2020).
- DICA (2018), "Key reforms in Myanmar Companies Law and New Myanmar Electronic Companies registry", Presentation, ASEAN-Japan Centre, March 23, <https://www.asean.or.jp/ja/wp-content/uploads/sites/2/2018/03/0c16c70f57471070c549bc860c45945d.pdf>
- EEAS (2020), "EU Myan Ku Fund distributes first billion in payments to over 12 900 garment workers", European Union External Action Press Release No. 200602_4, Yangon, June 2. Available at: https://eeas.europa.eu/regions/africa/80186/eu-myan-ku-fund-distributes-first-billion-payments-over-12900-garment-workers_en (accessed on 5 June 2020).
- Eurocham Myanmar (2020), *The Economic Impact of the COVID-19 Outbreak with European companies in Myanmar*, European Chamber of Commerce Myanmar, March.
- Fodor, Martin, and Stephen Ling (2019), *Myanmar - Country Environmental Analysis : A Road towards Sustainability, Peace, and Prosperity : Synthesis Report*, World Bank: Washington DC, May.
- Hofman, Bert and Kai Kaiser (2002), *The making of the big bang and its aftermath: a political economy perspective*, World Bank Group: Washington, D.C.
- Global New Light of Myanmar (2020), "EU announces €5 million [7.9 billion kyat] emergency cash fund for Myanmar garment workers impacted by COVID-19", website article, April 10, <https://www.globalnewlightofmyanmar.com/eu-announces-e5-million-7-9-billion-kyat-emergency-cash-fund-for-myanmar-garment-workers-impacted-by-covid-19/> (accessed on 5 June 2020).
- IFPRI (2020), "Assessing the Impacts of COVID-19 on Myanmar's Economy: a Social Accounting Matrix

- (SAM) Multiplier Approach”, *IFPRI Strategy Support Program Working Paper No. 1*, May.
- IMF (2020), *World Economic Outlook, April 2020: The Great Lockdown*, International Monetary Fund: Washington, D.C.
- IMF (2018), “Myanmar: 2017 Article IV Consultation - Staff Report”, *IMF Country Report No. 18/90*, March.
- International Growth Centre (2018), “Learning from Thilawa Special Economic Zone”, *IGC Policy Brief No. 89404*, February 2018.
- Jacobs, Scott (2015), “APEC study on stakeholder experiences in APEC with providing public comments on proposed regulations”, 27 August.
- KPMG (2020), “Myanmar: Government and institution measures in response to COVID-19”, website content, June 10, <https://home.kpmg/xx/en/home/insights/2020/04/myanmar-government-and-institution-measures-in-response-to-covid.html> (accessed on 5 June 2020).
- Lewis, B. (2015), “Twelve Years of fiscal decentralisation: a balance sheet”, in H. Hill (ed.), *Regional Dynamics in a Decentralised Indonesia*, Institute of Southeast Asian Studies, Singapore, pp. 135-55.
- MOPFI (2018), *Myanmar Sustainable Development Plan (2018 – 2030)*, Government of Myanmar: Nay Pyi Taw, August.
- Monoletti, P. and Nam Sandi, (2018), *Key economic issues for Myanmar’s peace negotiations*, Final Report, IGC, Yangon, June.
- Myanmar Times (2020a), “COVID-19 leaves over 60 000 workers jobless in Myanmar”, website article, September 24, <https://www.mmtimes.com/news/COVID-19-leaves-over-60000-workers-jobless-myanmar.html> (accessed on 5 June 2020).
- Myanmar Times (2020b), “MIC halves application fees for investors as coronavirus bites”, website article, April 9, <https://www.mmtimes.com/news/mic-halves-application-fees-investors-coronavirus-bites.html> (accessed on 5 June 2020).
- Myanmar Times (2020c), “MIC to accelerate approvals for labour-intensive, healthcare investments”, website article, April 11, <https://www.mmtimes.com/news/mic-accelerate-approvals-labour-intensive-healthcare-investments.html> (accessed on 5 June 2020).
- Myanmar Times (2019a), “Green light given for Thai-backed industrial estate near Yangon”, website article, October 29, <https://www.mmtimes.com/news/prospects-look-bright-south-korean-backed-industrial-complex-near-yangon.html> (accessed on 15 December 2019).
- Myanmar Times (2019b), “Prospects look bright for South Korean-backed industrial complex near Yangon”, website article, September 24, <https://www.mmtimes.com/news/prospects-look-bright-south-korean-backed-industrial-complex-near-yangon.html> (accessed on 15 December 2019).
- OECD (2020a), *OECD Economic Outlook, Interim Report September 2020*, OECD Publishing, Paris, <https://doi.org/10.1787/34ffc900-en>.
- OECD (2020b), “Foreign direct investment flows in the time of COVID-19”, OECD, Paris, May 4, https://read.oecd-ilibrary.org/view/?ref=132_132646-g8as4msdp9&title=Foreign-direct-investment-flows-in-the-time-of-COVID-19.
- OECD (2020c), “COVID-19 crisis response in ASEAN Member States”, OECD, Paris, May 4, https://read.oecd-ilibrary.org/view/?ref=129_129949-ehsuoqs87y&title=COVID-19-Crisis-Response-in-ASEAN-Member-States.
- OECD (2020d), “Investment Promotion Agencies in the time of COVID-19”, OECD, Paris, May 6, https://read.oecd-ilibrary.org/view/?ref=132_132715-6ewiabvnx7&title=Investment-promotion-agencies-in-the-time-of-COVID-19.
- OECD (2020e), “COVID-19 and Responsible Business Conduct”, OECD, Paris, April 16, https://read.oecd-ilibrary.org/view/?ref=129_129619-6upr496iui&title=COVID-19-and-responsible-business-conduct.
- OECD (2020f), “Building Back Better: A Sustainable, Resilient Recovery after COVID-19”, OECD, Paris,

- June 5, https://read.oecd-ilibrary.org/view/?ref=133_133639-s08q2ridhf&title=Building-back-better-A-sustainable-resilient-recovery-after-Covid-19.
- OECD (2019), *FDI Qualities Indicators: Measuring the sustainable development impacts of investment*, OECD, Paris, <http://www.oecd.org/fr/investissement/fdi-qualities-indicators.htm>.
- OECD (2018a), "The Role of Ombudsman Institutions in Open Government", *OECD Working Paper on Public Governance No. 29*, OECD Publishing, Paris, <https://doi.org/10.1787/7353965f-en>.
- OECD (2018b), *OECD Investment Policy Reviews: Cambodia 2018*, *OECD Investment Policy Reviews*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264309074-en>.
- OECD (2018c), *Trade Facilitation and the Global Economy*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264277571-en>.
- OECD (2017), "Mobilising financing for the transition", in *Investing in Climate, Investing in Growth*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264273528-9-en>.
- OECD (2016), *OECD Economic Surveys: Indonesia 2016*, OECD Publishing, Paris, https://doi.org/10.1787/eco_surveys-idn-2016-en.
- OECD (2015a), "Evidence-based policy making through Regulatory Impact Assessment", in *OECD Regulatory Policy Outlook 2015*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264238770-9-en>.
- OECD (2015b), *Policy Framework for Investment, 2015 Edition*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264208667-en>.
- OECD (2014), *OECD Investment Policy Reviews: Myanmar 2014*, *OECD Investment Policy Reviews*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264206441-en>.
- OECD (2012), *Recommendation of the Council on Regulatory Policy and Governance*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264209022-en>.
- OECD (2011), *Towards Green Growth*, *OECD Green Growth Studies*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264111318-en>.
- OECD-ERIA (2018), *SME Policy Index: ASEAN 2018: Boosting Competitiveness and Inclusive Growth*, *SME Policy Index*, OECD Publishing, Paris/ERIA, Jakarta, <https://doi.org/10.1787/9789264305328-en>.
- Thet Tun, Melinda (2017), "Making better laws for Myanmar", *Frontier Myanmar*, website article, October 24, <https://www.frontiermyanmar.net/en/making-better-laws-for-myanmar/> (accessed on 15 December 2019).
- Thomsen, S., Nicolas, F. and M. Bang (2013), "Lessons from Investment Policy Reform in Korea", *OECD Working Papers on International Investment*, 2013/02, OECD Publishing, Paris, <https://doi.org/10.1787/5k4376zqcpf1-en>
- Union Attorney General's Office (2015), *Moving Forward to the Rule of Law: Strategic Plan 2015-2019*, Government of Myanmar: Nay Pyi Taw.
- United Nations (2012), *Situation of human rights in Myanmar: note by the Secretary-General*, September 25, A/67/383, <https://www.refworld.org/docid/50a103cd2.html> (accessed 15 December 2019).
- World Bank (2020a), *World Bank East Asia and Pacific Economic Update, April 2020: East Asia and Pacific in the Time of COVID-19*, World Bank Group: Washington, D.C.
- World Bank (2020b), "PPPs and COVID-19 Resources", World Bank Group: Washington, D.C., April 9.
- World Bank (2018), *Myanmar's Future Jobs: Embracing Modernity – Main Report*, World Bank Group: Washington, D.C.
- World Justice Project (2019), *WJP Rule of Law Index 2019*, Washington, DC.

Notes

¹ Also because some of the investments leading to the peak were of a 'one-off' nature. The reduction has been largely driven by a decline in investments in the oil & gas sector, which has not had a project put to tender since then, and in investments in transport and communications following the entry of three new mobile telecom providers, namely of Ooredoo and Telenor in 2014 and MyTel in 2017. Foreign investment approvals in manufacturing, however, have remained fairly strong, denoting that there is still some positive momentum despite the situation.

² The cash relief is disbursed through a mobile money platform to workers in crisis who are jobless and / or face evictions from their homes ; workers whose contracts have been illegally terminated thereby countering irresponsible business practices ; and workers of Small and Medium Enterprises (SMEs) who agree to retain workers and to provide at least a matching support. Recipients are selected in consultation with trade unions and local civil society organisations (Global New Light of Myanmar, 2020; EEAS, 2020)

³ See OECD's work on Investment Promotion and Facilitation for more information:
<https://www.oecd.org/investment/investment-promotion-and-facilitation.htm>

⁴ The terms investment promotion and facilitation are often used simultaneously but imply two very different functions. One is about promoting a country or region as an investment destination, while the other is about making it easy for investors to establish or expand their existing investments.

⁵ McKinsey Global Institute examined more than 100 case studies (of the 400 cases carried out overall) that quantify the impact of a range of improvement levers from across three broad categories of opportunity: improving project selection and optimising infrastructure portfolios; streamlining delivery; and making the most of existing infrastructure assets. The case studies come from a range of countries covering different geographies and development profiles. Some of these cases were drawn from McKinsey's work, and some from external literature and interviews. They mostly come from 2008 to 2013, with a few going back as far as 2003.

2. Investment policy

This chapter assesses the regulatory regime for foreign investors in terms of barriers to entry and operations, as well as the legal frameworks for investment protection and dispute settlement. It compares Myanmar's FDI regime against regional peers and a global sample of countries, and identifies a number of policy options for consideration by the authorities for improving Myanmar's attractiveness to foreign direct investment. It also reviews several core investment policy issues – the non-discrimination principle, protections for investors' property rights and mechanisms for settling investment disputes – under Myanmar law and Myanmar's investment treaties. It takes stock of recent achievements, identifies key remaining challenges and proposes recommendations to address them.

The first OECD *Investment Policy Review of Myanmar* (OECD, 2014) noted the urgency of the former government to reform the investment policy framework. Many laws dated from colonial times, while others were often ill-suited to an open economy and not in conformity with international standards. The investment regime was scattered across multiple laws, in many instances outdated and incomplete. Investment procedures were cumbersome and sometimes unwarranted and some were particularly prone to discretionary abuse by authorities. Myanmar also remained largely closed to foreign investments, being assessed at the time as the second most restrictive economy to foreign direct investment (FDI) according to the OECD *FDI Regulatory Restrictiveness Index*.

This second OECD *Investment Policy Review of Myanmar* takes place in a substantially different environment. Many of the policy recommendations made in the first review were instrumental in a series of important reforms implemented subsequently that have significantly improved the investment climate. Myanmar has adopted a modernised investment and corporate framework for both domestic and foreign investors, pioneering explicit investors' obligations to act responsibly and reducing considerably the level of discrimination against FDI. Although a significant number of sectors are still partly off limits to foreign investors, Myanmar no longer features among the top most restrictive economies under the *Index*.

Despite considerable progress over recent years, the reform momentum needs to be sustained and even deepened for the benefits of investment reforms to be shared widely and growth to be environmentally sustainable. Only in this way can the positive effects of investment more effectively contribute towards improving the lives of Myanmar people and meeting the Sustainable Development Goals (SDGs).

The foundations of an enabling investment environment have been laid to a great extent with the new Myanmar Investment Law (MIL) (2016) and the new Companies Law (2018). New laws concerning intellectual property (IP) rights and arbitration are laudable achievements, as they bring Myanmar's legal framework broadly in line with international standards in these two important areas. However, a number of challenges for complementary policies and implementation capacity on the ground remain to be addressed. The success of these recent developments in the legal framework also hinges on ongoing efforts to improve the independence and competency of the judiciary and the Myanmar courts, which will have a crucial impact on investors' confidence in the effectiveness of these new laws in practice.

Myanmar is also at an important juncture in terms of its approach to investor protection in investment treaties. With only 14 investment treaties in force today, Myanmar is in a favourable position to review its approach to investment treaties. Treaties with vague, unqualified provisions may attract undesirable interpretations in ISDS cases and, in some instances, overlap with newer investment treaties with the same partner countries. Overlaps between older-style BITs and newer treaties with the same partners may raise issues of coherence between them which could potentially be exploited by investors to circumvent the newer, more nuanced investment treaties and thereby undermine reform efforts.

This chapter looks precisely at the core investment policy issues – the non-discrimination principle, the degree of openness to foreign investment, the protection of investors' property rights and mechanisms for settling investment disputes – that underpin efforts to create a quality investment environment for all. It takes stock of recent related reforms and examines the quality of government policies currently in place.

Main policy recommendations

- Evaluate the costs and benefits of remaining restrictions to foreign investment in manufacturing sectors with no bearing on national defence and security and that remain partly restrictive to foreign investors due to joint-venture requirements.
- Equally evaluate the costs of remaining restrictions to foreign participation in services sectors, such as in financial, construction and retail distribution services, which provide critical backbone services to all economic sectors. All these sectors are largely interlinked with market and efficiency-seeking manufacturing investments that Myanmar aims to attract. Cross-country evidence shows that these restrictions typically add costs to entire value chains, including in manufacturing sectors, by restraining potential competition among services input providers. This not only hinders a country's investment attractiveness, it may also end up hurting consumers' choices and purchasing power.
- Make sure that foreign investors are capable of registering long-term land leases in accordance with the MIL. For this, the government may want to issue clear instructions and procedures for the relevant land-related agencies to efficiently implement the MIL. Similarly, it should clarify that pursuant to the new Companies Law, Myanmar companies with up to 35% foreign ownership are allowed to own land under the same terms as wholly-owned Myanmar companies. The private sector has reported repeated difficulties in registering long-term leases of foreign investors with the Office of Registration of Deeds, because of the lack of clarity on the relationship of the MIL with the Transfer of Property Restriction Act of 1987 (TIPRA). Similar concerns have also been raised with regards to the relationship of the Condominium Law of 2016 and the TIPRA. The MIL's provision allowing all foreign investments in Myanmar to obtain longer terms leases (up to 50 years renewable) is one of its main achievements and a key improvement to the business environment. Access to land on a longer term basis is a critical condition for all businesses, especially for infrastructure projects and land-based investments which require debt financing.
- Clarify the 'negative list' status of the list of restricted investment activities issued by the Myanmar Investment Commission as mandated in Art 42-43 of MIL. This would require strong co-ordination within government but would add great clarity to the investment regime going forward, notably to potential foreign investors. At this stage, there may be little inconsistency between the current list (Notification 15/2017) and applied restrictions, but such a clarification is particularly important to avoid a widening dichotomy in the future. To date, only security services activities seem to be restricted and not listed in the Notification 15/2017, but this inconsistency generates uncertainty as to whether there are more restricted activities that are not listed or whether the list will be constantly updated to reflect changes in underlying regulations.
- Do not allow representatives from State-Economic Enterprises to take part in Proposal Assessment Teams involved in assessing projects in sectors and segments related to the SEE operations. The potential conflict of interest arising from their involvement in the process generates uncertainty and might result in non-competitive approval conditions.
- Continue to prioritise efforts to establish a functionally independent judiciary and improve legal certainty under the Myanmar court system. These challenges have been consistently identified as some of the most important for Myanmar in its democratic transition. The government should continue to pursue, together with external experts and other stakeholders, initiatives that aim to build trust in the independence of the judiciary, increase resources available for training a new generation of judges and lawyers and promote access to justice programmes at the community level to provide dispute resolution alternatives to the court system.

- Design, draft and implement subsidiary regulations to accompany recent laws on IP rights and arbitration. The enactment of these new laws is a laudable achievement. However, dedicated IP courts and authorities to supervise the administration, registration and enforcement of IP rights also need to be established before investors will be able to have confidence in their rights under the new IP laws. Similarly, the government should consider encouraging the development of dedicated commercial courts and building capacity within the judiciary to promote effective enforcement of rights granted under the new arbitration law.
- Review and consider possibilities for renegotiation and clarification of older-style investment treaties. These treaties should be calibrated to reflect the appropriate balance of preserving the government's right to regulate while contributing to Myanmar's efforts to attract FDI. The government's experiences with the COVID-19 pandemic may shape how it views key treaty provisions or interpretations as well as the appropriate balance in investment treaties. Vague, unqualified provisions in treaties concluded by Myanmar in the past may not appropriately safeguard the government's right to regulate and may attract unintended interpretations in ISDS disputes. Some of these older-style treaties also overlap with newer, more nuanced investment treaties concluded with the same partner countries. Myanmar, therefore, may wish to consider taking steps to update these treaties and its approach to future treaty negotiations to ensure the agreements appropriately safeguard the government's right to regulate. It may be possible to achieve updates to some existing treaties through treaty amendments or joint interpretations agreed with treaty partners. The government may also wish to engage with treaty partners with whom Myanmar has two or more investment treaties in force concurrently to review whether overlapping treaty coverage reflects current priorities.
- Manage potential exposure under existing investment treaties proactively. The government should continue to develop ISDS dispute prevention and case management tools. Myanmar may also wish to consider efforts to raise awareness about its investment treaties and the significance of its international obligations under these investment treaties for the day-to-day functions of different government agencies and officials that regularly interact with foreign investors.

The regulatory regime for foreign investors: barriers to entry and operations

At the time of the first OECD *Investment Policy Review* (2014), Myanmar was the second most restrictive economy to FDI according to the OECD *FDI Regulatory Restrictiveness Index* (Box 2.1). Emerging from years of economic isolation after the government initiated a wide range of reforms to open its economy to foreign trade and investment, investment policy measures in place were still in many ways excessive or unwarranted and some were particularly prone to discretionary abuse by authorities. The relatively poor scoring reflected the myriad legal and regulatory measures that discriminated against foreign investors for economic purposes, as the *Index* does not take into account any procedural hurdles or national security-based measures.

At that time, the OECD advocated for drastic reforms to Myanmar's investment regime, including with regards to rules on admission and treatment of foreign investors. Investment is critical to spur growth and sustainable development and international investment can sometimes provide additional advantages. Beyond bringing additional capital to a host economy, FDI can help to improve resource allocation and production capabilities, can act as a conduit for the local diffusion of technological and managerial expertise such as through the creation of local supplier linkages, and can provide improved access to international markets (OECD, 2015). The earlier *Review* also advocated for the adoption of rules encouraging responsible business conduct by domestic and foreign investors in Myanmar (see Chapter 4), recognising

that investments may involve negative externalities and that businesses should abide by the highest RBC standards to avoid or mitigate any harm that may arise from their or business partners' and suppliers operations.

Box 2.1. Calculating the OECD FDI Regulatory Restrictiveness Index

The OECD *FDI Regulatory Restrictiveness Index* seeks to gauge the restrictiveness of a country's FDI rules. The FDI Index is currently available for almost 80. It is used on a stand-alone basis to assess the restrictiveness of FDI policies in reviews of candidates for OECD accession and in OECD Investment Policy Reviews, including reviews of new adherent countries to the OECD Declaration.

The *FDI Index* does not provide a full measure of a country's investment climate since it does not score the actual implementation of formal restrictions and does not take into account other aspects of the investment regulatory framework which may also impinge on the FDI climate. Nonetheless, FDI rules are a critical determinant of a country's attractiveness to foreign investors and the Index, used in combination with other indicators measuring various aspects of the FDI climate, contributes to assessing countries' international investment policies and to explaining the varied performance across countries in attracting FDI.

The *FDI Index* covers 22 sectors, including agriculture, mining, electricity, manufacturing and main services (transport, construction, distribution, communications, real estate, financial and professional services). Restrictions are evaluated on a 0 (open) to 1 (closed) scale. The overall restrictiveness index is a simple average of individual sectoral scores.

For each sector, the scoring is based on the following elements:

- the level of foreign equity ownership permitted;
- the screening/approval procedures applied to inward foreign direct investment;
- restrictions on key foreign personnel; and
- other restrictions, e.g on land ownership, corporate organisation (branching).

The measures taken into account by the Index are limited to statutory regulatory restrictions on FDI, typically reflected in countries' negative lists under FTAs or, for OECD countries, under the list of exceptions to national treatment and other official OECD instruments. Measures are also identified through legal research undertaken in conjunction with OECD Investment Policy Reviews and yearly monitoring reports.

The *FDI Index* does not assess actual enforcement and implementation procedures. The discriminatory nature of measures, i.e. when they apply to foreign investors only, is the central criterion for scoring a measure. State ownership and state monopolies, to the extent they are not discriminatory towards foreigners, are not scored. Preferential treatment for special-economic zones and export-oriented investors is also not factored into the FDI Index score, nor is the more favourable treatment to one group of investors arising from international investment agreements.

Source: For more information on the methodology, see Kalinova, Palerm and Thomsen (2010). For the latest scores, see: www.oecd.org/investment/index.

Since then, Myanmar has made significant strides to liberalise its foreign investment regime. It no longer features as the second most restrictive under the OECD *FDI Regulatory Restrictiveness Index*, although a significant number of sectors remain partly off limits to foreign investors. The broad picture is, nonetheless, encouraging as the government seems to remain committed to reducing excessive or unnecessary restrictions on foreign investment moving forward.

In this respect, the government should consider continuing with the liberalisation of FDI in key sectors. Special attention could be given to removing remaining restrictions to foreign investment in manufacturing sectors with no bearing on national defence and security and that remain partly restrictive to foreign investors due to joint-venture requirements. The government may also consider advancing with reforms in financial, construction and distribution services, which provide critical backbone services to all economic sectors. All these sectors are largely interlinked with market and efficiency-seeking manufacturing investments that Myanmar aims to attract. Empirical evidence suggests that FDI restrictions in services typically add costs to entire value chains, including in manufacturing sectors, by restraining potential competition among services input providers. As such, they not only hinder a country's investment attractiveness, they also end up hurting consumer choice and purchasing power (OECD, 2018a; Nordås and Rouzet, 2015; Rouzet and Spinelli, 2016).

The government may also want to clarify the status of the 'negative list' of restricted investment activities issued by the Myanmar Investment Commission as mandated in Art. 42 and 43 of the MIL. Currently, this list is enshrined in Notification 15/2017. Giving this or a reformulated list a status of 'negative list', meaning that all activities that are not explicitly listed there would be open to investment in compliance with applicable regulations, would add great clarity to the investment regime moving forward, notably to potential foreign investors, although this would require strong upfront co-ordination within government.

At this stage, there may be little inconsistency between the current list (Notification 15/2017) and applied restrictions, but such a clarification is particularly important to avoid a widening dichotomy in the future. To date, only security services activities seems to be restricted and not listed in the Notification 15/2017, but this inconsistency generates uncertainty as to whether there are more restricted activities that are not on the current list or whether new inconsistencies may emerge in the future. For instance, if new restrictions or investment conditions are introduced and not reflected in the list.

The benefits of investment policy reforms implemented so far are beginning to bear fruit more widely and may provide additional support for the government to press ahead with further liberalisation. FDI inflows as a percentage of GDP have been on a rising trend since 2011, and FDI into manufacturing sectors has picked up considerably, increasing from about 5% of foreign investments up to 2012-13 to roughly 14% in 2018-19 according to statistics from DICA. These investments contribute to furthering economic diversification, job creation and the development of better employment opportunities.

Furthermore, as reported by the World Bank (2018a), reforms implemented since 2011 have accelerated capital accumulation and productivity gains, which are estimated to have been the main drivers of economic growth in the post-liberalisation period. Their estimates suggest that total factor productivity was responsible for almost half of the growth realised over 2010/11-2015/16, followed by capital accumulation (39%). FDI has played a major role in supporting these economic transformations. This growth pattern is similar to that of China, Cambodia and Viet Nam in their respective post-liberalisation periods, and reflects Myanmar's rapid structural transformation and growing integration with the world economy.

The telecommunications sector is perhaps the most notable example of the potential impacts of FDI liberalisation, notably when adequate frameworks are in place. Prior to the reform, access to fixed and mobile telephony in Myanmar was among the lowest in the world, with a mobile penetration rate of only 14%. Access to internet was even more insignificant. After the opening of the sector to private and foreign participation the situation changed dramatically. Currently, the level of mobile penetration has already reached 100%, with the rate of smartphone penetration reaching roughly 80% (World Bank, 2019).

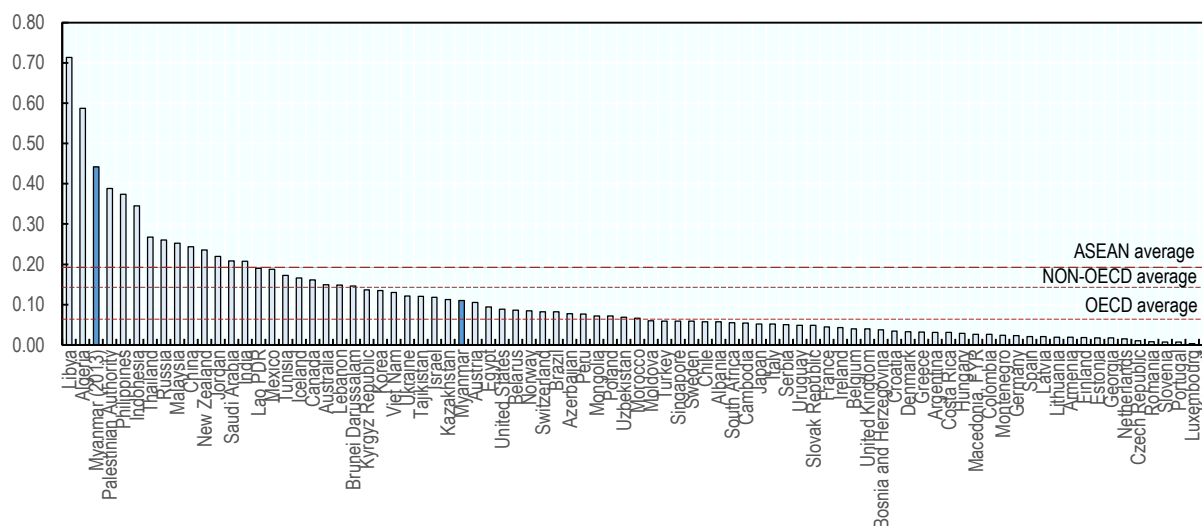
Myanmar has significantly removed restrictions to FDI over the past years

Recent reforms have considerably reduced barriers to entry and discriminatory treatment of foreign investors (Figure 2.1), bringing Myanmar's investment regime much closer to international levels of FDI openness, as measured by the OECD *FDI Regulatory Restrictiveness Index*. Nevertheless, the current

regime still maintains a considerable number of discriminatory measures and restrictions to FDI. The progress achieved since 2014 – notably if compared to the level of restrictions observed across ASEAN economies – is commendable. The number of sectors where foreign investors are required to operate through joint ventures with domestic investors, for instance, were significantly reduced during the period, from 94 to 22 sectors, and a number of sectors previously closed were opened to FDI, such as insurance, banking, wholesale and retail. Currently, the level of FDI restrictiveness is comparable with the average level of non-OECD economies included in the *Index*, and significantly below the ASEAN average.

Perhaps even more importantly, the new investment framework brought considerable clarity to foreign and domestic investors about the applicable rules and provided a more level playing field for foreign investors. Besides narrowing the extensive list of sectors in which foreign investment was previously either prohibited or restricted, the new law also provided for non-discrimination safeguards and brought foreign and domestic investments – once regulated by separate laws – under the same regime, reducing the possible scope for discriminatory treatment in the future.

Figure 2.1. OECD FDI Regulatory Restrictiveness Index, 2019 (open=0; closed=1)



Note: The OECD FDI Regulatory Restrictiveness Index covers only statutory measures discriminating against foreign investors (e.g. foreign equity limits, screening & approval procedures, restriction on key foreign personnel, and other operational measures). Other important aspects of an investment climate (e.g. the implementation of regulations and state monopolies, preferential treatment for export-oriented investors and SEZ regimes among other) are not considered. Data reflect regulatory restrictions as of end-December. See Kalinova et al. (2010) for further information on the methodology.

Source: OECD FDI Regulatory Restrictiveness Index, <https://www.oecd.org/investment/fdiindex.htm>.

The investment approval process was also streamlined under the new law. The previous approval system was complex and sometimes opaque and the burden to investors and the administration was considerable (OECD, 2014). Among other weaknesses, the approval process was all-encompassing, generally covering investments of all sizes in a broad range of sectors and activities without any consideration to their potentially different risks and profiles; it was also lengthy, involving multiple bodies and requiring multiple approvals in some cases; the approval criteria were complex and in some cases beyond the administration's assessment capacity; and there was considerable room for abuse of discretion by the Myanmar Investment Commission (MIC), both in terms of the approval system for investment and the conditions that could be attached to individual projects.

The new investment approval regime is much more in line with best international practices. It now applies similarly to both domestic and foreign investors, and its scope and procedures have been narrowed down

and simplified. The scope of projects requiring an approval by the MIC has been expressly defined in the law and its implementing regulation as follows: i) projects considered strategic to the Union; ii) large capital-intensive projects where investment is expected to exceed USD 100 million; iii) projects having a large potential impact on the environment and the local community; iv) businesses which use state-owned land and building; v) and businesses which are designated by the government to require the submission of a proposal to the Commission, such as for projects spanning across the national border or across states or regions, as well as projects using land above 100 acres or 1000 acres in the case of agricultural projects.

In addition, some investments may only be carried out with the approval of the relevant ministry as stipulated in the List of Restricted Investment Activities (Notification No. 15/2017). The criteria for approval have also been streamlined and publicised, including in relation to requirements by line ministries. All other projects are exempt from investment approvals, needing only to comply with the relevant regulations for conducting the business. At their discretion, projects falling outside the scope of the MIC approval requirement may apply for an endorsement of the Commission (or its relevant state or regional office for investment capital amounts up to USD 5 million) in order to enjoy benefits relating to rights to use land and investment incentives as stipulated in the Law on Investment and implementing regulations.

The new approval framework also obliges authorities to act according to pre-established timeframes of up to 90 working days for the entire approval process, as stipulated in the Myanmar Investment Rules (Notification No. 35/2017), although some flexibility is provided for authorities to suspend or extend such timeframes in specific cases (e.g. investor delays in providing required additional information or because of complexity and novelty of the proposal).

As a result, the time required to obtain a MIC permit has gone down from roughly 90 days and 8 procedures under the previous framework, although in reality it often took about 6 months to a year (Frontier Myanmar, 2018), to 40 days and 4 procedures under the new regime (DICA, 2019a). The simplified endorsement procedure is subject to shorter statutory timelines (60 days). Similar results are also observed in relation to registering a company under the new Companies Law and its online portal MyCo. Prior to such reforms, the World Bank's Doing Business indicator showed that it took 72 days and cost about 157% of the income per capita of Myanmar to start a business in the country. In 2020, subsequent to the implementation of the online MyCo portal, starting a business can now be done in 7 days (in a few hours in the simplest cases) and the associated cost is estimated at about 13% of the income per capita (see Chapter 3 for more information).

There is still room for improvement nevertheless with respect to MIC permits and endorsements. For example, stakeholders have reported that representatives of State-Economic Enterprises are sometimes present at Proposal Assessment Team meetings, at which investors make a briefing about their projects and clarify any queries the authorities may have. The PAT team is responsible for deciding on whether a proposal can be submitted for MIC approval or not, and if it requires modifications before being allowed to proceed to MIC approval. There is clearly a potential for conflict of interests associated with the participation of SEE representatives at these meetings. This generates uncertainty and can be detrimental to competition if conditions attached to approving proposals end-up erecting inefficient barriers to entry.

There have also been concerns about the application of Art. 64(d) of the Myanmar Investment Rules by which the Commission shall consider, when assessing the investor and investment proposal, whether or not the proposal and the investor demonstrate a commitment to carry out the investment in a responsible and sustainable manner. Stakeholders consulted during this review have reported that the MIC typically requires the investors to commit to spend 2% of profits in corporate social responsibility activities. There is no guideline on what sort of activities qualify as CSR for this purpose.

Despite the authorities' well-intended objectives, this practice is detrimental in many ways to the objective of encouraging responsible investments. First, it reinforces the idea that 'positive' actions parallel to business activities, such as philanthropic actions and even sometimes simple compliance with laws and regulations, are a legitimate way to compensate for any harm caused by businesses to the environment,

labour and local communities. This is non-educative at the minimum. Secondly, and more importantly, it does little to prevent malpractices and abuses by investors, including because there is no proportionality of such expenditures, and often no link whatsoever, to the potential costs and negative externalities of the business activity (see Chapter 4 for an in-depth discussion and recommendations of how Myanmar can better promote responsible business conduct).

Oddly, some manufacturing activities remain partly off-limits to foreign investors

For a number of reasons, countries worldwide have long opened non-security-related manufacturing sectors to foreign investment. This is typically allowed without any form of discrimination, except when a horizontal measure applying across the board is in place, such as screening or restrictions on the acquisition of land for business purposes by foreign investors. Very few countries still maintain some sort of explicit discrimination against foreign investment in manufacturing.

Table 2.1. List of manufacturing activities facing FDI restrictions

	Sector	Types of Investment Businesses	Industrial Code
Investment activities that are not allowed to be carried out by foreign investors			
1	Oil refining & chemicals	Refinement of minerals by medium scale and small scale	ISIC 2410
2	Food & others	Prospecting, exploration and production of jade/gem stones	ISIC 0990, 3211
Investment activities allowed only in the form of a joint venture with any citizen owned entity or any Myanmar citizen			
3	Oil refining & chemicals	Manufacturing and domestic distribution of plastic products	ISIC* 1511, 1512, 1520, 46312, 4759, 47593
4	Oil refining & chemicals	Manufacturing and domestic distribution of chemicals based on available natural resources	ISIC 2011, 202, 46312, 4759, 47593
5	Oil refining & chemicals	Manufacturing and domestic distribution of flammable solid, liquid, gaseous fuels and aerosol (Acetylene, Gasoline, Propane, Hair Sprays, Perfume, Deodorant, Insect spray)	ISIC 201, 202, 46312, 4759, 47593
6	Oil refining & chemicals	Manufacturing and domestic distribution of oxidants (Oxygen, Hydrogen Peroxide), compressed Gases (Acetone, Argon, Hydrogen, Nitrogen, Acetylene)	ISIC 201, 202, 46312, 4759, 47593
7	Oil refining & chemicals	Manufacturing and domestic distribution of corrosive chemicals (Sulphuric Acid, Nitric Acid)	ISIC 201, 2012, 46312, 4759, 47593
8	Oil refining & chemicals	Manufacturing and distribution of industrial chemical gases including compressed, liquefied and solid forms	ISIC 201, 202, 46312, 4759, 47593
9	Food & others	Value added manufacturing and domestic distribution of cereal products such as biscuits, wafers, all kinds of noodles and vermicelli	ISIC 1074m 46312, 4759, 47593
10	Food & others	Manufacturing and domestic distribution of all kind of confectionery including those of sweet, cocoa and chocolate	ISIC 1073, 46312, 4759, 47593
11	Food & others	Processing, canning, manufacturing and marketing of food products except milk and dairy products	ISIC 1075, 46312, 4759, 47593
12	Food & others	Manufacturing and domestic distribution of malt and malt liquors and non-aerated products	ISIC 1103, 46312, 4759, 47593
13	Food & others	Manufacturing, distilling, blending, rectifying, bottling and domestic distribution of all kinds of spirits, alcohol, alcoholic beverages and non-alcoholic beverages	ISIC 1101, 1102, 46312, 4759, 47593
14	Food & others	Manufacturing and domestic distribution of all kinds of purified ice	ISIC 1079, 46312, 4759, 47593
15	Food & others	Manufacturing and distribution of purified drinking water	ISIC 1105
16	Oil refining & chemicals	Manufacturing and domestic distribution of all kinds of soap	ISIC 2023/20231, 46312, 4759, 47593
17	Oil refining & chemicals	Manufacturing and domestic wholesale of all kinds of cosmetic products	ISIC 2023/ 20232, 46312, 4759, 47593

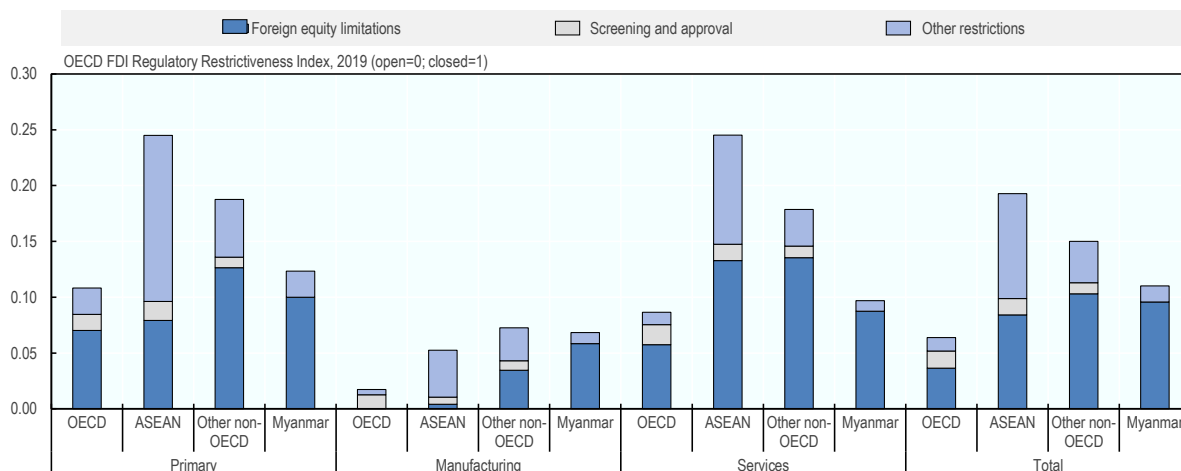
Note: *These ISIC codes are the ones referenced in the official Notification No. 15/2017, although they do not match the description of the restricted activity. The correspondent ISIC code for the manufacturing of plastic products is 2220.

Source: Myanmar Investment Commission, Notification No. 15 /2017 on the List of Restricted Investment Activities Notification 15/2017, April 10.

Myanmar is an exception in this regard. It still restricts the participation of foreign investors in some manufacturing activities by either requiring them to invest jointly with domestic investors, in which case the minimum direct shareholding or interest of a Myanmar Citizen Investor in the joint venture is 20%, or prohibiting their participation altogether (Table 2.1). The scores are also slightly increased by a horizontal restriction on the access to land by foreign enterprises, who are only able to access land on an inequitable leasehold basis, whereas local firms are also able to access land on a freehold basis. Although this is not widely the case giving the rarity of freehold land, the methodology does not take this into account.

The pervasiveness of such restrictions in Myanmar widely contrasts to the experiences in other parts of the world, including within ASEAN economies (Figure 2.2), although it is worth noting that investments within special economic zones are exempted from the purview of the Law on Investment and its implementation rules. The economic implications of such restrictions would probably be more limited if domestic producers of such goods faced competition in import markets, but this is not entirely the case. Myanmar has historically erected barriers to trade and many of these goods are still not allowed to be freely imported into the country, featuring among the 4 613 tariff lines still requiring import licences under the current Import Negative List (Notification No. 22/2019 of the Ministry of Commerce).

Figure 2.2. OECD FDI Regulatory Restrictiveness Index, by sector and type, 2019



Note: see Figure 2.1 note.

Source: OECD FDI Regulatory Restrictiveness Index, www.oecd.org/investment/fdiindex.htm.

With a few possible exceptions, the list of prohibited or restricted manufacturing activities can hardly be considered strategic enough to justify any particular protection from the state. The maintenance of such high entry barriers to FDI serves most likely to insulate domestic groups from competition and force linkages with interested foreign investors or simply ensure that domestic interest groups share in the rents of such projects. In Myanmar, such vested interests may additionally come from the numerous state economic enterprises (SEEs) that still operate in related manufacturing markets (Rieffel, 2015). If the case, a future opening up of such sectors to foreign investment should be contemplated together with the possibility of privatising related SEEs.

The exercise of control over operations is one key underlying characteristic of foreign investment by multinational firms (Hymer, 1976; Grossman and Hart, 1986) and forced joint-venture requirements may restrict their ability to fully exercise such control and influence the distribution of a project's ex post surplus. In addition, foreign investors may be reluctant to enter into a joint venture with local investors, especially when it is difficult to find suitable local partners with the required capacity and skills. Among other things,

issues of weak corporate governance and lack of transparency, as well as home-country sanctions impeding investors from transacting with ‘specially-designated individuals and companies’, as in the case of US persons, may play a role in this. In certain environments, foreign joint venture partners may also have incentives to deploy older technologies and production techniques than used in the industry frontier if they believe the risks of technological leakage is high (Moran, Graham and Blomström, 2005).

As such, restrictions may deter investments in the restricted sector, as well as in other activities relying on their inputs. By potentially constraining competition in such markets, they may affect consumers’ choice and purchasing power and may, in some cases, have even larger environmental and health externalities. One example is the beverages industry, particularly alcohol, where foreign investment in manufacturing and distribution is subject to joint ventures and imports were banned until May 2020, with few exceptions. The result was the development of counterfeit and illicit trade of alcoholic drinks, with potentially larger public health risks and loss of government tax revenues.

Moving forward, the government may want to revise this forced joint venture policy in non-strategic manufacturing sectors by relying on other, less distortive alternatives to achieve intended public objectives. Non-discriminatory regulations can be used to mitigate potential negative externalities, and encouragement of good corporate governance and advanced investment promotion and SME development activities may support the formation of genuine and more efficient joint ventures, alliances and linkages between foreign and domestic investors (see Chapters 3 and 7 for more information about policies that can support such objectives).

Remaining barriers to FDI in services sectors have economy-wide productivity implications

The service sector offers immense opportunities to improve the livelihoods of Myanmar’s citizens, typically playing a major role in absorbing part of the structural shift in employment and economic value arising from the agricultural exodus. In addition, it plays an increasingly intrinsic role in manufacturing activities, whether domestically-oriented or part of regional and global value chains (GVCs).

Manufactured goods have likely never been as service-intense as they are today. In OECD economies, services inputs already account for slightly more than half of the value of manufacturing exports (Miroudot and Cadestin, 2017). Services are contributing to value-added generation in manufacturing industries both upstream, by helping to improve productive efficiency with, for instance, more competitive logistics and financial services, and downstream by facilitating product differentiation with, for instance, digital product extensions and complementary services and digitals distribution and aftersales services.

The development of efficient services markets depends to a great extent on having a pro-competitive domestic regulatory environment behind the border. But the liberalisation of FDI entry plays an important complementary role. For practical purposes, the latter is the focus of discussion here. Market access policies share more commonalities across sectors than behind the border issues that may be highly sector-specific.

As mentioned above, Myanmar has considerably reduced barriers to FDI in recent years. A number of such reforms impinged on services sectors that were once shielded from foreign competition and which were subsequently opened completely or partially to foreign investment. This was the case, for instance, of telecommunications, banking, distribution and transport services.

More recently, the government also liberalised foreign investments in insurance services. A first opening came already with the enactment of the Myanmar Companies Law, which allowed up to 35% of foreign participation in a Myanmar company before being considered a foreign company, although this policy had not yet been implemented until recently by line authorities. Then, in early 2019, the government further liberalised FDI in insurance activities by allowing the entry of up to three foreign life insurers through wholly-owned subsidiaries (Announcement No. 1/2019 by the Ministry of Planning and Finance). In addition,

foreign investors were also allowed to invest in life and non-life insurance businesses as Myanmar companies or through joint ventures in which foreign interests do not exceed 35%. As of March 2020, foreign investment in companies listed on the Yangon Stock Exchange was allowed, up to foreign shareholding limits if any stipulated at the discretion of the companies and subject to approval from the relevant authorities.

Beyond insurance, the banking sector has also been further liberalised recently. Along the same lines as the insurance reform, the Central Bank of Myanmar issued, in January 2019, Regulation No. 1/2019 permitting foreign banks and other financial institutions to hold up to 35% of equity in a Myanmar bank. Consequently, the measure opened up the retail banking market to foreign participation up to that limit. Banks with foreign shareholding beyond the 35% threshold will be allowed to engage in retail banking in January 2021 according to the Central Bank announcement of 7 November 2019. In late 2018, the CBM had already reinstituted a wave of liberalising reforms with the issuance of Directive No. 6/2018 allowing foreign bank branches to provide banking and financing to local firms in both foreign currency and kyat, at par with local banks. Previously, foreign bank branches were only allowed to engage in wholesale banking and export financing activities to foreign-invested entities and local financial institutions, and they were fully prohibited from engaging in retail banking services.

Despite this, in addition to remaining restrictions in insurance and banking sectors, foreign investment remain prohibited or limited to joint ventures with any local entity or any Myanmar citizen in the following services activities:

- Construction, sales and lease of residential buildings, except if under a build-operate-transfer agreement with the government where 100% foreign ownership is permitted;
- Real estate investment: foreign investors are allowed to own up to 40% of the total floor area of registered condominiums;
- Securities firms, in which the foreign shareholder may not control and hold more than 50% of the shares in a licensed securities business;
- Retail activities in mini-market, convenience store (Floor area must be above 10 000 square feet or 929 m²);
- Construction for fish landing site, fishing harbour and fish auction market;
- Publishing and distribution of periodicals in ethnic languages including Burmese;
- Tour-guide service, including travel agency services; and
- A few other niche service activities.

Some of these activities might entail considerable economic costs by shielding domestic investors from foreign competitive pressures. The conditions imposed on foreign engagement in retail activities, for instance, seem fairly stringent (the minimum floor area requirement is large for supermarkets within a city for instance), possibly protecting relatively large domestic retail groups in addition to SMEs in the sector. An evaluation of the costs of maintaining the current restrictions in key backbone services sectors in place, such as retail distribution, construction, banking and insurance, would shed light on whether such restrictions are still relevant and effective in achieving their public purpose. Excessive protection of domestic services industries may be detrimental to other downstream industries and consumers who may have to pay more for quality-equivalent services.

With all the recent reforms, the government may also want to update the list of restricted investment activities in order to reflect the most up-to-date regulatory environment and increase the legibility of the investment regime to investors. As mentioned above, at this stage, there may be little inconsistency between the current list (Notification 15/2017) and applied restrictions, but clarifying the 'negative list' status of the list is particularly important to avoid a widening dichotomy in the future.

Access to land and real estate by foreign investors remains particularly difficult

The fragmented nature of the land framework (see Chapter 8) adds an additional layer of complexity for foreign investors to navigate through. The different land laws contain uneven restrictions on transfers of land to foreign investors. Only certain types of land can actually be leased to foreign investors and many require specific permissions (Table 2.2).

In addition, pursuant to the Transfer of Property Restriction Act of 1987 (TIPRA), foreign investors are not allowed to acquire immovable property rights by way of purchase, gift, pawn, and exchange or enter into leases which exceed one year, nor are they entitled to acquire immovable property by way of mortgage without special government permission. While it is relatively common worldwide for foreign investors to be subject to more strict regulations on access to and ownership of agricultural land and, to a lesser extent, of land for business purposes and real estate investment, it is rather unusual to impose such a short lease term period.

The MIL and the SEZ Law were a great advancement in the regulatory business environment in Myanmar in this respect. The MIL allows foreign investors to extend a land lease term to up to 50 years with the possibility of two additional extensions of 10 years each upon obtaining a MIC permit or endorsement approving a Land Rights Authorisation for the project by the Myanmar Investment Commission. The SEZ Law equally allows foreign investors located inside the zones to enter into long-term leases up to 50 years, extendable for another 25 years. Alternatively, foreign investors may partner with or invest up to 35% in a Myanmar company to make a land-based investment under the same conditions of domestic investors.

Table 2.2. Restrictions on foreign investors in land under Myanmar land laws

Law	Right	Responsible authority	Entities entitled to acquire or use land
Restrictions pursuant to the main land laws			
VFV Law	Right to use VFV land for industrial crops (Form 11); for perennial plants and orchards (Form 12)	VFV Committees (Central, State/Regional, District, Township, Village tract)	VFV land use rights can be granted to citizens, rural households wishing to carry out manageable agricultural projects, government organisations, non-governmental organisations Foreign investors must be in a joint venture with the government, a Myanmar company or Myanmar citizen, and have a MIC permit or endorsement to be able to apply for VFV land. But VFV land is made available to foreign investor only if it cannot be used by Myanmar citizens
Farmland Law	Land Use Certificate (LUC) issued to farmers (Form 7, with a map on Form 105)	Farmland Administrative Body (FAB) (Central, State/Regional, District, Township, Village tract)	Farmland use rights can be granted to citizens, government organisations, non-governmental organisations or companies. Myanmar companies can buy or lease LUCs from farmers. Foreigners (individuals or companies) can only lease farmland from farmers with permission of the government.
Forest Law	Permission to Use and Contract with the Forest Department	Forest Department (Central, State/Regional, District, Township branches)	Foreign investor are allowed to obtain forest land rights, but they are prohibited from manufacturing forest products from forest areas and government administered natural forest and require approval from MONREC as part of the MIC process to: (i) log in forest land and land administered by the government or; (ii) establish forest plantations (teak, hardwood, rubber, bamboo, cane etc.); (iii) carry out wood-based industry and related businesses with implementation of forest plantation (MIC Notification 15/2017)
Restrictions pursuant to other laws and policies (non-discriminatory)			
NLUP	Moratorium	Unclear (possibly the NLUC)	The NLUP states that “Land allocation of customary land to any land user, other than for public purposes, shall be temporarily suspended until these lands are reviewed, recognised and registered as customary lands” (Art. 68). The moratorium is not yet in force.

Foreign investors have also been allowed, pursuant to the 2016 Condominium Law and 2017 rules, to purchase up to 40% of the ‘saleable floor area’ of a condominium building. This refers to six-floor or more residential buildings with an area of at least 20 000 square feet and standing on land registered as ‘collectively owned land’. While this represents an important market liberalisation, some implementation challenges remain.¹ In respect to foreign investors, practitioners have called attention to the unaddressed inconsistencies between the Condominium Law and the TIPRA. The new condominium regime does not explicitly state that it prevails over the TIPRA, although it can be assumed so given its explicit recognition of foreign ownership rights; nor does it clearly specify if foreign legal persons and natural persons are equally entitled to acquire condominium units or whether these rights are limited to natural persons only (Stephenson Hardwood, 2018; Lincoln Legal Services, 2018).

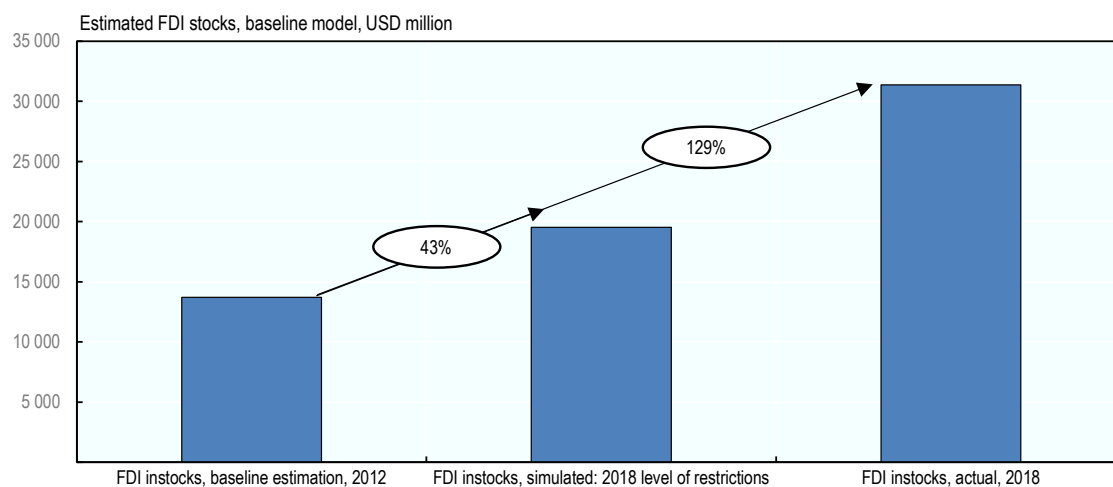
In general, the application of the TIPRA is still confusing and unclear in relation to property holdings by foreigners. This has proved problematic even in situations where the applicable regime seems much clearer, such as for leases of land to foreign investors in accordance with the Myanmar Investment Law (MIL). The MIL clearly states that it prevails over other laws and as such long-term leases to foreigners should be possible for MIC-permitted or endorsed projects. But practitioners report that obtaining some of the required government approvals for leases of property to foreigners can be very difficult and even once obtained, it may prove challenging to fold them into a transaction because concerned government agencies sometimes disagree in the application of the law. They have reported the unwillingness of the Office of Registration of Deeds (ORD) to register long-term leases due to policy disagreements about whether foreigners should be able to lease land or due to the lack of clear instructions and procedures for doing so. This has been a major hurdle to infrastructure and land-based investment projects in Myanmar, which typically rely on debt financing.

Investment policy reforms have likely resulted in more inward FDI than expected

Recent OECD research shows that the introduction of reforms leading to a 10% reduction in the level of FDI restrictiveness, as measured by the OECD *FDI Regulatory Restrictiveness Index*, could increase bilateral FDI inward stocks by around 2.1% on average across countries (Mistura and Roulet, 2019). An illustrative simulation exercise, drawing on the baseline model relying on data up to 2012, suggests that Myanmar has possibly benefited more from reforms to its investment regime than what would have been predicted.

The model suggests that, all else held equal, Myanmar’s bilateral FDI stocks would be expected to be 43% higher if it carried out the implementation of reforms bringing down FDI restrictions to the current level observed in 2018 as measured by the OECD *FDI Regulatory Restrictiveness Index* (Figure 2.3). In reality, by 2018, inward FDI stocks were already 130% higher than the baseline estimation. A direct comparison cannot be made as other issues have not been held equal, but given the magnitude of the difference, it is plausible that reforms have more than paid off in terms of investment attraction.

By contrast, remaining restrictions may continue to imposing sizeable costs to the economy, not only in terms of forgone FDI and associated tax revenues, but also through economy-wide impacts on productivity growth. As mentioned above, services have proved to be a significant channel for value added generation in manufacturing industries (OECD, 2020a, 2018). The increased fragmentation of production chains across regions and globally exacerbates the role played by network industries and complementary business services in supporting manufacturing operations. Previous OECD (2018a) work demonstrated that the benefits of services liberalisation in ASEAN is greater for: i) manufacturing firms in machinery and transport equipment industries which rely extensively on services; ii) for small and medium-sized enterprises (SMEs) as compared to large firms; iii) domestic firms as opposed to foreign-owned firms; and iv) firms that do not export compared to exporters.

Figure 2.3. Simulated effects of FDI liberalisation reforms in Myanmar

Note: The simulation is based on an augmented gravity model of bilateral inward FDI positions using a poisson pseudo-maximum likelihood estimator. Typical gravity variables and a series of other policy and non-policy factors are included (distance, contiguity, the existence of a common language, colonial ties, market size, economic growth, real exchange rates, similarity in size and factor resource endowments, trade openness, natural resource endowments, institutional maturity, FDI restrictions, participation in free trade areas, corporate tax), as well as host and home country and time-fixed effects. The regressions cover bilateral FDI relationships between 60 countries over the 1997-2012 period. Source: author's calculation based on Mistura and Roulet (2019); UNCTAD FDI statistics.

Market access reforms increase competitive pressures in services sectors and, consequently, productivity. In turn, this allows downstream manufacturers to benefit from higher quality services inputs or lower services input costs. As Myanmar aims to attract further investments into manufacturing, it may want to consider accelerating service sector reforms that contribute to fostering a level playing field for all investors.

Protection of investments and dispute settlement in Myanmar

A fair, transparent, clear and predictable regulatory framework for investment is a critical determinant of investment decisions and their contribution to development. Uncertainty about the enforceability of lawful rights and obligations raises the cost of capital, thereby weakening firms' competitiveness and reducing investment. Moreover, ambiguities in the legal system can also foster corruption: investors may be more likely to seek to protect or advance their interests through bribery, and government actors may seek undue benefits.

The ability to make and enforce contracts and resolve disputes efficiently is, therefore, fundamental if markets are to function properly. Good enforcement procedures enhance predictability in commercial relationships by assuring investors that their contractual rights will be upheld promptly by local courts. When procedures for enforcing contracts are overly bureaucratic and cumbersome or when contract disputes cannot be resolved in a timely and cost effective manner, companies may restrict their activities. Traders may depend more heavily on personal and family connections; banks may reduce the amount of lending because of doubts about their ability to collect on debts or obtain control of property pledged as collateral to secure loans; and transactions may tend to be conducted on a cash-only basis. This limits the funding available for business expansion and slows down trade, investment, economic growth and development.

Investor protection under the new Myanmar Investment Law

The new Myanmar Investment Law (MIL) (2016) and the accompanying Myanmar Investment Rules (MIR) (2017) strengthened the investor protection regime afforded to foreign and domestic investors alike. These developments represent important strides towards reassuring investors that Myanmar is a secure investment destination in line with the government's seven-point investment policy issued in December 2016 (DICA, 2016).²

The government's guarantee of freedom from unlawful expropriation under Chapter 14 of the MIL marks a significant improvement from the previous regime (which is described in detail in the first OECD *Investment Policy Review*). It brings this guarantee in line with similar provisions found in other regional investment laws and Myanmar's bilateral investment treaties (discussed separately below).

Article 52 of the MIL guarantees that the government will not nationalise investments covered by the Law, either directly or indirectly, except in certain enumerated circumstances and against fair compensation. Article 53 provides that compensation should reflect the "market value" of the expropriated investment subject to a consideration of several other factors including "the public interest", "the interests of the private investor", "the present and past conditions of investment", "the reason for expropriation" and "the profits acquired by the investor during the term of investment". These qualifications are unusual and could conceivably conflict with Myanmar's obligations under its investment treaties (discussed separately below). Article 54 preserves the government's policy space to regulate in the public interest in a manner similar to Annex 2 of the ASEAN Comprehensive Investment Agreement (ACIA) by clarifying that non-discriminatory regulatory measures will not amount to indirect expropriation.

Aside from the guarantee against expropriation, three other investor protections in the MIL have either been introduced for the first time or improved substantially when compared to the previous regime.

- A general principle of non-discriminatory treatment is codified in the new Law. Article 47 clarifies that foreign investors can now expect to be treated in a non-discriminatory manner as compared to Myanmar nationals (national treatment) and nationals of any other third country (most-favoured nation treatment). Neither of these guarantees featured in the previous regime.
- A new guarantee of "fair and equitable treatment" (FET) in Article 48 is defined to cover two types of treatment – the right to obtain information on measures or decisions that impact a given investor or investment and the right to due process and appeal in respect of government measures, including any changes to terms of investment licences or permits granted by the government. This newly-introduced guarantee therefore appears to be more circumscribed and limited than the FET provisions in almost all of Myanmar's investment treaties and the way in which arbitral tribunals ISDS cases have interpreted similar treaty provisions (discussed below).
- The provisions in Chapter 15 of the MIL and Chapter 21 of the MIR guaranteeing free transfer of funds from investment activities in Myanmar are more sophisticated than under the previous regime. They set out with greater precision the categories of financial rights covered by the guarantee and introducing special rules during balance-of-payments and other financial crises that afford greater flexibility to the government in those circumstances.

Alongside the new investor protections are a progressive set of investor obligations in Chapter 16 of the MIL and Chapter 20 of the MIR – the likes of which are scarce in investment treaties in the region and worldwide – which broadly require investors to abide by domestic laws, abide by the terms of licences and permits issued to them, respect labour rights enjoyed by their local employees and follow international best practices to avoid environmental damage (see Chapter 4 and 6). The MIR empower the Investment Commission with an enforcement and supervisory role for some of these obligations. The investor protections are also subject to a range of general and security-related exceptions in Chapters 21 and 22 of the MIL that preserve the government's right to regulate on a range of issues in the public interest.

As with investment laws in many other ASEAN member states,³ the new Investment Law does not contain a unilateral, binding undertaking by the government to submit future investment disputes with investors to international arbitration. Chapter 19 introduces an investor grievance mechanism, which is discussed further below. Disputes between the government and investors under the new Law that cannot be resolved amicably though this process can be resolved in contractual dispute forums (such as arbitration under investment contracts or investment treaties) or, if no such agreement exists, by the competent court or arbitral tribunal in Myanmar (which is not identified in the new Law or the Rules). As with Myanmar's new Arbitration Law, it remains to be seen how Myanmar's courts and arbitral tribunals will apply the MIL and the MIR rules in future disputes.

Protection of intellectual property rights

Significant developments have also taken place towards modernising Myanmar's regime for protecting and enforcing intellectual property (IP) rights. Until recently, Myanmar had no statutory regime for trademarks, patents or industrial designs while the *Myanmar Copyright Act (1914)* enacted more than a century ago in the pre-independence era was widely considered deficient compared to international standards.

In 2019, Myanmar's parliament enacted four long-anticipated IP laws following parliamentary and presidential approvals – the Industrial Design Law, the Trademark Law, the Patent Law and the Copyright Law. The new laws are intended to harmonise Myanmar's legal regime with international standards in these four areas and create a modern, comprehensive coverage for IP rights in Myanmar.

The new laws are not yet in force. According to their terms, they will only come into effect on a date specified in a future Presidential notification. This is expected to take place once the administrative infrastructure and implementing regulations have been established to support the new IP regime. The government is currently prioritising efforts to draft implementing rules for the Trademark Law with a view to the Law coming into force in February 2021. Rules to support the other three new laws should follow shortly thereafter with technical support from a range of experts and external stakeholders.

Importantly, the new laws seek to align with the minimum standards for IP protection and enforcement set out in the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Once in force, the new laws will introduce dedicated statutory rules on trademarks, patents and industrial designs for the first time in Myanmar's history. The new Copyright Law will repeal the *Myanmar Copyright Act (1914)* and introduce a range of new improvements on the previous regime. The improvements include protections for foreign works, modern definitions for several categories of protected works, a registration process and new enforcement options against copyright infringement. Existing copyrighted works with unexpired terms under the *Myanmar Copyright Act (1914)* will automatically qualify for protection under the new Copyright Law.

The enactment of the four new IP laws is the latest step in an ongoing process to establish a functioning regime for the protection of IP rights in Myanmar. The next step is for the government to draft and introduce implementing regulations for these laws for consideration by parliament. The Ministry of Commerce has been designated as the core government ministry responsible for administering the new laws with four other ministries – the Ministry of Information, the Ministry of Planning, Finance and Industry, the Ministry of Agriculture, Livestock and Irrigation, and the Ministry of Education – having supervisory roles.

Dedicated IP courts and authorities to supervise the administration, registration and enforcement of IP rights also need to be established. In the meantime, it will not be possible for investors to apply for rights under the new laws. The Ministry of Commerce, with technical assistance from World Intellectual Property Organization (WIPO), the ASEAN Secretariat, the Japan International Cooperation Agency and other external IP experts, is leading efforts to develop plans to create a national IP office before the upcoming 2020 general elections to perform the administrative and supervisory functions envisaged in the new laws. The Supreme Court of Myanmar is empowered expressly under the new laws to establish dedicated IP

courts but this process will undoubtedly take time. It will involve raising awareness and capacity for judges to deal effectively with IP-related disputes.

Myanmar may wish to increase its engagement in international fora as part of its efforts to modernise its IP protection regime. Myanmar is a signatory to a number of multilateral and regional conventions relating to IP protection, including the TRIPS Agreement, the ASEAN Framework Agreement on Intellectual Property Cooperation and the Convention Establishing the WIPO. The enactment of the four new IP laws in 2019 is an important step towards achieving domestic implementation of these commitments but challenges remain, as described above. In respect of the TRIPS Agreement, Myanmar and other WTO members from least developed countries have been allowed additional time – until 2021 for most standards and until 2033 for standards affecting pharmaceutical products – by the WTO’s TRIPS Council to achieve domestic implementation of TRIPS obligations. These extensions may allow Myanmar to implement its new IP laws and bring its IP rights regime into line with the TRIPS Agreement.

However, Myanmar is not yet a member of any of the 26 WIPO-administered treaties containing the most important international commitments on intellectual property. For example, some stakeholders report that the visually-impaired community in Myanmar wishes for the government to accede to the Marrakesh Treaty for the benefit of those affected by a range of disabilities that interfere with the effective reading of printed material, which Indonesia, Philippines and Thailand have all signed and brought into force in 2019 or 2020.

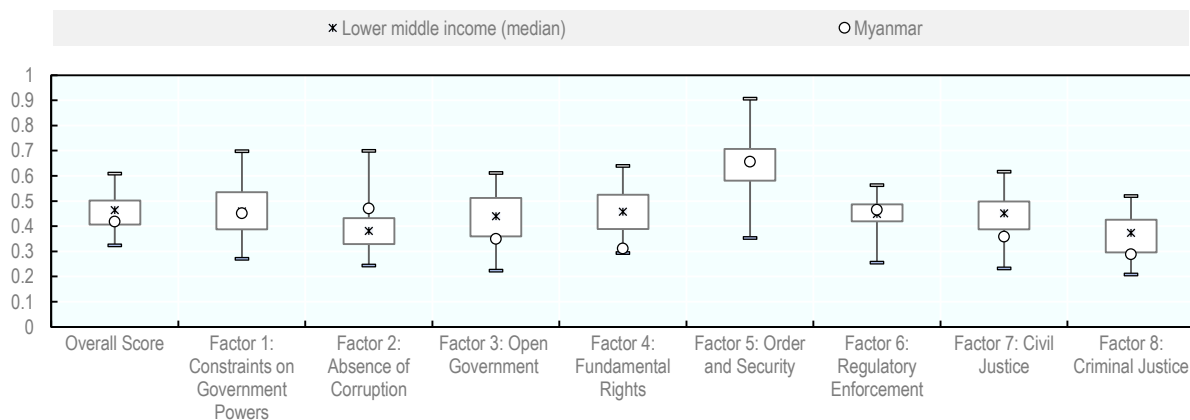
As with the new laws enacted in 2019, however, the success of any legal instruments adopted by Myanmar to establish a robust IP rights regime depends on whether newly-established IP institutions and courts are able to enforce registered IP rights effectively in practice. Coordination between government ministries and agencies will be critical to ensure that the new laws and forthcoming implementing regulations are enforced in a meaningful way. It will also be important to raise awareness of the implications of the new laws for local Myanmar business owners, as well as for customs and police officials, including the need to apply for IP registration and the consequences of infringement.

Access to justice and the court system in Myanmar

The existing infrastructure for domestic adjudication of civil disputes continues to suffer from a number of significant problems. Some of these issues seem to persist since the first OECD *Investment Policy Review* (OECD, 2014). The level of trust in the judiciary system is still low: it remains widely perceived as corrupt, inefficient, under-resourced and subject to the influence of the executive. Reforming the judiciary has been repeatedly identified as one of the biggest challenges faced by Myanmar in its reform endeavours, and various indicators consistently point to weakness in the justice system.

Myanmar ranks, for instance, 110th of 126 countries scored in the 2019 edition of the World Justice Project Rule of Law Index. This hard assessment is valid even if considering only other lower middle-income countries covered by the indicator. Myanmar’s performance is below the group median, sometimes significantly, in five out of eight sub-components of the WJP index (Figure 2.4). Only Cambodia ranks lower than Myanmar of the 15 countries scored from the East Asia & Pacific region. Myanmar ranks in the last five countries of 126 on both civil justice and human rights sub-components of the WJP Index. The World Bank’s Doing Business 2020 indicator also points to problems in the effectiveness of contract enforcement mechanisms in Myanmar, ranking the country 187th of 190 countries included in the indicator. While the average cost of enforcing contracts through the courts is at par with the average cost observed for East Asia and Pacific countries included in the Doing Business indicator, the time taken to resolve a dispute, counted from the moment the plaintiff decides to file the lawsuit in court until payment, is twice as high and the quality of the judicial processes is also estimated to be equally weak.⁴

Figure 2.4. World Justice Project Rule of Law Index, 2019: Myanmar and lower-middle income peers (best=1; worst=0)



Note: The World Justice Project Rule of Law Index measures rule of law adherence across 126 countries and jurisdictions worldwide. The country scores and rankings are built from more than 500 variables drawn from the assessments of more than 120 000 households and 3 800 legal experts. They capture the experiences and perceptions of ordinary citizens and in-country professionals concerning the performance of the state and its agents and the actual operation of the legal framework in their country. For Myanmar, they reflect responses to the WJP Rule of Law Index questionnaire collected in 2018 by a professional survey company through face-to-face interviews with 1 000 legal experts and regular persons in Yangon, Mandalay and Nay Pyi Taw.

Source: World Justice Project Rule of Law Index, 2019, <https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2019>.

While these results may partly reflect the legacy of the Military regime (see discussion below) and not fully take into account recent initiatives to improve the justice system, it remains nevertheless an area requiring particular attention by the authorities. Reforms are understandably difficult to implement in this area and may take a long time to show material results, but such dismal performance against peers reinforces the need for the government to strengthen existing efforts to improve the justice system.

Establishing a functionally independent judiciary and improving legal certainty under the Myanmar court system remain some of the biggest challenges faced by Myanmar in its democratic transition. Recent civil conflict in parts of Myanmar has attracted considerable international attention, notably with respect to potential human rights violations and the level of ‘state capture’ by the military who still maintains considerable economic and political power and enjoys full constitutional autonomy from any branch of the civilian government, including the judiciary (Reuters, 2018; UN Human Rights Council, 2018a and 2018b; International Commission of Jurists, 2018).

Since the first OECD *Investment Policy Review*, several initiatives have been pursued to improve the independence of the judiciary, the effectiveness of alternative dispute resolution and access to justice in Myanmar. The Supreme Court of Myanmar, with technical assistance from international partners, published the Judicial Strategic Plan 2015-2017 in November 2014 followed by the Judicial Strategic Plan 2018-2022 in January 2018. The Judicial Strategic Plans identify five core action areas: (i) protect public access to justice, (ii) promote public awareness, (iii) enhance judicial independence and accountability, (iv) maintain commitments to ensuring equality, fairness and integrity of the judiciary and (v) strengthen efficiency and timeliness of case processing. The 2015-2017 Plan earmarked three regional courts to pilot test strategic reform initiatives while the 2018-2022 Plan builds on the results and best practices developed in the pilot tests to establish a national case management programme that will be implemented in all courts in Myanmar by 2020.

Promoting greater access to justice, individual rights and adherence to the rule of law is also a key feature of the government's Myanmar Sustainable Development Plan 2018-2030 published by the Ministry of Planning and Finance in August 2018. The MSDP identifies individual government agencies responsible for implementing the government's goals of achieving judicial independence, transparent and consultative law-making processes and a stable rule of law at the community level and for conflict-affected areas. Planned actions include reforming the current legal aid system, increasing awareness of access to justice at the community level, developing a robust and independent legal profession, improving contract enforcement mechanisms and strengthening adherence to fair trial standards during criminal prosecutions.

Several access to justice programmes have also been established by international donors. The European Union and the British Council have partnered with civil society and non-government organisations to implement the "MyJustice" programme aimed at working with local communities to improve awareness about legal rights, local-level alternative dispute resolution options, legal aid opportunities and capacity-building for legal and court professionals. A survey published for the MyJustice programme in 2018 indicates that public perceptions regarding the functions and effectiveness of laws in Myanmar continue to be shaped by individual experiences under the Military regime and a significant number of Myanmar citizens do not have confidence that anyone can provide them with access to justice (MyJustice, 2018). This survey and other recent studies suggest that distrust of the official court system prevails, with many disputes not being brought to the official court system for resolution but rather to community-level justice institutions – primarily village tract administrators, village elders and religious leaders – that coexist with the official system (MyJustice, 2018 and 2016; Chan et al., 2017a and 2017b; Kyed et al., 2019). Other initiatives led by international donors have targeted capacity building for Myanmar criminal defence lawyers (Stevens, 2018). Initiatives include the Singapore-Myanmar Integrated Legal Exchange whereby Myanmar judges, court officials and law students benefit from various professional exchanges involving the Singaporean courts including study visits, collaborative seminars, symposiums and scholarship programs.

The new Arbitration Law

Myanmar's new Arbitration Law came into force in January 2016. This is a significant development towards securing investor confidence in Myanmar's domestic legal infrastructure in aid of commercial arbitration. The new Arbitration Law closely follows the text of the Model Law published by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 and amended in 2006, which is designed to assist states in reforming and modernising their laws on arbitral procedure.

One of the most important features of the new Arbitration Law is a codification of the principle that domestic courts shall not intervene in arbitrations except in certain limited circumstances. This should signal an end to decades of intensive court supervision of arbitrations in Myanmar under the previous pre-independence era laws.

Under the new Arbitration Law, parties may apply to the Myanmar courts during domestic arbitration proceedings in certain circumstances to appoint an arbitrator, compel the production of evidence, issue an injunction or decide a preliminary question of law.

The Myanmar courts are also vested with certain powers once an arbitral tribunal has issued an award in a domestic arbitration. Parties to domestic arbitrations under the Act can appeal to Myanmar courts on issues of law arising from an arbitral award. Myanmar courts also have powers to enforce domestic and foreign arbitral awards and determine applications to set aside arbitral awards. The limited grounds for Myanmar courts to refuse enforcement of a foreign arbitral award issued by a tribunal sitting outside of Myanmar are set out in the Arbitration Law in line with Myanmar's accession to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in July 2013. The Arbitration Law does not, however, appear to establish procedures for the Myanmar courts to set aside, recognise or enforce an international arbitral award issued by a Myanmar-seated arbitral tribunal (i.e. compared to a

domestic arbitration between Myanmar entities seated in Myanmar). This is one issue that might be clarified in a future revision of the new Law.⁵

A curious feature of the Arbitration Law is that Myanmar courts may set aside a domestic arbitral award (Article 41(a)(vii)) or refuse to enforce a foreign arbitral award (Article 46(c)(ii)) if they find that to do so “would be contrary to the national interests of the State”. It is likely that this is intended to track the language of the well-known public policy exception in the New York Convention, but some ambiguity may arise with the official English translation of the Law, which adopts the formulation of “national interests”. This issue might be helpfully clarified in a future revision of the Law, its implementing regulations or a practice note issued by the Myanmar courts.

The enactment of the Arbitration Law is a laudable achievement but challenges remain for the implementation phase. Aside from drafting subsidiary legislation to accompany the new Law, as envisaged under the Supreme Court’s Judicial Strategic Plan 2018-2022, foremost of these challenges is the development of a truly independent judiciary (as discussed above) and building capacity within the regional courts empowered under the new Law to deal effectively with applications made under the new Law.

DICA reports that internal training on the Arbitration Law is being conducted for judges and court officials (DICA, 2016b), but as of August 2019, no applications have been filed under the new Arbitration Law to set aside, recognise or enforce domestic or foreign arbitral awards.⁶ It therefore remains to be seen how the judiciary will apply the new Law in practice. The Supreme Court, together with external technical experts, may wish to renew efforts to establish a dedicated commercial court staffed by judges that specialise in handling cases arising from commercial contracts and arbitration in a separate court list to other cases.

Another challenge lies in fostering a new generation of qualified lawyers and legal services firms to act as counsel in arbitrations and arbitration-related litigation in Myanmar. It is hoped that the newly-formed Myanmar Arbitration Centre (MAC) may be able to contribute to capacity building efforts and raising awareness for alternative dispute resolution (San Pé, 2016 and 2019). The Myanmar Arbitration Centre was launched in August 2019 following several years of preparatory work by a steering committee within Myanmar’s Federation of Chambers of Commerce and Industry (UMFCCI) together with experts from regional international arbitration centres. As of August 2019, some uncertainties exist regarding the new MAC and its potential attractiveness to foreign investors in particular. These include the individuals that comprise its roster of arbitrators, whether parties may nominate arbitrators that do not appear on MAC’s roster of arbitrators and whether disputes governed by laws other than Myanmar law will be accepted.

Investment treaties

Myanmar is a party to 14 investment treaties (also referred to as international investment agreements or IIAs) that are in force today. Seven of these treaties are bilateral investment treaties (BITs) and seven of them are multilateral investment agreements in the context of Myanmar’s membership of ASEAN. Investment treaties entered into between two or more states typically protect certain investments made by nationals of a contracting state in the territory of another contracting state. Protections afforded under investment treaties generally arise in addition to and independently from domestic law protections. Treaty-based protections generally only cover investors defined as foreign. Increasingly, investment treaties also address market access for foreign investment.

Although Myanmar has signed eleven bilateral investment treaties (BITs),⁷ only seven of these treaties have entered into force, namely with China (2001), India (2008), Israel (2014), Japan (2013), Korea (2014), Philippines (1998) and Thailand (2008). Four other BITs –with Viet Nam (2000), Lao PDR (2003), Kuwait (2008) and Singapore (2019) – have been signed but not ratified and are therefore not in force yet. The Myanmar authorities have noted, however, that the Singapore BIT (2019) is expected to be ratified and come into force in 2020.

Myanmar is also party to seven investment agreements through its membership of ASEAN: the ASEAN Comprehensive Investment Agreement (2009) (ACIA), in force for Myanmar since February 2012, as well as six agreements between ASEAN member states and third countries (ASEAN+ agreements) that contain investor protections in force between Myanmar and Japan (2008), Australia/New Zealand (2009), Korea (2009), China (2009), India (2014) and Hong Kong, China (2017).

Developments since the first OECD Investment Policy Review

In the six years since the first OECD *Investment Policy Review* (OECD, 2014) was published, Myanmar signed two agreements containing binding investor protections in the context of ASEAN, both of which are now in force, namely the India-ASEAN Investment Agreement (November 2014) and the ASEAN-Hong Kong, China Investment Agreement (November 2017). Myanmar has signed one new BIT in this period: the Myanmar-Singapore BIT (2019).

An ASEAN+ trade agreement concluded in 2008 with Japan did not originally contain investment protections or ISDS but an amending protocol signed in March 2019 adds these elements. The amending protocol came into force on 1 August 2020 for Japan, Lao PDR, Myanmar, Singapore, Thailand and Viet Nam.

One BIT has also been terminated during this period. India notified Myanmar in March 2019 of its intention to terminate the BIT. India reports that the termination took effect on 21 March 2020.⁸ The provisions of the treaty will remain effective for fifteen years from the date of its termination (i.e. until 21 March 2035) in respect of investments made or acquired before the date of termination (Article 16(2)).

Myanmar has also been negotiating or considering some new investment-related agreements. In early 2019, together with ASEAN member states, it concluded negotiations for the First Protocol to Amend the ASEAN-Japan Comprehensive Economic Partnership Agreement, which added an investment and a trade in services chapters to the agreement. Myanmar has also been discussing in recent years with several new partners outside the Asia-Pacific region including the European Union,⁹ Canada¹⁰ and the Russian Federation regarding the possibility of future investment agreements.

Reconsidering Myanmar's investment treaty policy

Myanmar's investment treaties can be grouped in two broad categories: those that reflect the features often associated with older investment treaties concluded in great numbers in the 1990s and early 2000s (including Myanmar's BITs with China, India, Israel, Kuwait, Laos PDR, Philippines, Thailand and Viet Nam) and those that reflect more recent treaty practice (including Myanmar's BITs with Japan, Korea and Singapore, as well as ACIA and the ASEAN+ investment agreements).

Older investment treaties are generally characterised by a lack of specificity of the meaning of key provisions and extensive protections for covered investors. This scenario entails exposure, especially given that the majority of Myanmar's BITs have vague standards of protection and very little regulation of ISDS. Two of the primary areas of Myanmar's investment treaty policy for reconsideration are therefore its approach to substantive treaty standards, such as the FET standard, and ISDS mechanisms that would allow investors to bring claims against Myanmar in international arbitration proceedings. The next two subsections consider these two issues, followed by several other issues that Myanmar may wish to consider as part of a reevaluation of its approach to investment treaties.

Fair and equitable treatment provisions

All of Myanmar's investment agreements in force today contain provisions requiring Myanmar to treat covered investors fairly and equitably. The fair and equitable treatment (FET) standard is almost always at the centre of investment treaty policy debates and claims by investors under investment treaties. Most FET provisions were agreed before the rise of ISDS claims related to this treatment standard. Starting around

2000, broad theories for the interpretation of FET provisions by arbitral tribunals emerged as the number of ISDS cases increased.

Myanmar's BITs with China, India, Israel, Philippines and Thailand do not provide specific guidance on the types of treatment that will be considered fair and equitable. Arbitral tribunals in ISDS cases under investment treaties have taken different approaches to interpreting similar "free-standing" FET provisions, which has created considerable uncertainty for investors and states alike. Governments have reacted to these developments in various ways, including by adopting more restrictive approaches to FET or excluding FET in recent treaties (see Box 2.2).

Box 2.2. Recent approaches to the FET provision and ISDS

States are becoming more active in the ways in which they specify, address or exclude absolute FET-type obligations in their treaties and submissions in ISDS. Dissatisfaction with and uncertainties about FET and its scope have also led some governments to exclude it from their treaties or from the scope of ISDS. Some important recent approaches are outlined below.

The MST-FET approach. This approach involves the express limitation of FET to the minimum standard of treatment under customary international law (MST). This approach has been used in a growing number of recent treaties, especially in treaties involving states from the Americas and Asia (Gaukrodger, 2017).

In addition to using MST-FET, the Comprehensive and Progressive Trans-Pacific Partnership Agreement (2018) (CPTPP), contains a carve-out to address legitimate expectations, and requires the claimant to establish any asserted rule of MST-FET by demonstrating widespread state practice and *opinio juris*, which is difficult to do (Article 9.6 (3)-(5), fns 15 and 17, Annex 9A). This approach has since been replicated by other states (e.g., Australia-Indonesia CEPA (2019), Article 14.7). Myanmar's BITs with Japan and Korea, as well as all of the ASEAN+ agreements barring with China, expressly link FET to the customary international law standard for the treatment of aliens.

The defined-list approach. This approach adopts a positive list setting forth the elements of FET. Recent treaties negotiated by the European Union, China, France and Slovakia contain such defined lists. This approach can vary greatly depending on the nature of the list. Some lists include elements such as a denial of justice, manifest arbitrariness, fundamental breach of due process, targeted discrimination on manifestly wrongful grounds, and/or abusive treatment of investors. This approach likely results in a broader concept of FET than MST-FET, especially if state practice and *opinio juris* are required to establish rules under MST-FET.

The FET provisions in the ASEAN-China Investment Agreement (2009) and the ACIA are narrower examples of this approach, both of which expressly limit FET to a prohibition on denials of justice.

Myanmar's BIT with Korea and the ASEAN+ agreements with Australia/New Zealand, Korea and India combine the above two approaches by clarifying that FET does not require treatment in addition to what is required under customary international law and also defining FET as requiring a prohibition on denials of justice.

Exclusion of FET from ISDS or from the treaty. The recently-concluded USMCA updating NAFTA generally excludes FET from the scope of ISDS (except for a narrow class of cases involving certain government contracts) (Article 14.D.3). ISDS under the USMCA generally applies only to claims of direct expropriation and post-establishment discrimination (and only to Mexico-United States relations); only state-to-state dispute settlement (SSDS) is available for FET claims. India's Model BIT does not refer to FET and instead identifies specific elements; Brazil's model treaty also excludes FET.

More specific approaches to FET provisions could improve predictability for the government, investors and arbitrators alike. They could also potentially contribute to preserving the government's right to regulate in the context of investment treaties (Gaukrodger, 2017a, 2017b). ACIA and the ASEAN+ agreements provides examples of more nuanced approaches to FET amongst Myanmar's existing treaties. Another way to achieve further clarity would be to consider developing joint interpretative declarations and/or protocols to other existing investment treaties with treaty counterparties as well as other states and stakeholders.¹¹

Investor-state dispute settlement (ISDS)

Many investment treaties allow covered foreign investors to bring claims against host States in investor-state arbitration, in addition or as an alternative to domestic remedies. Investor-state arbitration currently generally involves *ad hoc* arbitration tribunals that adjudicate disputes in an approach derived from international commercial arbitration. ISDS is included in all of Myanmar's BITs, ACIA and all of the ASEAN+ agreements except the ASEAN-Hong Kong, China Investment Agreement.¹²

Myanmar has been a respondent state in only one ISDS claim to date. A Singaporean investor's claims under the ASEAN Investment Agreement (1987) (which has now been superseded by ACIA) and the Framework Agreement for the ASEAN Investment Area (1998) were dismissed for lack of jurisdiction.¹³

Myanmar's older BITs signed before 2013 regulate investor-state arbitration very lightly. They thus leave substantial decisional power to arbitrators or to claimants and their legal counsel. All of these older BITs give claimants and their counsel substantial power over key procedural issues, including the identity of the appointing authority, through the investor's unilateral choice among several arbitration institutions. None of them address expressly issues such as time limits for covered investor claims,¹⁴ the governing law in ISDS cases (barring Myanmar's BITs with China and India, which adopt different formulations¹⁵), non-disputing government party interventions on issues of interpretation,¹⁶ transparency in ISDS cases or the remedies that may be awarded by an arbitral tribunal.¹⁷

Myanmar's BITs with Japan and Korea, as well as ACIA and the ASEAN investment agreements, all contain somewhat more detailed provisions governing ISDS. Myanmar may wish to consider developing a consistent policy approach to ISDS mechanisms in investment treaties. DICA (2019d) has stated that ACIA was used as a benchmark during the drafting process for the MIL. However, it is not clear whether this approach has been adopted in negotiations for new investment treaties or the renegotiation of existing treaties.¹⁸

Multilateral reform efforts are underway with regard to ISDS. Governments participating in the UNCITRAL Commission's Working Group III (including Myanmar) have agreed by consensus that reforms to ISDS are desirable to address a wide range of government and civil society concerns with the current system (UNCITRAL Commission, 2019a).¹⁹ Phase 3 of the work, involving the elaboration of possible reforms, is now underway. The possible reforms under consideration (no decisions have yet been reached) include both structural type reforms (a permanent multilateral investment court with government-selected judges or a permanent appellate tribunal) as well as more incremental reforms such as a code of conduct for arbitrators or adjudicators.

Recent treaty practice has both greater specification of ISDS and, in some cases, replacement of investor-state arbitration with more court-like systems. Treaties like the CPTPP and the EU-Canada CETA are among some recent treaties that have included investor-state arbitration reforms. Common features in these treaties include time limits for investor claims, designating a sole appointing authority for default arbitrator appointments in investor-state arbitrations, possibilities for summary dismissal of unmeritorious claims, mandatory transparency requirements, provisions for non-disputing party participation, the possibility for joint interpretations of the treaty by the State parties that are binding on the arbitral tribunal, and provisions to prevent arbitrators acting as counsel or experts in new investment disputes (i.e. provisions that limit arbitrators' ability to engage in "double hatting"). The European Union, which supports

the concept of a multilateral investment court, has included court-like dispute settlement in its all its recent investment protection treaties.²⁰ Brazil's treaties designate domestic entities ("National Focal Points") to act as an ombudsperson by evaluating investor grievances and proposing solutions to a Joint Committee comprised of government representatives from both states.²¹ Under this model, state-state dispute settlement is also available if necessary. South Africa has terminated its BITs with European countries and now permits, under domestic legislation, foreign investors to bring direct claims against the government in domestic courts.

Clearer specification of investment protection provisions may help to reflect government intent more effectively, including in light of experiences during the COVID-19 pandemic

Specifications on key provisions in investment treaties should reflect policy choices informed by the government's priorities. Policy-makers need to consider the costs and benefits of these choices and their potential impact on foreign and domestic investors, together with Myanmar's legitimate regulatory interests and potential exposure to ISDS claims and damages. The government should review its investment treaties and consider possibilities for renegotiation and clarification of older-style investment treaties that may not reflect current priorities, including in relation to the specification of FET provisions, other protection provisions and ISDS. Depending on the context and treaty language, it may be possible to achieve these goals through joint interpretations agreed with treaty partners. In other cases, treaty amendments may be required. Replacement of older investment treaties by consent may also be appropriate in some cases.

The government's experiences with the COVID-19 pandemic may shape how it views key treaty provisions or interpretations as well as the appropriate balance between investor protections and the right to regulate. Measures taken by governments to protect their societies and economies during the pandemic affect companies and investors. Investment treaties should allow governments sufficient policy space to respond effectively to the crisis and to take vital measures such as securing quick access to essential goods and services. While it may be too early to assess the consequences of the pandemic for investment treaty makers, it is likely that experiences with the crisis may refocus government attention on the balance between investor protection and governments' right to regulate, especially in times of crisis (OECD, 2020). Governments have been addressing the balance between investment protection and the right to regulate in investment treaties through analysis and discussion at the OECD (Gaukrodger, 2017a, 2017b).

Investment treaties as tools to liberalise domestic investment policy

While liberalisation provisions are common features of international trade agreements, they have been much less common in investment treaties. Investment treaties can be used to create obligations to liberalise investment policy by facilitating the making or establishment of new investments (Pohl, 2018). This can be achieved by extending the national treatment (NT) and most-favoured nation (MFN) treatment standards to investors seeking to make investments (i.e. the pre-establishment phase of an investment) or by expressly prohibiting measures that block market access.²²

Five of Myanmar's investment treaties grant so-called pre-establishment NT or MFN treatment, or both, to investors.²³ One of these treaties would allow investors to bring ISDS claims in relation to alleged breaches of these obligations.²⁴ The market access obligations in these five treaties are accompanied by certain exclusions and reservations (see Box 2.3).

Myanmar may wish to consider whether entering into liberalisation obligations aligns with its policy goals when signing new investment treaties in the future, especially bilateral agreements signed outside the ASEAN framework. While econometric studies have failed to establish a clear and consistent link between investment protection and FDI flows,²⁵ there is greater evidence that reducing barriers and restrictions to foreign investments (whether through investment treaties or otherwise) does lead to more FDI flows.²⁶

Box 2.3. Negative and positive list-approaches to NT and MFN exceptions

When countries grant national and/or most-favoured nation treatment, whether pre- or post-establishment, they typically do so subject to exceptions or reservations adopted under one of two different approaches.

A *negative list-approach* typically provides that MFN and NT are granted subject to specific exceptions or reservations (negative lists) that are often contained in detailed annexes to the treaty. Article 7 of the Japan-Myanmar BIT (2013), for example, provides that the governments may adopt and maintain measures in certain sectors that do not conform with the MFN and NT provisions and identify sectors in which they wish to reserve full policy space, both of which categories are recorded in Annexes I and II to the BIT.

A *positive-list approach* involves limiting the application of MFN and NT liberalisation provisions to specific identified sectors (positive lists). Article 3(3) of ACIA is an example of a positive list. Generally, the negative list-approach is seen as more conducive to investment liberalisation particularly over time with the development of new areas of economic activity that are not covered by negative lists.

Developing approaches for dispute prevention and early dispute settlement

DICA may wish to review its approach to prevention and early settlement of ISDS disputes alongside the ongoing implementation process for the newly established investor grievance mechanism under the MIL. Article 83 of the new Law indicates that investors must attempt to settle investment disputes amicably by submitting a notice of dispute to the Investor Assistance Committee (IAC) in charge with attempting to resolve investor grievances and preventing them from reaching legal proceedings. The IAC, however, was recently dissolved by MIC's Notification No. 9/2020 of 7 April 2020 implementing the Myanmar's Investor Grievance Mechanism mentioned in Chapter 19 of the MIL. The new mechanism was developed and is being implemented with assistance from the IFC.

Notification No. 9/2020 provides some details of its design and functioning processes, clarifying the composition of the members of the Investor Grievance Committee, the general powers of the Committee to gather facts and submit recommendations to the government regarding investment disputes and annual reporting requirements. As of August 2020, no official translation is yet available, but preliminary information indicates that the mechanism is designed to solely address grievances brought up by investors against state entities. Grievances between investors and communities are not contemplated. Contrary to expectations, only investors with permission or approval of the Commission have access to the mechanism. Dispute provisions are also not contemplated.

CSOs and business stakeholders consulted during the review process did not necessarily see a problem in restraining the scope of application of the mechanism to only investor-state issues, noting that there are already a number of other grievances mechanisms for stakeholders and communities to raise concerns to the authorities (e.g. under the Environment Impact Assessment process). However, there was a strong call for greater clarification about the mandates and powers of the various grievances bodies in place, as well as for greater co-ordination among them to enhance their effectiveness.

In advancing with the implementation of the investor grievance mechanism, Myanmar may wish to clarify in the MIR the length of time during which an investor must pursue an amicable settlement before it can start legal proceedings and a time limit for the institution of legal proceedings. Both of these features appear in Myanmar's investment treaties but are not currently included in the new Law or Rules. Myanmar may also wish to publish informal guidelines on its expectations regarding the grievance mechanism or examples of its operation in practice, in due course, to provide further comfort for investors. It is

encouraging that Myanmar's revised Investment Promotion Plan launched in 2018 indicates that the Investment Commission is already taking steps to issue clarifications on investment-related laws and regulations to improve predictability for investors.

Effective dispute prevention and early dispute settlement mechanisms are important not only to avoid ISDS arbitrations being filed against Myanmar but also as a means of encouraging continuing collaboration and FDI commitments from investors that may otherwise abandon investment plans or projects. Foreign investors in developing countries that cancel investment plans or withdraw from existing investments due to arbitrary, expropriatory or non-transparent governmental measures affecting their investments do not always bring an ISDS or other legal claim against the government (World Bank, 2018b; Echandi, 2019). This makes it difficult to conclude that the lack of ISDS cases brought against Myanmar correlates to effective retention rates for inbound FDI and successful management of investor grievances.

The government should continue to build awareness within ministries, agencies and local or sub-national government entities regarding Myanmar's obligations under investment treaties and the potential impact that government decisions may have on investor rights under investment treaties. Internal guidelines for relevant ministries and agencies could be a useful way to disseminate information and establish best practices for interactions with investors to minimise the risk of ISDS claims. DICA (2017) reports that workshops have been held with the assistance of external experts on the resolution of investment disputes and investor grievances.

A communication protocol regarding important decisions made below a ministerial level that may adversely affect investment projects could also be considered. Croatia, for instance, has reported successful outcomes from a joint ministerial committee established in 2013 to identify opportunities for settlement and early resolution of investment disputes when the government receives pre-arbitration notices of dispute from covered investors under investment treaties (OECD, 2019). Evaluating investor claims candidly with the help of legal experts before any form of binding arbitration is initiated can be an important step in preventing protracted and costly legal proceedings.

Managing overlaps between investment treaties

Myanmar has eight relationships with treaty partners that involve overlapping investment treaties. It has signed BITs with four ASEAN partners (Lao PDR, Philippines, Thailand and Viet Nam) for whom ACIA is now concurrently in force, as well as with four other countries (China, India, Japan and Korea) that are parties to ASEAN+ trade and investment agreements. All eight of these countries are also negotiating RCEP.

Overlapping investment treaties that apply to investments by investors from the same country may raise some policy concerns. As a general matter, Myanmar should strive to minimise inefficient inconsistencies between international obligations entered into with different countries. Investors from countries with two or more treaties in force may be able to rely on more favourably-worded provisions in Myanmar's older BITs in their dealings with the government or in ISDS disputes. This approach could also potentially undermine reform efforts in some of Myanmar's newer treaties if investors can circumvent newer, more nuanced investment treaties by relying older BITs that are still in force.

Any significant differences between Myanmar's BITS, ACIA and the ASEAN+ agreements are also unlikely to contribute to the goals of ASEAN member states in strengthening common rules on investment protection and liberalisation at a regional level. Myanmar may wish to engage with these treaty partners to review whether their respective international obligations reflect current priorities. Depending on the context and treaty language, it may be possible to achieve these goals through joint interpretations agreed with treaty partners. In other cases, treaty amendments may be required.

Despite the concerns that may arise with overlapping treaties, some governments may consider that they need to provide certain extra incentives or guarantees to some treaty partners over others in order to attract

FDI. This may be because they expect that investors from those countries are less likely to invest their capital in the absence of such treatment or assess that the broader benefits associated with attracting FDI from those countries are particularly lucrative. Some governments may also consider that similar provisions in different treaties, while framed differently, are likely to be interpreted in a consistent way. The balance between these interests and assessments is a delicate one and may evolve over time.

Managing overlaps between investment treaties and domestic law

The scope of investor protections and obligations under the MIL and Myanmar's investment treaties also overlap in some respects. Some overlaps appear to give rise to inconsistencies in approach. As discussed above, the FET obligation in the MIL is more limited than the broad, unqualified language of the FET provisions in many of Myanmar's BITs. Likewise, the measure of compensation for expropriation under the MIL is different to the expropriation regimes in Myanmar's investment treaties. Almost all of Myanmar's investment treaties provide advance consent for international arbitration in investment disputes unlike the MIL; the latter also imposes obligations on investors that do not appear in Myanmar's investment treaties.

Differences between the MIL and investment treaties may create more favourable legal regimes that apply to some investors and not others based on their nationality. It may also prompt some investors to structure their investments through a company in one of Myanmar's treaty partner countries to seek to benefit from treaty protections and/or treaty-based ISDS if they perceive these to be more favourable than protections and dispute resolution options under the MIL (OECD, 2018b). The government may wish to conduct a gap analysis between the MIL and investment treaty provisions to consider the implications of any differences and ensure that these different regimes continue to reflect the government's current priorities. Business contracts that Myanmar enters into with specific investors could create an additional layer of contractual rights and obligations for specific investors.

Developing a coordinated policy position on international investment agreements

Myanmar may wish to consider developing a common policy position on investment treaties to inform future treaty negotiations that aligns with Myanmar's policy goals with respect to investment, domestic laws including the new Investment Law and accompanying Investment Rules, and Myanmar's approach to its existing investment treaties, most importantly with its ASEAN partners.

Myanmar's revised Investment Promotion Plan launched in 2018 states that it is "*crucial to expand multilateral investment treaties, for example with ASEAN, and bilateral investment treaties*" but does not explain the underlying policy rationale (MIC, 2018, p. 73). Investment treaties should be considered as one possible tool through which Myanmar can complement its own domestic regulatory and institutional reform efforts to attract FDI and signal to foreign investors that it is developing into an attractive and predictable FDI destination. Investment treaties should not generally be considered as a substitute for pursuing long-term improvements in the domestic court system, the institutions responsible for implementing and enforcing domestic legislation, and modernisation of the regulatory environment affecting investors. Careful identification of Myanmar's objectives when signing investment treaties is critical in order to target desired outcomes and avoid unintended consequences of investment treaties.

A common policy position, together with a model set of provisions for future investment treaties, may allow Myanmar to strike an appropriate balance between investor protections, liberalisation commitments, and Myanmar's ability to regulate in the public interest. It may also help to ensure that treaty provisions are consistent with domestic legislation. A model investment treaty could conceivably allow Myanmar to address aspects of the new Investment Law – such as the progressive set of investor obligations related to environmental protection, labour rights and responsible business conduct – with treaty partners in future negotiations.

While treaties always reflect negotiated outcomes, the government may also wish to assess carefully whether ISDS provisions should feature in future investment treaties that it signs in light of concerns that have led some states to change their approach to ISDS (as described above). Myanmar's Investment Promotion Plan states that “*becoming a member of the International Centre for Settlement of Investment Disputes (ICSID) will be the next step in the preparation of a framework for investor protection*” and that dispute resolution with investors “*must be undertaken within the ICSID framework if any dispute occurs*” (MIC, 2018, p. 73-74). It is unclear whether the government has undertaken an assessment of political and economic costs and benefits associated with becoming a party to the ICSID Convention in light of the considerations raised in the first OECD *Investment Policy Review*.

Myanmar may wish to consider the costs and benefits of ISDS more broadly alongside potential alternatives or complementary steps. These might include *ad hoc* arbitration agreements with specific investors or the possibility for investors to purchase political risk insurance from the World Bank's Multilateral Investment Guarantee Agency that Myanmar joined as a member in 2013. If Myanmar decides to include ISDS provisions in future treaties, ensuring that protection standards such as FET are appropriately clarified in the treaty, in line with the ACIA and ASEAN+ agreements, will help to reduce Myanmar's exposure to ISDS claims. The government may also wish to consider whether the inclusion of ISDS can be leveraged to achieve Myanmar's objectives in other aspects of the treaty negotiations.

As in all policy areas, Myanmar should consult widely with all stakeholders, including all relevant ministries and agencies, civil society organisations and foreign investors, if it were to develop a common policy position on investment treaties. It may also be prudent to establish a dedicated unit within a body such as the MIC or DICA that is responsible for co-ordinating an evaluation of Myanmar's experience with existing investment agreements and proposals for a future common policy position. This process could be strengthened by drawing on the experiences of other states that have developed model investment agreements recently²⁷ and concluded investment agreements as part of larger trade agreements involving large capital exporters,²⁸ as well as Myanmar's own experiences negotiating ACIA, the ASEAN+ agreements and BITs with Japan (2013) and Korea (2014). It may also be beneficial to explore the possibility of collaborating with governments of other states that have recently undergone democratic transitions regarding the implications of investment treaties for legacy issues from previous regimes.²⁹

References

- Aisbett, E., M. Busse and P. Nunnenkamp (2018), “Bilateral investment treaties as deterrents of host country discretion: the impact of investor-state disputes on foreign direct investment in developing countries”, *Review of World Economics*, Springer, Berlin, Vol. 154/1, pp. 119-155.
- Alschner, W. (2014), “Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?”, *Journal of International Economic Law*, Volume 17/2, pp. 271-298.
- Armstrong, S. (2018), “The Impact of Investment Treaties and ISDS Provisions on FDI in Asia and Globally”, in J. Chaisse and L. Nottage (eds.), *International Investment Treaties and Arbitration Across Asia*, Brill Nijhoff, Leiden, pp. 57-82.
- Armstrong, S. P. and L. Nottage (2016), “The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis”, *Sydney Law School Research Paper No. 16/74*, 15 August 2016.
- Atanasova, D. (2019), “Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?”, *Journal of International Dispute Settlement*, advance copy, June 14.
- Aung Naing Oo (2018), “A new model for a new era in Myanmar from the 1944 Arbitration Act to the 2016 Arbitration Law”, in Bell, G. (ed.), *The UNCITRAL Model Law and Asian Arbitration Laws: Implementation and Comparisons*, Cambridge University Press, Cambridge, pp. 187-203.

- Batifort, S. and J. Benton Heath (2018), “The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization”, *American Journal of International Law*, Volume 111/4, American Society of International Law, Washington D.C., pp. 873-913.
- Bellak, C. (2015), “Economic Impact of Investment Agreements”, University of Vienna, *Department of Economics Working Paper No. 200*, August 2015.
- Berger, A., M. Busse, P. Nunnenkamp and M. Roy (2013), “Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box”, *International Economics and Economic Policy*, Vol. 10/2, Springer, Berlin, pp. 247-275.
- Berger, A., M. Busse, P. Nunnenkamp and M. Roy (2012), “Attracting FDI through BITs and RTAs: Does Treaty Content Matter?”, in K. Sauvart and J. Reimer (eds.), *FDI Perspectives: issues in international investment*, 2nd edition, Vale Columbia Center on Sustainable International Investment, New York, pp. 155-156.
- Berger, A., M. Busse, P. Nunnenkamp and M. Roy (2011), “More stringent BITs, less ambiguous effects on FDI? Not a bit!”, *Economic Letters*, Vol. 112/3, Elsevier, Amsterdam, pp. 270-272.
- Bonnitcha, J. (2018), “International investment arbitration in Myanmar: bounded rationality but not as we know it”, in J. Chaisse and L. Nottage (eds.), *International Investment Treaties and Arbitration Across Asia*, Brill Nijhoff, Leiden, pp. 339-342.
- Bonnitcha, J. (2017a), *Investment Laws of ASEAN Countries: A Comparative Review*, International Institute for Sustainable Development, Winnipeg, December 2017.
- Bonnitcha, J. (2017b), *Assessing the Impacts of Investment Treaties: Overview of the evidence*, International Institute for Sustainable Development, Winnipeg, September 2017.
- Bonnitcha, J. (2014), “Investment Treaties and Transition from Authoritarian Rule”, *Journal of World Investment & Trade*, Vol. 15/5-6, Brill Nijhoff, Leiden, pp. 965-1011.
- Bonnitcha, J., L.N. Skovgaard and M. Waibel (2017), *The Political Economy of the Investment Treaty Regime*, Oxford University Press, Oxford.
- Chaisse, J. (2015), “The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration”, *Hastings Business Law Journal*, Vol. 11/2, University of California, Oakland, pp. 225-305.
- Chan, E. and J. So (2017a), *UNDP Access to Justice and Informal Justice Systems Research, Rakhine State*, United National Development Programme, Myanmar.
- Chan, E. and J. So (2017b), *UNDP Access to Justice and Informal Justice Systems Research, Yangon region: Snapshot Study*, United Nations Development Programme, Myanmar.
- Chan, L.S., J. Delaney and M.M.A. Naing (2017), “Myanmar”, *The Baker McKenzie International Arbitration Yearbook 2016-2017*, 10th edition, pp. 303-312.
- CIDSE (Coopération Internationale pour le Développement et la Solidarité) (2016), *Myths and risks of the EU-Myanmar Investment Protection Agreement, Policy Brief*, September.
- Colen, L., D. Persyn and A. Guariso (2016), “Bilateral Investment Treaties and FDI: Does the Sector Matter?”, *World Development*, Vol. 83, Elsevier, Amsterdam, pp. 193-206.
- Development Solutions (2016), *Sustainability Impact Assessment (SIA) in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar: Executive Summary*, report prepared for the European Commission, June 2016.
- DICA (2019a), “The reforms, outcomes and the update of the Investment Environment in Myanmar”, Presentation delivered at the Myanmar Investment Summit 2019 by U Aung Naing Oo, (then) Director General of the Directorate of Investment and Company Administration (DICA), January.
- DICA (2019b), “On the Investment Climate and Business Environment in Myanmar – U Aung Naing Oo, Director-General, DICA”, Speech delivered to the Invest Myanmar Summit 2019, January 29.

- DICA (2019c), “Welcoming Remarks by H.E. U Thaung Tun, Union Minister of Investment and Foreign Economic Relations and Chairman of Myanmar Investment Commission, on the occasion of Yangon Investment Forum 2019”, 10 May 2019.
- DICA (2019d), “Investment Agreements”, website section, <https://www.dica.gov.mm/en/investment-agreements> (accessed 24 June 2019).
- DICA (2017), “Workshop on Resolution of Investment Disputes and Grievances between Investors and State”, website section, March 20, <https://www.dica.gov.mm/en/news/workshop-resolution-investment-disputes-and-grievances-between-investors-and-state> (accessed 25 June 2019).
- DICA (2016a), *Investment Policy*, December 21.
- DICA (2016b), “Supreme Court official explained arbitration dispute resolution system”, website section, March 11, <https://www.dica.gov.mm/en/news/supreme-court-official-explained-arbitration-dispute-resolution-system> (accessed 27 June 2019).
- Echandi, R. (2019), “The Debate on Treaty-Based Investor–State Dispute Settlement: Empirical Evidence (1987–2017) and Policy Implications”, *ICSID Review - Foreign Investment Law Journal*, ICSID, Washington D.C., siy024.
- EU Commission (2019), “Trade policy: Myanmar (Burma)”, website section, <https://ec.europa.eu/trade/policy/countries-and-regions/countries/myanmar/> (accessed 24 June 2019).
- Finch, J. and A. Thida (2016) “International Arbitration Under Myanmar’s Arbitration Law”, *Asian International Arbitration Journal*, Vol. 12/2, Wolters Kluwer and the Singapore International Arbitration Centre, Singapore, pp 235-252.
- Frontier Myanmar (2018), “The key changes for investors in the new MIC regime”, website article, <https://www.frontiermyanmar.net/en/the-key-changes-for-investors-in-the-new-mic-regime/> (accessed 24 September 2019).
- Gaukrodger, D. (2017a), “The balance between investor protection and the right to regulate in investment treaties: A scoping paper”, *OECD Working Papers on International Investment*, No. 2017/02, OECD Publishing, Paris, <https://doi.org/10.1787/82786801-en>.
- Gaukrodger, D. (2017b), “Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law”, *OECD Working Papers on International Investment*, No. 2017/03, OECD Publishing, Paris, <https://doi.org/10.1787/0a62034b-en>.
- Gaukrodger, D. (2016), “The legal framework applicable to joint interpretive agreements of investment treaties”, *OECD Working Papers on International Investment*, No. 2016/01, OECD Publishing, Paris, <https://doi.org/10.1787/5jm3xgt6f29w-en>.
- Gertz, G., S. Jandhyala and L.N.S. Poulsen (2018), “Legalization, diplomacy, and development: Do investment treaties de-politicize investment disputes?”, *World Development*, Vol. 107, Elsevier, Amsterdam, pp. 239-252.
- Gordon, K. and J. Pohl (2015), “Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World”, *OECD Working Papers on International Investment*, No. 2015/02, OECD Publishing, Paris, <https://doi.org/10.1787/5js7rhd8sq7h-en>.
- Government of Canada (2018), “Public Consultations on a Possible Canada-ASEAN FTA”, website section, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/asean-anase/public-consultations-publiques.aspx?lang=eng> (accessed 27 June 2019).
- Greenlee, W. (2017) “Arbitration in Myanmar: the best option?”, *International Law News*, Vol. 45/3, American Bar Association, Chicago.
- Grossman, S. J., and Hart, O. D. (1986), “The costs and benefits of ownership: A theory of vertical and lateral integration”, *Journal of Political Economy*, Vol. 94(4), pp. 691–719.

- Hymer, S. (1976), *The international operations of national firms: a study of foreign direct investment*, Cambridge: MIT Press, 1976.
- International Commission of Jurists (2018), *Achieving Justice for Gross Human Rights Violations in Myanmar: Baseline Study*, ICJ, Geneva, January.
- Jusoh, S. (2019), “Myanmar’s Investor-State Dispute Settlement Experience and Investor Grievance Mechanism”, in Esplugues, C. (ed.), *Foreign Investment and Investment Arbitration in Asia*, Intersentia, Cambridge, pp. 205-226.
- Kalinova, B., Palerm, A. and Thomsen, S. (2010), “OECD’s FDI Restrictiveness Index: 2010 Update”, *OECD Working Papers on International Investment*, 2010/03, OECD Publishing, Paris, <https://doi.org/10.1787/5km91p02zj7g-en>.
- Kyaw, T. A. (2018), “Evolving Legal Framework in Myanmar and Implications for FDI” and “Positioning Myanmar as an attractive new investment destination in Southeast Asia”, Presentations to the Eighth Meeting of the Asia-Pacific Foreign Direct Investment Network, Bangkok, Thailand, September 26.
- Kyed, H. and A. Thawngmung (2019), “The Significance of Everyday Access to Justice in Myanmar’s Transition to Democracy”, *Trends in Southeast Asia*, No. 9 of 2019, June 2019, ISEAS – Yusof Ishak Institute, Singapore.
- Ministry of Education (Science and Technology), Department of Research and Innovation, Intellectual Property Department (2018), “About Us”, website section (accessed 26 June 2019).
- Miroudot, S. and C. Cadestin (2017), “Services In Global Value Chains: From Inputs to Value-Creating Activities”, *OECD Trade Policy Papers*, No. 197, OECD Publishing, Paris, <https://doi.org/10.1787/465f0d8b-en>.
- Mistura, F. and Caroline Roulet (2019), “The determinants of Foreign Direct Investment: Do statutory restrictions matter?”, *OECD Working Papers on International Investment*, No. 2019/01, OECD Publishing, Paris, <https://doi.org/10.1787/641507ce-en>.
- Moran, T. H., Graham, E. M. and Blomström, M. (2005), “Chapter 14: Conclusions and Implications for FDI Policy in Developing Countries, New Methods of Research, and a Future Research Agenda”, in Moran, Graham, and Magnus Blomström (ed.), *Does Foreign Direct Investment Promote Development?*, Institute for International Economics, Washington D.C.
- Myanmar Investment Commission (2018), *Myanmar Investment Promotion Plan: 2016/17-2035/36*, Government of Myanmar, October.
- Myanmar Times (2019a), “President urges faster reforms to build federal union”, website section, May 28, <https://www.mmtimes.com/news/president-urges-faster-reforms-build-federal-union.html> (accessed 27 June 2019).
- Myanmar Times (2019b), “Better implementation of the Law needed to draw Foreign Investors”, website section, June 10, <https://www.mmtimes.com/news/better-implementation-law-needed-draw-foreign-investors.html> (accessed 19 June 2019).
- Myanmar Times (2016), “Commercial court and skilled judges crucial, say legal experts”, website section, August 26, <https://www.mmtimes.com/business/22171-commercial-court-and-skilled-judges-crucial-say-legal-experts.html> (accessed 27 June 2019).
- MyJustice (2018), *Searching for justice in the law: Understanding access to justice in Myanmar. Findings from the Myanmar Justice Survey 2017*, British Council, London.
- MyJustice (2016), *Making big cases small & small cases disappear: experiences of local justice in Myanmar*, British Council, London.
- Nordås, H. and Dorothee Rouzet (2015), “The impact of services trade restrictiveness on trade flows: First estimates”, *OECD Trade Policy Papers*, No. 178, OECD Publishing, Paris, <https://doi.org/10.1787/5js6ds9b6kjb-en>.
- OECD (2020a), *Trade Policy Implications of Global Value Chains*, OECD, Paris, February,

- https://issuu.com/oecd.publishing/docs/trade_policy_implications_of_global
- OECD (2020b), "OECD investment policy responses to COVID-19", OECD, Paris, April 17, <http://www.oecd.org/coronavirus/policy-responses/oecd-investment-policy-responses-to-covid-19-4be0254d/#abstract-d1e14>.
- OECD (2019), *OECD Investment Policy Reviews: Croatia 2019*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/2bf079ba-en>.
- OECD (2018a), *OECD Investment Policy Reviews: Southeast Asia*, OECD, Paris, <http://www.oecd.org/investment/oecd-investment-policy-review-southeast-asia.htm>
- OECD (2018b), "Background information on treaty shopping" in: Treaty shopping and tools for treaty reform – Agenda and Conference material, March 12, www.oecd.org/daf/inv/investment-policy/4th-Annual-Conference-on-Investment-Treaties-agenda.pdf
- OECD (2016), "The impact of investment treaties on companies, shareholders and creditors", in *OECD Business and Finance Outlook 2016*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264257573-13-en>.
- OECD (2015), *Policy Framework for Investment, 2015 Edition*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264208667-en>.
- OECD (2014), *OECD Investment Policy Reviews: Myanmar 2014*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264206441-en>.
- Pohl, J. (2018), "Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence", *OECD Working Papers on International Investment*, No. 2018/01, OECD Publishing, Paris, <https://doi.org/10.1787/e5f85c3d-en>.
- Pohl, J. (2013), "Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions", *OECD Working Papers on International Investment*, No. 2013/04, OECD Publishing, Paris, <https://doi.org/10.1787/5k3tsj5f5vh-en>.
- Pohl, J., K. Mashigo and A. Nohen (2012), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", *OECD Working Papers on International Investment*, No. 2012/02, OECD Publishing, Paris, <https://doi.org/10.1787/5k8xb71nf628-en>.
- Poulsen, L.N.S. (2010), "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence", in *Yearbook on International Investment Law and Policy 2009/2010*, Oxford University Press, New York, pp. 539-574.
- Poulsen, L.N.S. and E. Aisbett (2016), "Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime", *Journal of International Dispute Settlement*, Oxford University Press, Oxford, Vol. 7/1, pp. 72-91.
- Productivity Commission (2010), *Bilateral and Regional Trade Agreements*, Research Report, Canberra, November 2010.
- Reuters (2018), "Reuters journalists freed from Myanmar prison", website section, May 7, <https://www.reuters.com/subjects/myanmar-reporters> (accessed 26 June 2019).
- Rieffel, Lex (2015), "Policy Options for Improving the Performance of the State Economic Enterprise Sector in Myanmar", *ISEAS Working Paper No. 1, 2015*, Singapore.
- Rouzet, D. and Francesca Spinelli (2016), "Services Trade Restrictiveness, Mark-Ups and Competition", *OECD Trade Policy Papers*, No. 194, OECD Publishing, Paris, <https://doi.org/10.1787/5jln7dlm3931-en>.
- San Pé, R. (2019), "Country Update: Myanmar", *Asian Dispute Review*, April 2019, Hong Kong, China International Arbitration Centre, Hong Kong, China, pp. 78-84.
- San Pé, R. (2016), "The way forward on resolving commercial disputes", website article, Frontier Myanmar, Yangon, September 2, <https://www.frontiermyanmar.net/en/robert-san-pe-the-way-forward-on->

[resolving-commercial-disputes/](#) (accessed 26 June 2019).

Stevens, J. (2018), *Myanmar Criminal Defence Practice Manual*, 1st edition, International Bridges to Justice, Taunggyi, Myanmar.

Tilleke & Gibbons (2019a), “Enactment of New IP Laws in Myanmar”, website section, May 9, <https://www.tilleke.com/resources/enactment-new-ip-laws-myanmar> (accessed 19 June 2019).

Tilleke & Gibbons (2019b), “Myanmar Enacts Copyright Law”, website section, June 5, <https://www.tilleke.com/resources/myanmar-enacts-copyright-law> (accessed 19 June 2019).

Tilleke & Gibbons (2019c), “Practical Implications of Myanmar’s New Trademark Law”, June 5, <https://www.tilleke.com/resources/practical-implications-myanmars-new-trademark-law> (accessed 19 June 2019).

TNI (2016), “Open Letter: Suspend negotiations for an investment protection agreement between the EU and Myanmar”, website content, October 16, <https://www.tni.org/en/article/suspend-negotiations-for-an-investment-protection-agreement-between-the-eu-and-myanmar> (accessed 27 June 2019).

UN Human Rights Council (2019b), “Situation of human rights of Rohingya Muslims and other minorities in Myanmar”, resolution adopted by the Human Rights Council, thirty-ninth session of the UN Human Rights Council, September 27.

UN Human Rights Council (2018a), “Report of the independent international fact-finding mission on Myanmar”, presented at that thirty-ninth session of the UN Human Rights Council, September 12.

UNCITRAL Commission (2019a), “Working Group III: Investor-State Dispute Settlement Reform”, website content, https://uncitral.un.org/en/working_groups/3/investor-state (accessed 27 June 2019).

UNCITRAL Commission (2019b), “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019)”, Document No. A/CN.9/970.

UNCITRAL Commission (2018), “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)”, Document No. A/CN.9/964.

UNCTAD (2019), “Taking Stock of IIA Reform: Recent Developments”, *IIA Issues Note No. 3*, Geneva.

UNCTAD (2018), “Recent Developments in the International Investment Regime”, *IIA Issues Note No. 1*, Geneva.

UNESCAP (2015), “Business and Development in Myanmar: A policy handbook for private sector development”, *Studies in Trade and Investment No. 82*, United Nations Economic and Social Commission for Asia and the Pacific, United Nations Publication, Thailand.

US Department of State (2019), “2019 Investment Climate Statements: Burma”, July 11.

Vidigal, G. and B. Stevens (2018), “Brazil’s New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?”, *Journal of World Investment & Trade*, Vol. 19/3, Brill Nijhoff, Leiden, pp. 475-512.

World Bank (2019), *Building Reform Momentum*, Myanmar Economic Monitor, June.

World Bank (2018a), *Myanmar’s Future Jobs: Embracing Modernity – Main Report*, World Bank Group: Washington, D.C.

World Bank (2018b), *Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications*, World Bank Group, Washington, D.C.

Zielinski, L. (2017) “Myanmar”, in L. Malintoppi and C. Tan (eds.), *Investment Protection in Southeast Asia: A Country-By-Country Guide on Arbitration Laws and Bilateral Investment Treaties*, Brill Nijhoff, Leiden, pp. 226-228.

Notes

¹ Legal practitioners have particularly called attention to uncertainties around the rules for converting land into 'collectively owned land' as required by the law for the building to be registered as a condominium building and for its units to be separately transferred and registered. The rules provided some clarification on the process for converting land owned by the co-developer into 'collectively owned land', but is not explicit about the procedures for converting and registering state-owned grant land or land leased from a government entity under a Build-Operate-Transfer contract as 'collectively owned land', which are more common types of land for condominium projects. But these and other implementation issues may be clarified and eased as the relevant agencies gain experience with the regime. Only in early 2019 was the regime put into practice, following the establishment of state and regional condominium management committees by the Ministry of Construction responsible for registering and regulating condominium developers and developments (Stephenson Hardwood, 2018; Lincoln Legal Services, 2018).

² DICA (2016); DICA (2019c); Kyaw (2018).

³ See generally Bonnitcha (2017a). Some investment laws in other regions contain standing consent for international arbitration to resolve investment disputes. See, for example, Investment Code of Togo, Law No. 2012-001, Article 8 (providing for ICSID arbitration); Investment Code of Cote d'Ivoire, Law No. 2018-646, 1 August 2018, Article 50 (providing for OHADA arbitration).

⁴ The cost dimension of the indicator on contract enforcement refers to average cost of court fees, attorney fees (where the use of attorneys is mandatory or common) and enforcement fees expressed as a percentage of the claim value. The time take to resolve a dispute is counted from the moment the plaintiff decides to file the lawsuit in court until payment, and covers both the days when actions take place and the waiting periods in between. The quality of judicial processes index measures whether each economy has adopted a series of good practices in its court system in four areas: court structure and proceedings, case management, court automation and alternative dispute resolution. For more information on the methodology, please refer to the World Bank's Doing Business website at: <https://www.doingbusiness.org/>.

⁵ For further discussion, see Finch et al. (2016); Zielinski (2017); Chan et al. (2017); Greenlee (2017); Aung Naing Oo (2018); Bonnitcha (2018).

⁶ See also the US Department of State (2019): "There is still little track record of enforcing foreign awards in Burma and inherent jurisdictional risks remain in any recourse to the local legal system. The new Arbitration Law however brings Burma's legislation more in line with internationally accepted standards in arbitration."

⁷ Myanmar has also signed a Memorandum of Understanding with India in 2012 to establish a Joint Trade and Investment Forum and a number of framework agreements, including with the United States and Indonesia in 2013, that envisage the possibility for future cooperation on investment and trade but do not contain binding investor protections or liberalisation commitments that are typically found in investment treaties.

⁸ Government of India, Ministry of Finance, Department of Economic Affairs, Bilateral Investment Treaties (BITS)/Agreements, accessed 18 June 2019.

⁹ See, generally, EU Commission (2019). Negotiations between Myanmar and the EU regarding an Investment Protection Agreement began in 2013 and led to the development of an EU-funded Sustainability Impact Assessment (Development Solutions, 2016) published in June 2016. Negotiations are reported to have been suspended in September 2017 despite the text of the agreement reaching an advanced stage of the negotiations. Civil society groups expressed concerns regarding the implications of the treaty under negotiation in several open letters addressed to the EU Commissioner for Trade during the negotiations. See, for example, CIDSE (2016); TNI (2016).

¹⁰ Canada and ASEAN member states announced in September 2017 that they had conducted exploratory discussions for a possible Canada-ASEAN free trade agreement. Canada undertook public consultations on a possible free trade agreement with ASEAN during 2018. See Government of Canada (2018).

¹¹ For example, see the Joint Interpretative Declaration between Columbia and India (2018) regarding the Columbia-India BIT (2009). See also Gaukrodger (2016), Gordon and Pohl (2015).

¹² The treaty Parties to the ASEAN-Hong Kong (China) Investment Agreement (AHKIA) have not yet agreed on an ISDS mechanism but have scheduled this item for discussion as part of their ongoing Work Programme under the treaty. See AHKIA, Article 20.

¹³ *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003.

¹⁴ C.f. Korea-Myanmar BIT (2014), Article 11(6); Japan-Myanmar BIT (2013), Article 18(6).

¹⁵ See Atanasova (2019) for issues surrounding applicable law clauses in investment treaties.

¹⁶ C.f. Japan-Myanmar BIT (2013), Article 18(9).

¹⁷ C.f. Korea-Myanmar BIT (2014), Article 11(9).

¹⁸ See also Kyaw (2018), slides 8-9.

¹⁹ UNCITRAL Commission (2019a). Governments in Working Group III at UNCITRAL agreed by consensus at a November 2018 meeting that it is desirable to develop reforms to address concerns related to ten issues. See UNCITRAL Commission (2018). The ten areas are: (i) unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals; (ii) the lack of a framework for multiple proceedings brought pursuant to investment treaties, laws, instruments and agreements that provided access to ISDS mechanisms; (iii) the fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions; (iv) the lack or apparent lack of independence and impartiality of decision makers in ISDS; (v) the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules; (vi) the lack of appropriate diversity among decision makers in ISDS; (vii) the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules; (viii) the cost and duration of ISDS proceedings; (ix) the allocation of costs by arbitral tribunals in ISDS; and (x) security for costs. In April 2019, Working Group III identified an eleventh area of concern – the definition, use and regulation of third-party funding in ISDS – and adopted by consensus a work plan for the development of reforms for ISDS at UNCITRAL. See UNCITRAL Commission (2019b), para 25.

²⁰ See EU-Canada CETA (2016); EU-Singapore Investment Protection Agreement (2018); EU-Mexico Agreement (2018); EU-Viet Nam Investment Protection Agreement (2019).

²¹ See, for example, Brazil-Chile FTA (2018), Article 15; Brazil-Angola BIT (2015), Article 15.

²² See, for example, EU-Canada CETA (2016), Article 8.4; EU-Viet Nam FTA (2018), Article 8.4.

²³ Japan-Myanmar BIT (2013), Articles 1(d), 2, 3; ACIA, Articles 3(3), 5, 6; ASEAN-Korea Investment Agreement, Articles 3, 4; AANZFTA, Chapter 11, Article 4; ASEAN-India Investment Agreement, Article 3.

²⁴ Japan-Myanmar BIT (2013), Article 18(1). ACIA and the ASEAN+ agreements with Australia/New Zealand, India and Korea exclude pre-establishment NT and MFN from the scope of the ISDS provisions in those agreements by allowing claims to be brought by investors only in relation to loss or damage suffered “with respect to the management, conduct, operation or sale or other disposition” of a covered investment (c.f. admission or establishment): ACIA, Article 32(a); ASEAN-Korea Investment Agreement, Article 18(1); AANZFTA, Chapter 11, Article 20(a); ASEAN-India Investment Agreement, Article 20(1).

²⁵ As described in the first OECD Investment Policy Review (OECD, 2014, Annex 3.A1, pp. 124-127), the assumption that investment treaties encourage foreign direct investment has been difficult to establish as a factual matter despite a multitude of recent studies. See Pohl (2018), pp. 13-39; Aisbett et al. (2018); Armstrong (2018); Bonnitcha (2017b); Bonnitcha et al. (2017); Armstrong et al. (2016); Colen et al. (2016); Bellak (2015); Berger et al. (2013); Berger et al. (2012); Berger et al. (2011); Gertz et al. (2018); Poulsen et al. (2016) and Poulsen (2010).

²⁶ Mistura et al. (2019); Berger et al. (2013).

²⁷ See, for example, the model investment agreements of Brazil (2015), India (2016), Netherlands (2019) and Belgium/Luxembourg (2019).

²⁸ See, for example, EU-Canada CETA (2016), CPTPP (2018), EU-Singapore Investment Protection Agreement (2018), USMCA (2018), Australia-Indonesia CEPA (2019) and EU-Viet Nam Investment Protection Agreement (2019). See also, generally, Vidigal et al. (2018).

²⁹ See, generally, Bonnitcha, J. (2014).

3. Investment promotion and facilitation

This chapter examines investment promotion and facilitation policies in place in Myanmar. It analyses the institutional framework for investment promotion and facilitation, with a particular emphasis on the role and activities of DICA, Myanmar's investment promotion agency. It highlights key reforms and measures implemented by the government to improve the business environment and facilitate the process for incoming investors as well as to attract foreign investment. The chapter identifies continuing challenges and proposes recommendations to address them.

Myanmar's investment promotion and facilitation framework has also evolved considerably since the first review. On the institutional side, a new Ministry for Investment and Foreign Economic Relations (MIFER) has been established *inter alia* to steer investment policy and deepen investment climate reforms. Important strides have been made with regards to investment facilitation, notably the streamlining of procedures for establishing a business, obtaining investment approvals and other needed licences with the one-stop-shop (OSS), although there is still much room for improvement with regards to the latter. The Directorate for Investment and Company Administration (DICA) – Myanmar's Investment Promotion Agency (IPA) – has been strengthened to deliver on its mandate and has asserted itself as a leading reformist agency within the government. Myanmar has also established a long-term investment promotion plan – the Myanmar Investment Promotion Plan (MIPP) for 2016-2036 – which sets out an ambitious agenda and strategies for promoting further domestic and foreign investments.

This makes it timely to take stock of recent investment promotion and facilitation reforms and to provide possible directions for the government's ambitious agenda to attract investment for sustainable development. The OECD's survey of IPAs, which Myanmar also completed in the context of this review, allows for some benchmarking of country experiences across regions and provides additional insights on how best to organise Myanmar's promotional and facilitation efforts going forward.¹

Much of the analysis in this chapter concerns investment facilitation, partly because investment promotion activities are still rather embryonic in Myanmar.² Apart from trips abroad where Ministers and the Director General of DICA meet potential investors and business groups and establishing a list of priority sectors for investment, investment promotion in Myanmar is still in its early stages. This is understandable given the weaknesses of the business environment that prevailed at the time of Myanmar's economic transition in 2011. Investing heavily in investment promotion and branding activities before building the foundations of a good investment climate would have likely been a waste of resources.

DICA has, therefore, wisely focused its efforts on facilitating investments and has gone a long way in this regard. Focusing on easing regulatory bottlenecks is also indirectly a valuable investment promotion activity as it increases the attractiveness of Myanmar as an investment destination, although there is still much room for improvement in investment facilitation. To some extent a first wave of business reforms has been achieved with the new Investment and Companies Laws, but reforms to 'second tier' regulations affecting business operations beyond establishment are still much needed. Investors still complain about the unclear and burdensome procedures for obtaining ministerial licences and permits necessary for conducting their businesses. The OSS still operates more as a centralised information centre than as an actual single window agency with authority to issue permits and licences on behalf of the various ministries and agencies represented there. This is in clear contrast to the OSS at Thilawa SEZ where officials have autonomy to take decisions on behalf of their ministries, making the process much less burdensome for investors.

Myanmar's investment framework has also reached a level of maturity that now allows DICA to take a more strategic look and graduate to more sophisticated investment facilitation and promotion activities. These include the development of capacity building programmes for domestic firms and industries, as well as being more active in facilitating business linkages with foreign investors. Co-ordination with other major actors active in promoting investments and private sector development in Myanmar, such as special economic zones (SEZs) and the SME Centre under the Ministry of Planning, Finance and Industry, could be strengthened for these purposes, although wide capacity gaps between domestic and foreign firms still remains a major barrier to greater linkages.

DICA has, nonetheless, developed a good reputation and reach with the business community and has an ample understanding of investors' interests and concerns. This can be leveraged in co-ordination with other relevant actors to build industry-specific business development services and 'first-stage' linkages between domestic and foreign investors. Investment promotion activities could also be strengthened in alignment with these objectives, for instance by targeting investors in activities and segments with a greater propensity to integrate with the domestic economy.

Main policy recommendations

- Strengthen investment promotion activities, while continuing to improve investment facilitation:
 - Myanmar has made big strides in improving the legal and regulatory framework for investor entry and establishment, including through institutional restructuring and the establishment of adequate mechanisms, like one-stop shops and an online business registration system. DICA may now start to scale up its investment promotion measures *per se*. This would require significant institutional adjustments, both within DICA (see the next recommendation) and in terms of co-ordination across different actors undertaking their own promotional activities, such as the Thilawa Special Economic Zone.
 - Developing its investment promotion functions may require strengthening and clarifying its legal mandate, which today is submersed in functions of the Myanmar Investment Commission, as well as possibly an institutional and budget rearrangement. The government should consider what would be the best organisation design for delivering on such a mandate. This may imply designing a new strategy to re-position the investment promotion branch of DICA, either remaining as part of a larger ministry or becoming more autonomous.
 - Commission a feasibility study by an independent body to analyse various institutional options for DICA, such as those proposed in the MIPP. Decisions on institutional arrangements and the status of the IPA in this regard require careful analysis of the expected outcomes of any reforms and the consequences on the budget, human resources and the overall effectiveness of investment promotion and facilitation.
 - Explore concrete opportunities and activities to foster MNE-SME linkages. DICA has the unique advantage of being close to foreign investors from the establishment phase and should thus seek to promote partnerships with local enterprises early on. This could extend to piloting initiatives in SEZs and industrial zones. Generally, the government should maintain efforts to strengthen the SME sector as a viable source of linkages with MNEs and for inclusive growth in Myanmar, while encouraging the private sector to establish its own industry-specific business development services.
 - Considering their institutional independence (reporting to different branches of the government), careful co-ordination between DICA and the other investment promotion agents in the country, such as special economic zones, is needed to avoid policy misalignment, duplication and wasted resources. This is particularly important when it comes to the use and management of investment promotion instruments that have an impact on public revenue, such as fiscal incentives. Fiscal and non-fiscal incentives for firms locating inside the zones are particularly aggressive vis-à-vis the applied regime outside zones. Co-ordination is therefore needed to avoid an unwarranted expansion of zones and the adequate phasing out of some of the excessive fiscal incentives available to firms inside zones, while at the same time seeking greater alignment of the outside regime with the non-fiscal regulatory innovations and improvements available to firms inside the zones (see Chapter 7 for a detailed discussion on how to improve industrial and economic zone policy).
- In terms of investment facilitation, priority should be given to enhancing the effectiveness of the DICA OSS, as well as intensifying support and co-operation with other ministries and agencies to streamline and improve second-tier regulations affecting business operations beyond establishment:
 - Enhancing the effectiveness of the DICA OSS could be achieved by (1) integrating other licences and permits processes into the OSS, including by securing autonomy of OSS

officials to decide on behalf of the various ministries and agencies they represent, similarly to current practice in the Thilawa One-Stop-Services-Centre (OSSC); and (2) by exploring further digital solutions for managing applications at the OSS. Moving away from the current paper-based system to digital record keeping not only provides documentation security, but can also allow for faster and more efficient analysis of the data. This could eventually be linked to a customer relationship management system that should be hosted at DICA, building on the customer service training DICA staff are already receiving through donor co-operation programmes.

- An area requiring particular attention is the co-ordination between DICA and the Environmental Conservation Department (ECD), responsible for the Environmental Impact Assessment process. Because of the current dual approval process in place, investors with potentially poorly sited or designed projects may be led to believe that they have been given a green light to proceed from DICA, while this is not the case. In such situations, investors may seek to ignore or resist implementing ECD's recommendations. Conversely, investors may be equally concerned that implementing ECD's recommendation will invalidate their MIC permits. Expectations must be clarified at the outset to avoid frustrations and facilitate compliance with standards, which could be made easier if the two processes were integrated as recommended above.
- Concerted efforts are still needed in improving and streamlining regulations affecting business operations beyond establishment. The MIC's request to the relevant ministries to develop standard operating procedures (SOPs) is a welcome initiative. The ministries should be assisted in developing the SOPs to ensure alignment around common objectives, which should be part of an overall strategy for regulatory improvements, inter alia, supporting the development the National Single Window.
- Consider the distance to the frontier when embarking on continued efforts to improve on the Doing Business rankings. While Myanmar made impressive strides in some categories, such as in starting a business, future efforts could be targeted at categories where Myanmar lies far from the top frontier, such as in the areas of contract enforcement, getting credit, protecting minority investors and resolving insolvency.
- Strengthen its role in policy advocacy and support for good regulatory governance in business related areas:
 - Take advantage of the agency's strong links and frequent interactions with the private sector to involve them more systematically in defining and revising investment policies and priorities, including investment promotion strategies.
 - Continue implementing good regulatory practices in DICA and aim to pilot ex ante regulatory impact assessments. In the absence of a central government unit overseeing regulatory policy and implementation, including ex ante and ex post regulatory reviews, competent government units should seek international support and advice in undertaking reviews and assessments in policy areas within their remits. These experiences can offer valuable lessons for broader reviews of the stock of regulation in Myanmar and to optimise the regulatory framework, particularly as regards second tier regulations. In the near-to-medium-term, however, a central government unit with a mandate for regulatory oversight should be established.
- Enhance DICA's operational, accountability and transparency framework:
 - Launch the process of developing an operational strategy in DICA to define targets, core objectives, key performance indicators and budgets, as well as a sound monitoring and

evaluation (M&E) system. Such a strategy is a key step in designing the future institutional set up for investment promotion in the medium term.

- Strengthen the quality of DICA's annual report, highlighting its progress vis-à-vis core objectives, and make it public, including in English. This could be inspired by the reports of some leading IPAs and would form an integral part of the M&E system mentioned above.
- DICA is also well-placed to develop an M&E system that monitors and reports on approved and endorsed projects obligations, including on responsible business conduct commitments (see Chapter 4 for a more detailed discussion). The new online portal (MyCo) should facilitate publishing information concerning project proposals summaries, including before MIC approval, as well as ensuring and monitoring MIC-permitted and endorsed companies' compliance with their annual reporting obligations under the Myanmar Investment Rule (MIR) 196, including with respect to commitments made in the context of the their Initial Environmental Examination or Environmental Impact Assessments (see Chapter 6 for more information). In this respect, DICA could also propose a standardised template for investors to facilitate reporting, assessment and future policy orientations. For educational and transparency purposes, DICA could make public in its website all the non-confidential and not materially sensitive information reported by investors.
- Continue the on-going efforts to strengthen the 15 DICA branch offices. Beyond company administration tasks, these branches are key nodes for identifying upfront potential investor grievances, as well as for monitoring and ensuring investors compliance with obligations in their permits and endorsements.

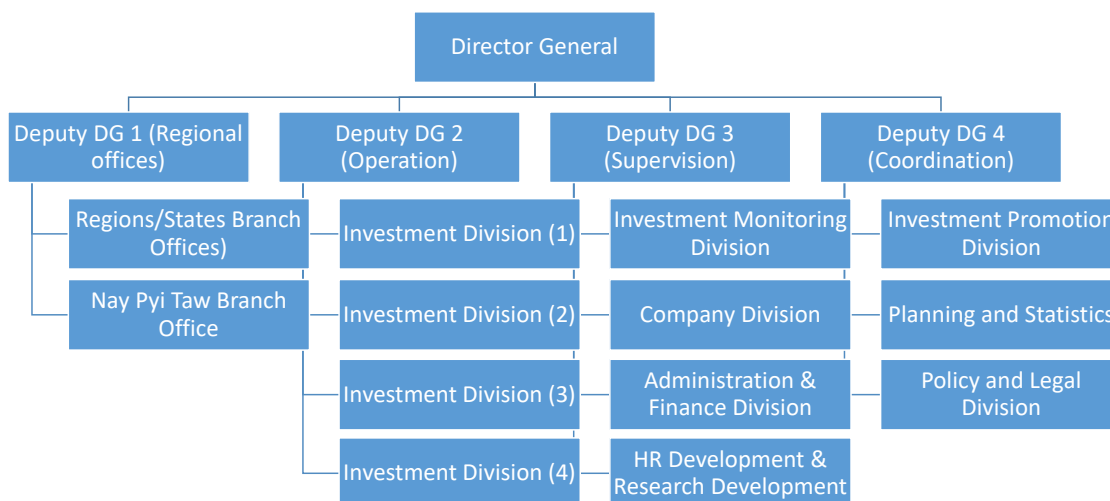
Institutional setting for investment promotion and facilitation

DICA, established in 1993, is the dedicated investment promotion agency (IPA), responsible for handling company registration and for coordinating investment promotion in Myanmar. The agency, located in the recently established Ministry of Investment and Foreign Economic Relations (MIFER), also spearheads major reform initiatives pertaining to the private sector. It has been a key driver behind the vast and consequent private sector related reforms since opening the economy in 2011 and the agency has matured significantly in its own right.

While its Director General also acts as the Secretary to the Myanmar Investment Commission, DICA fulfils a wide range of functions central to regulating business activity in Myanmar (Figure 3.1):

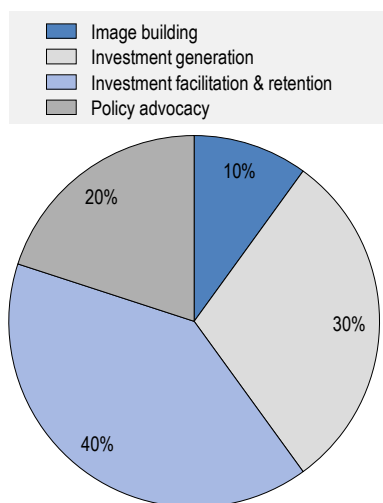
- Inward foreign investment promotion
- Domestic investment promotion
- Operating a one-stop shop
- Screening and prior approval of investment projects with foreign participations or investor registration
- Negotiation of international trade, investment and other agreements
- Export promotion
- Innovation promotion
- Granting of fiscal and financial incentives
- Granting of long-term land leases
- Promotion of regional development

Figure 3.1. DICA's structure



Source: DICA's website section: "Development and Structure of DICA" (accessed 2 August 2019).

Figure 3.2. DICA Investment Promotion Budget Use



Source: author's elaboration based on the OECD IPA Survey of Myanmar, 2019, conducted in the context of this Investment Policy Review.

DICA receives the entirety of its budget from the government and does not generate its own resources. Given the importance and recognition of the agency's mandate, DICA has managed to increase its budget steadily since 2014. In terms of budget use, it is encouraging to note that 40% is used for investment facilitation and retention measures (Figure 3.2). Improving the investment climate is DICA's priority at this stage of Myanmar's development and this has shown results as is seen further below. Its 500 staff also have a reputation with stakeholders of being very reactive and competent. In fact, the great majority of the staff have a university degree, with 80 having completed graduate or post-graduate studies (OECD IPA Survey of Myanmar, 2019).

The Investment Promotion Plan and related investment facilitation reforms

Developing strategic plans can be an effective way to provide a vision for countries such as Myanmar undertaking profound changes in terms of economic and political orientation. The Myanmar Investment Promotion Plan (MIPP) is one such plan spanning 2016-36 and providing a long-term set of objectives in a comprehensive manner, covering five categories: investment-related policies and regulations, institutional development for investment promotion, infrastructure development, business-related systems, and local industries and human resources.

It also includes a detailed implementation structure and plan. An Investment Promotion Committee and task forces covering the five categories have already been established as announced in the MIPP. It is chaired by the Union Minister of Investment and Foreign Economic Relations, with DICA serving as the secretariat of the committee. In terms of implementation, the MIPP is divided into master plans, reviewed every five years, allowing for adjustments to the MIPP as the economy evolves. If implemented accordingly, this reflects good regulatory practice.

A vision to have Myanmar become a middle-income country by 2030 is supported by objectives in the areas listed above. It is an ambitious plan and the intention of the government to link it to the Sustainable Development Goals (SDGs) illustrates a conscious effort to ensure coherence with broader development objectives. While reducing the regulatory burden for business can be part of a strategy to promote private-sector led growth, linking these efforts to broader societal benefits is central to enhancing the overall regulatory framework. Myanmar is thus taking an exemplary step in this regard and should be encouraged to keep a perspective on the broader development agenda, while implementing the plan.

One of the main drivers behind the MIPP was the need to review the 2014 Foreign Direct Investment Promotion Plan, as a number of key achievements proposed by the FDIPP had been reached (Table 3.1), and the government felt the need to progress to a next stage of reforms.

Table 3.1. Achieving the FDIPP targets

FDIPP Target	Results
Strengthen the functions of the One-Stop -Service (OSS)	The OSS has been established within DICA
Integrate the FIL and MCIL	Myanmar Investment Law promulgated in 2016
Review the Myanmar Companies Act	Revised Myanmar Companies Law enacted in 2017
Effective implementation of the SEZ Law	Applied to Thilawa SEZ, with issuance of required notifications
Strengthening establishments of PPPs	PPP unit established to promote PPPs across ministries
Enhance DICA investment promotion	Various initiatives completed: investment guides, seminars on investment promotion in regions, enhanced website, establishment of Japan Desk at DICA

Source: *Myanmar Investment Promotion Plan, 2018*.

Given the broad scope of the plan, this review focuses on some key strategic areas, so as to provide the government with tailored policy guidance. A number of specific areas are reviewed below.

Recent efforts in facilitating investment

“It is not enough just to enact new laws. Good implementation of the rules and bylaws must be carried out as well. But many government organisations still do not know the procedures to enforce the law.”

U Aung Naing Oo,
Permanent Secretary of MIFER, former Director General of DICA³

The government recognises that good investment facilitation depends on quality regulations, which allow companies to establish and begin operations and smoothly. As such, improving the regulatory framework for business is central to Myanmar's investment facilitation efforts, and Myanmar's ambitions in terms of improving its World Bank Doing Business ranking feature prominently in this regard. The Private Sector Development Committee oversees the Improving Myanmar's Doing Business Ranking Working Group chaired by the Deputy Minister of Commerce.

Considerable progress made on the ease of starting a business

According to the World Bank, Myanmar was one of the top 20 business climate reformers in 2019 (World Bank, 2019). The results also reveal different challenges that lie ahead and may provide indications of reform priorities going forward.

As shown in Table 3.2, it has become easier to start a business and to obtain construction permits. These are laudable achievements and illustrate that targeted efforts to reform can yield results. The improvements in starting a business were largely driven by the establishment of the online company registration platform, MyCo, as well as the lowering of the registration fees (World Bank, 2019). But such improvements did not span across all Doing Business categories. Enforcing contracts remains difficult, shedding some light on broader governance and rule of law issues that still need to be addressed. In trading across borders, Myanmar actually slipped to 168th from 159th in 2016. This reflects the challenges of implementing reforms that span across various line ministries and regulators. Generally, it is difficult to maintain consistent regulatory improvements in an environment where other countries also aim to improve their regulation for business amidst the international competition for investment. Such realities need to be considered when assessing progress under the MIPP.

Also, what matters at least as much as the actual improvements in the score is the distance to frontier, namely how far the country lies from international best practice in the respective category. For example, in starting a business, Myanmar has a score of 89.3, which is very close to the top frontier. Additional efforts to improve on the Doing Business ranking in this category might thus not be a priority. In getting credit and enforcing contracts on the other hand, Myanmar scores a low 10 and 26.4 respectively, far from the top frontier. Similarly, Myanmar is far from the top performers in resolving insolvency and protecting minority investors.

Table 3.2. Myanmar's Performance in the World Bank's Doing Business Index, by category, out of 190 countries included

	Starting a business	Dealing with construction permits	Getting electricity	Registering property	Getting credit	Protecting minority investors	Paying taxes	Trading across borders	Enforcing contracts	Resolving insolvency
2016	170	66	149	143	175	179	119	159	188	164
2020	70	46	148	125	181	176	129	168	187	164

Source: World Bank (2015, 2019), Doing Business Indicators.

Second-tier regulations affecting business operations are still in need of reform

The MIPP has set ambitious targets for Myanmar with respect to the overall ease of Doing Business in the country as measured by the World Bank's Doing Business ranking: to be in the top 100 by 2020, in the top 85 by 2025, top 60 by 2030 and to be in the top 40 by 2035. Reaching these objectives would require significant improvements in the various Doing Business categories and associated fast-paced deregulation. Many countries, including in Southeast Asia, have followed an aggressive approach to

deregulation. Thailand, for example, launched the “regulatory guillotine” project in 2017 to cut down on permits and red tape, as part of a broader effort to improve government service delivery with citizens and businesses as the ultimate beneficiaries. The targets set by Myanmar might be overly-ambitious, especially since such rapid improvements require trade-offs, some of which may conflict with other sustainable development objectives, as with environmental licences. It is also questionable whether these targets take into account the distance to frontier considerations mentioned above.

Deregulation requires mature systems and institutions with the appropriate capacity to advance policies without a heavy regulatory burden. Low Doing Business scores are also correlated with low per capita income, further indicating that the discussion on improving the investment climate cannot be done in isolation from the fundamental sustainable development objectives of the country, particularly poverty reduction (Channel, 2007). While focusing on ambitious Doing Business ranking targets can be a driver for reform, reaching these targets does not necessarily address the underlying weaknesses of an investment regime. In fact, the link between FDI attraction and business regulation is not firmly established, as issues such as market size, political stability, proximity to markets and infrastructure are also crucial for investors. Hence, there must be a compelling motivation for prioritising strained government capacity into achieving the targets set in the MIPP with respect to Myanmar’s performance in the Doing Business indicator.

More to the point, good and effective regulation adds to trust in the system, which offers elements of certainty for companies. Certainty and policy stability are key ingredients for a sound investment climate (OECD, 2015a). However, improving regulation is not always synonymous with deregulation. The latter is typically welcomed when permitting the removal of inefficient barriers to competition and administrative deficiencies, but it is not a solution for addressing market and co-ordination failures. The relevant matter in this case is finding out the most efficient regulatory setting for addressing the identified concern. Getting it right is not always straightforward and excessive pressures for rapid deregulation can sometimes be detrimental to achieving expected outcomes. The risk of failures and further inefficiencies are also likely higher in fast-evolving contexts as in Myanmar, where 232 pieces of legislation were passed between 2011 and 2016 (OECD, 2018b).

With this in mind, a thorough assessment of current regulations impinging on business operations, notably second tier regulations beyond entry and establishment, is needed and can provide avenues for substantial improvements in the business environment by simply improving regulatory efficiency and without compromising authorities’ ability to fulfil their public policy objectives. The reform of the regulatory system for starting a business in Myanmar led by DICA is a good example of such how regulatory audits can help to identify inefficiencies in the system and its administration. As mentioned before, it allowed DICA to efficiently reformulate the previous system in order to significantly reduce the costs and time required for starting a business while still safeguarding consumers against potentially undesirable businesses failing to meet minimum acceptable standards for operating a business in the country.

Implementing such reforms may sometimes be politically challenging. Certain line ministries remain resistant to often resist cutting regulations, as a result of capacity weaknesses and turf wars. Nevertheless a revision of second tier regulations affecting business operations presents the next level of regulatory reform needed in Myanmar. One critical issue is the lack of clear and publicised standard operational procedures (SOPs) for obtaining approvals for permits and licences, as well as occasional disagreements among and within agencies about which procedure applies (see Chapter 8 for a discussion on land administration). Stakeholders consulted during this review reported that in some cases the conditions and the procedures for obtaining approvals are not well-documented within the responsible government agency, which leads to uncertainties and confusion for investors, as well as potential illicit behaviour by the officials involved in some cases.

A comprehensive overview of the regulatory stock is a critical first step in developing and improving existing SOPs governing the different regulations in place. According to the authorities, this is an on-going exercise.

Building on the example of the Thilawa SEZ One-Stop-Services-Centre (OSSC), the Myanmar Investment Commission (MIC) has instructed all relevant ministers to develop SOPs for delivering licences and permits under their responsibility. Clarifying SOPs with application forms and their legal/regulatory basis is the first step for transparency. Most SOPs have been developed by now according to the authorities and the MIC is currently in the process of prioritising key SOPs for simplification. The development of clear SOPs and their public dissemination would greatly contribute to easing the administrative burden on business and citizens, while adding transparency and efficiency to the system. This will also lead to improving DICA's OSS, discussed further below, in view of developing a true national single window.

Beyond SOPs, there is a general need to improve regulatory governance. Understanding the stock of regulations impinging on businesses and having a clear process for the review of existing regulations as well as developing new ones is vital to policy development. In the absence of such understanding, there is a risk that obsolete regulation stays in place and that new regulation is enacted without a formal process that clearly identifies the reason for its introduction and what problem it is intended to address. Also, the anticipated burden on the system created by the new regulation ought to be assessed (see Chapter 8 for a related discussion in the context of land-related legislation).

This issue is coupled with a limited knowledge within government as far as effective decentralisation and regulatory impact assessments are concerned. A weak, incoherent and often unnecessary stock of regulation can have detrimental effects on growth and society as a whole. Regulatory reform, understood as the changes that improve the quality of the regulatory environment, provides a real opportunity to stimulate economic activity, unlock productivity and growth, and foster inclusiveness. For DICA, easing the regulatory constraints on business is also an important objective to ensure inclusiveness, as larger firms suffer less from heavy public bureaucracy than smaller firms that struggle to deal with numerous regulatory demands.

High-quality regulation at one level of government can be undermined by poor regulatory policies and practices at other levels, adversely affecting the performance of economies and business and citizens' activities (OECD, 2015b). Achieving regulatory quality is difficult, especially in environments marked by fast-paced development where governments are left unsure of what and how to regulate.⁴ As highlighted above, the aim should not be to cut regulation for the sake of improving Myanmar's Doing Business ranking, but rather to enhance the benefit of regulation for its citizens. In this regard, OECD's *Recommendation on Good Regulatory Policy and Governance* (Box 3.1) can support the government of Myanmar in its efforts to improve its regulatory framework and to decrease its stock of regulations effectively.

A Legislative Review Committee had been set up by the government, but its progress seems to have slowed down in recent years. DICA could thus be well placed to pilot some good regulatory practices. In the absence of a central government body in charge of *ex ante* and *ex post* regulatory reviews and impact assessments, DICA should be encouraged to pilot regulatory impact assessments (RIA) as part of its drive to reduce the regulatory burden, and *inter alia*, improve Myanmar's Doing Business ranking. The experience from undertaking an RIA can then be assessed, the methodology adjusted as appropriate, and then expanded to other ministries.

The new Myanmar Companies Law (MCL, 2017), replacing the outdated Company Act from 1914, has also allowed for some simplifications. For example, companies registering under the MCL now require only a minimum of one shareholder and one director. The MCL also stipulates that the registrar should establish a systematic process for the electronic record management, including authentication, submission (e.g. of annual returns), filing, storage and maintenance, facilitating the monitoring of compliance with the law. Signatures may be made through the entry of the signer's name in an electronic form, replacing the older practice of relying on paper. The general electronic process of incorporation will undoubtedly lead to easing the regulatory burden for registrants and eventually contribute to efficiency gains (PWC, 2018).

Box 3.1. OECD Recommendation of the Council on Regulatory Policy and Governance

Good regulation is essential for economies to function effectively, while meeting important social and environmental goals. Recognising the need for governments to be able to rely on clear and timely guidance on the principles, mechanisms and institutions required to improve the design, enforcement and review of their regulatory framework to the highest standards, the OECD developed the Recommendation in 2012. It advises governments on the effective use of regulation to achieve better social, environmental and economic outcomes; and calls for a whole-of-government approach to regulatory reform – emphasising the importance of consultation, co-ordination, communication and co-operation to address the challenges posed by the inter-connectedness of sectors and economies. It also provides a systemic governance framework that can deliver ongoing improvements to the quality of regulations.

It recommends that adherents to the Recommendation:

- Commit at the highest political level to an explicit whole-of-government policy for regulatory quality.
- Adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation.
- Establish mechanisms and institutions to actively provide oversight of regulatory policy procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality.
- Integrate regulatory impact assessment (RIA) into the early stages of the policy process for the formulation of new regulatory proposals.
- Conduct systematic programme reviews of the stock of significant regulation against clearly defined goals.
- Regularly publish reports on the performance of regulatory policy and reform programmes and the public authorities applying the regulations.
- Develop a consistent policy covering the role and functions of regulatory agencies.
- Ensure the effectiveness of systems for the review of the legality and procedural fairness of regulations and of decisions made by bodies empowered to issue regulatory sanctions.
- As appropriate apply risk assessment, risk management, and risk communication strategies to the design and implementation of regulations to ensure that regulation is targeted and effective.
- Promote regulatory coherence through co-ordination mechanisms between the supranational, the national and sub-national levels of government.
- Foster the development of regulatory management capacity and performance at sub-national levels of government.
- In developing regulatory measures, give consideration to all relevant international standards and frameworks for co-operation in the same field.

See OECD (2012) for full text of the Recommendation. Other useful OECD instruments in the area of regulatory policy and governance include:

- OECD (2015), “*OECD Regulatory Policy in Perspective: A Reader's Companion to the OECD Regulatory Policy Outlook*”, OECD Publishing: Paris.
- OECD (2008), “*Introductory Handbook for undertaking Regulatory Impact Analysis*” OECD Publishing: Paris.

Source: OECD (2012).

The MCL has also introduced some elements to promote SMEs. For example, a small company is defined as a company and its subsidiaries that have at most 30 employees and annual revenue in the prior financial year of less than MMK 50 million. This is in line with the recommendation from the first OECD *Investment Policy Review of Myanmar*, which recommended reforms, such as the MCL, to include elements specific to easing the operational environment for SMEs (OECD, 2014). A company now falling into that category is exempted from holding an annual general meeting, preparing annual financial statements and having its financial statements audited, although it is still required to keep written financial records (PWC, 2018).

The SME Development Law (2015), at the time of implementation, was another step to improve the legal framework for SMEs, although according to the authorities many firms are still not aware of the law, which impedes opportunities to make full use of it. To address this shortcoming, the former Ministry of Industry, which merged in 2019 with the Ministry of Planning and Finance, established SME centres in the regions as well as SME roadmaps for individual regions.⁵

With the implementation of the MCL (2017), however, the duplication of the two legal frameworks creates market fragmentation and inconsistencies. SMEs can now easily register online through DICA's online registration system, MyCo (explained further below), but are still required to register with the Ministry of Planning, Finance and Industry (MOPFI) (an online system is also available) to be certified as SME and to qualify for access to preferential bank financing (e.g. the Two-Step Loan Scheme developed by JICA in co-operation with MOPFI and Myanma Economic Bank). A harmonisation of SME definitions across the two laws, as well as the consolidation of the two registration systems, would make it easier for SMEs to navigate existing bureaucracies.

Operating a business in Myanmar

Despite the structural challenges, Myanmar has gained a reputation, since 2011, of being reform-oriented with regard to improving the overall business environment, even if reforms have slowed down more recently. The 2019 Myanmar Business Environment Index by the Asia Foundation highlights some of Myanmar's achievements in terms of easing regulation for local businesses (Malesky et al., 2019). According to the Index, businesses find the administrative requirements to open up a business acceptable. Post-entry administrative procedures are seen as reasonable, although challenges remain in the area of regulatory inspections, with a high number of inspections and non-transparent costing of certain public service.

In 2014, Myanmar was the lowest ranked country (189th) in terms of starting a business but by 2019 had moved up to 70th place in this category (Table 3.3), primarily due to the introduction of the online registration platform and a reduction of the registration fees for business. Even in 2019, Myanmar was already recognised by the World Bank as a top reformer in this category, along with Brunei Darussalam, Viet Nam and Indonesia (World Bank, 2019).

Table 3.3. Doing Business in Myanmar and selected ASEAN economies, 2014 and 2020

Rankings out of 190 (in 2020) and 189 (in 2014) countries.

		Myanmar	Indonesia	Viet Nam	Cambodia	Malaysia
Ease of doing business	2020	165	73	70	144	12
	2014	182	120	99	137	6
Starting a business	2020	70	140	115	187	126

Note: The Doing Business methodology has changed between 2014 and 2019, which can partially explain some of the changes in the rankings. Source: World Bank (2019).

The introduction of the online business registration system at DICA, MyCo (Myanmar Companies Online), has greatly eased the registration burden for companies, particularly for SMEs. According to some stakeholders, the time to register a company in 2010 was 4 months on average, whereas with MyCo, it can take as little as 15 minutes. Registering a business has become faster, simpler and more accessible. Given the 90% mobile coverage in Myanmar, the online platform can greatly help SME registration and use of online services, thereby also overcoming the informality barrier. The new Myanmar Company Law (MCL, 2017) has also greatly contributed to this simplification (Box 3.2).

Box 3.2. Key requirements and steps for setting up a business in Myanmar

The most common and practical form for a business in Myanmar is a Private Company Limited by Shares (PCLS), compliant with the following:

- At least one shareholder and one director. A single natural person can be both the sole shareholder and sole director;
- At least one director who is, as a rule, resident in Myanmar, meaning residing in Myanmar for at least 183 days in any 12-month period. The resident director does not need to be a Myanmar citizen;
- Have less than 50 shareholders;
- May use the services of a company secretary, even though secretaries are not compulsory.

There are no longer any minimum capital requirements for incorporating a PCLS, nor any minimum level of Myanmar ownership. Some local ownership and minimum capital requirements do apply to investment and operating permits/licences for certain business and investment operations in Myanmar. Under these conditions, the company's capital and ownership will need to be structured accordingly.

Below are the 12 main steps in starting a business in Myanmar (World Bank, 2019):

- Conduct a name check at the Company Registration Office (CRO) at DICA
- Request business incorporation certificate
- Obtain signature of the directors before a lawyer or certified public accountant
- Payment of stamp duty and registration fees
- Open bank account
- Obtain certificate of incorporation
- Submit certification of registration documents
- Obtain a company seal or a rubber stamp
- Register with the Tax Office
- Register for commercial tax
- Registration of employees at the labour office in township
- Registration with the Social Security Board for social security benefits

Source: Myanmar Companies Law (2017), Livingstons Legal (2019) and World Bank (2019)

The MyCo website also includes links to key framework documents, such as the MCL and a Company Director's Guide on how to interpret the MCL. The site also keeps track of registration activities, which will serve a valuable statistical function for reporting and analysis. All these reforms, mostly enacted in 2018, are likely to reflect positively in future evaluations and rankings of Myanmar's business environment, further supporting the momentum behind the MIPP.

Myanmar's early experiences with the one-stop shop model

The rise of supermarkets to simplify retail trade in the 1920s was early evidence of one-stop shops. Many governments have since adopted this concept as part of their efforts to improve service delivery for citizens. One-stop shops can serve many purposes; one of the most common objectives in terms of investment facilitation is swift business registration. Different contexts and local realities will also affect the form of the one-stop shop that works best. For example, in Viet Nam, some one-stop shops at the local level in the provinces have proven to be effective, whereas a nation-wide model for trade facilitation has been more difficult to achieve, with many goods being inspected numerous times by different bodies.⁶ Box 3.3 provides some good one-stop shop practices.

The two most notable one-stop-shops for investment currently being implemented in Myanmar are the DICA One-Stop-Shop (OSS) and the Thilawa One-Stop-Shop-Centre (OSSC) (see also Chapter 7). The DICA OSS brings together the main departments from relevant ministries, providing guidance and necessary information for businesses, as well as licences, with the aim to eventually offer a single window for all business-related licences. However, unlike in the Thilawa OSSC, it still operates more as a centralised information centre than an actual single window agency with authority to issue permits and licences on behalf of the various ministries represented there. In Thilawa, OSSC officials have autonomy to take decisions on behalf of their ministries, which renders processes much less burdensome for investors.

An area requiring particular attention is the co-ordination between DICA OSS and the Environmental Conservation Department (ECD), responsible for the Environmental Impact Assessment approvals. Because of the current dual approval process in place, investors with potentially poorly sited or designed projects may be led to believe that they have been given a green light to proceed from DICA, while this is not the case. In these situations, investors may try to ignore or resist to implement ECD's recommendations. Inversely, investors may equally be concerned that implementing ECD's recommendation will invalidate their MIC permit. There is a clear need for expectations to be clarified at the outset to investors, which could be made easier if these two processes were integrated.

Beyond the issue of mandate and autonomy, setting-up fully operational one-stop shops is a gradual process and takes time. The DICA OSS is a good initiative. Its facilities seem well-organised, the premises appear structured and the staff are helpful and competent, but procedures still mainly rely on paper, which presents a documentation risk in case of paper loss and is less environmentally friendly. Just as DICA launched MyCo, similar initiatives aimed at making the OSS a paperless environment by taking advantage of various digital solutions are highly recommended. This would also allow DICA to use more advanced digital solutions to organisational challenges, such as a customer relationship management (CRM) system.

Box 3.3. One-stop shop inter-ministerial coordination

Apart from the MIC, line ministries are the traditional sources of approval/rejection for investment projects, and coordination with them is often the most difficult part of establishing an effective one-stop shop (OSS). The level of authority granted to the OSS and its staff in streamlining investment approval processes largely determines the extent and nature of interaction with the line ministries.

In its most basic form, the OSS may simply be a grouping of relevant ministry representatives, either in the same physical office or on the same online platform, each of which receives investor applications and sends them to their home ministry for approval. Similarly, there may be a single point of contact for investors which then passes along forms and applications to relevant ministries. As such, the OSS does not alter ministerial responsibilities and does not require any regulatory or legislative change. Apart from agreeing on the location of the OSS and assigning an employee to it, complex inter-ministerial communication is not required.

Even in the case where the ministry representative at the OSS has some approval/rejection authority, coordination between ministries and the OSS is often minimal. Such a representative may use the pre-existing guidelines from his/her ministry and only consult with ministry colleagues, effectively creating a ministry island in the OSS.

Experts therefore recommend that an OSS at least begin to combine approval processes and be capable of some approval/rejection on its own. It is at this stage that coordination with line ministries becomes crucial. Line ministries are frequently resistant to process consolidation and the sharing of approvals, as it may be perceived as usurping the power of the ministry, and possibly threatening ministry jobs linked to the role. On a more mundane level, it also necessitates operational change and extra upfront work.

Therefore, OSS-ministry coordination should begin with an inventory of all ministry approvals and processes, followed by a realistic appraisal of approvals and processes that are redundant or might be combined. There is no best practice as to how and when ministries are integrated into the review, but most studies stress that (1) a strong political mandate for reform is important in driving the process and (2) the scope of OSS jurisdiction should be strictly defined, suggesting that OSS configuration must take into account the concerns of the ministries.

Source: Adapted from OECD (2010)

Strengthening the autonomy of the IPA

The MIPP advocates for DICA to become an independent IPA in order to give investment promotion more institutional clout. A number of issues need to be considered along with such a strategy, especially since one size does not fit all. Different forms of IPAs, institutional settings, activities and strategies for investment promotion can match different government objectives but also different target enterprises. Even in similar geographic and development contexts, large differences exist among IPAs in terms of strategic priorities, functions, tools, organisational characteristics and governance policy. Investment promotion practitioners need to adapt to changing industry developments, sector trends and investment policy reforms.

An IPA's governance system can greatly affect its ability to support and service foreign investors. Some OECD members (16%) have chosen to establish their IPA under the authority of the head of government, such as in Turkey where the agency ISPAT has been reporting to the president's office since its creation. ISPAT is the only OECD IPA that reports exclusively to the head of state. The reason for putting the agency under the authority of the president was to make sure the agency was agile, flexible, and with a high level of political visibility towards the community of foreign investors.

The governance of an IPA is related to the way it is supervised, guided, controlled and managed. When IPAs are established, their legal status will determine many organisational and functional aspects of the agency. It will have a particular effect on the degree of autonomy the IPA has from the government, particularly in terms of financial and human resources management. The most common types of legal status for IPAs are the following:

- Governmental department or unit (often within a ministry)
- Autonomous public agency
- Joint public-private body
- Privately-owned organisation

Independence is not an end in itself: if independence truly provides a solution to efficiency and effectiveness in the agencies' operations, the results should be visible in terms of improved outcomes.

IPAs' institutional independence may help them to be less subject to governments' budget volatility and political cycles and thus more effective when it comes to accomplishing their functions. According to the IPA surveys conducted by the OECD, autonomous public agencies are the most common forms of IPA legal status across both developed and developing countries. For example, all IPAs in the Middle East and North African region and 60% of those in the OECD are autonomous public agencies. Across OECD agencies, the second most frequent legal status are governmental IPAs (part of a ministry) and the remaining 9% are private or semi-private (OECD, 2019). What is important is to find the right model that suits the current political, economic development and institutional context.

DICA, formerly under the Ministry of National Planning and Economic Development and then the merged Ministry of Planning and Finance has been transferred to the new Ministry of Investment and Foreign Economic Relations. The IPA is thus a governmental unit. Reporting to a minister is not uncommon – 59% of OECD IPAs report to a minister – but it nonetheless risks reducing the political visibility of investment promotion efforts. DICA nevertheless is on strong political footing and enjoys support from the government, as reflected in an 80% increase of its annual operational budget since 2014, all of which comes from the government, which has also allowed it to almost double its staff to over 500 in the same period (OECD IPA Survey of Myanmar, 2019). Stakeholders have commented that moving DICA to an investment focused ministry also sends a strong signal to the investment community, allowing the government to separate investment related policies from more contentious political issues.

In less than ten years, DICA has undergone a number of significant organisational reforms which have borne fruit given the influence, size, and stakeholder reputation of the agency. Its achievements provide reasonable grounds for further ambitions. Becoming an independent agency under the president's office, as stipulated in the MIPP might thus be an option, although the institutional location of the agency is less important than high-level support from the government (Box 3.4). The latter is critical for a well-functioning IPA with the clout to attract and facilitate foreign investments.

Box 3.4. Rwandan Development Board

A panacea for investment promotion and facilitation?

The Rwandan Development Board (RDB) has often been hailed as a model for developing and emerging economies aiming to improve their investment climate and attract FDI. In 2000, after a decade of civil war and unrest, Rwanda launched an ambitious campaign aimed at civil reconciliation, economic growth and poverty reduction. The role of the private sector was central to this agenda and further recognised in Rwanda's *Vision 2020* to lift the country to a middle-income economy and its 2007 Poverty Reduction Strategy Paper.

The RDB was established in 2008, combining 7 agencies and the Rwandan Investment Promotion Agency, with its CEO reporting to the president. It also has a board of directors. Its first head was the US-based trader, Joe Richie, in an effort to impress the international business community. Inspired by Singapore's Economic Development Board, successes in terms of business facilitation were quickly achieved: a reform pipeline was created; in less than 10 years, 26 business regulation reforms were pushed through; trading across border formalities were improved by reducing 14 documents and 60 days needed to export to 8 documents and 29 days in just six years; company registrations surged. Overall, regulatory performance in Rwanda has improved significantly, and the RDB played a central role. The increased professionalism in the tourist industry marked by a boom in the sector is also notable. The tourism promotion agency is one of the government bodies that was merged with the RDB when it was established.

Nevertheless, the agency also encountered some problems. CEOs changed frequently and the quality of its staff below the level of director was often questionable. Other organisational issues also emerged

characterised by hierarchical conflicts, a legacy from merging numerous powerful agencies. Some point to the success in terms of improving Rwanda's Doing Business ranking of the World Bank as being the result of the Doing Business Unit that was created in the RDB specifically for that purpose. A good number of Rwanda's broader investment climate improvements are linked to measures beyond RDB's remit. For example, the tax system was simplified and the private sector benefitted from a significant increase in the number of notaries to help businesses to formalise.

Creating an independent agency reporting directly to a head of state is likely to lift its visibility and give it additional clout. But it will only be able to perform effectively if other relevant government bodies have the resources and commitment to deliver on a common agenda and when there is an overall drive for economic development and regulatory improvement. It also needs to secure the adequate budget for its operations and should adhere to accountability and transparency principles like any other government or semi-public body.

Sources: *World Bank (2013) and Behuria (2018)*.

Such a move should be carefully designed, however. It is highly recommended that a feasibility study by an independent body consider the objectives of institutional change and what shortcomings it is aimed to tackle. All viable alternative options and different scenarios need to be considered. Issues to consider prior to embarking on a strategy for an independent IPA should include the following:

- *Oversight*: An important part of the governance of IPAs is the board, which allows for an external entity to supervise and advise the work of the agency. Boards can vary greatly from one organisation to another in terms of their decision-making power and composition, with potential representatives from the public sector, private sector, research/academia, civil society or other parts of society. In OECD economies, over two thirds of IPAs (69%) have a board, either supervisory or advisory. The legal status of an IPA seems to have an influence on whether it has a board or not and on its nature. Those agencies with a higher degree of legal autonomy tend to be governed by a board (OECD, 2018a). Today, DICA reports to the Minister of Investment and Foreign Economic Relations (MIFER). Should it envisage to gain further independence, by, for example, moving to the president's office, oversight mechanisms should be considered. A board could thus be a viable solution, especially as the president will hardly be in a position to dedicate time to guide the agency.
- *Budget*: Autonomy can mean institutional/functional or budgetary autonomy. The latter is one of the key dimensions of independence. Not being embedded within a powerful ministry, such as MIFER, also means that DICA would have to secure some of its own funding streams. Full independence would require the development of products and services that would generate enough revenue for the IPA to fund its operations and staff – currently at about 500. This involves the implementation of a carefully designed cost-recovery strategy. Lack of resources can put the survival of the agency at risk and impede its capacity to make informed independent decisions.
- *Role clarity and accountability*: Independence does not mean that the agency will work in a vacuum, without appropriate checks on its work. Independence is hard to realise if the roles of the agency are unclear and ill-defined. A lack of clarity on the roles creates grey areas where the decisions on policy priorities and objectives of all actors involved in investment promotion and facilitation are mixed. Setting clear and transparent boundaries on who does what and which institution can be held accountable is essential to guarantee independence and accountability of the agencies (OECD, 2016).
- *Mandates*: Which mandates should be part of an independent agency, under the president's office, requires careful analysis. This goes back to a fundamental consideration of what shortcomings such a move is to address and how it would enhance efficiency, cut costs, and contribute to better

services for business and citizens. One option would be to follow the Rwandan example (Box 3.4), which merged and moved a large organisation under reporting lines to the president. Another approach would be to single out the investment promotion function of the IPA and shift it to the president's office, leaving the business registration (and company administration in the current DICA model) under a dedicated ministry. This was the option chosen by Georgia when it created Invest in Georgia and placed it under the prime minister's office (a model which was later reversed by merging the agency with Enterprise Georgia to allow for investment promotion activities to benefit from synergies with other functions, such as export promotion).

- *Human Resources:* Any strategic change to an organisation will lead to some adjustments in terms of human resources. In some cases new opportunities are created to reward staff that have been key in the success of the organisation, in others it can lead to staff dismissals due to re-organisations, optimisation efforts and new budget allocations. Any change, even if it appears to be positive on paper, will lead to a transition phase. Such periods are particularly challenging for staff who are facing uncertainty. For managers, this also poses challenges in terms of motivating staff, all while the organisation needs to deliver on strategic objectives. The human resources considerations of any change of format to an agency is squarely linked to the changes in functions of the agency described above. For example, if only the investment promotion units of an IPA move to a president's office, which staff stay with the IPA, and which staff stay with the investment facilitation and business registration units (wherever these may end up being located)? DICA has recently seen a change in reporting lines, having moved to MIFER and many key staff members were kept, which ensured continuity. Any future move thus needs to be managed carefully.

Other powerful actors are also involved in investment promotion and facilitation in Myanmar. Like in the Philippines, where many special economic zones (SEZs), such as those under the Philippines Economic Zone Authority, undertake their own investment promotion efforts and offer competent one-stop shop services to investor, the Thilawa SEZ in Myanmar is playing an active role in attracting investments (see Chapter 7). This is to be encouraged, especially since SEZs can often usefully pilot investment facilitation schemes. The one-stop shop centre in Thilawa, for instance, brings together 11 government bodies, has a front office with representatives to interact with investors, backed-up by a sizeable back office to follow-up on the various requests. These developments illustrate some of the laudable recent efforts the government has undertaken. It now becomes even more important to coordinate with the other investment promotion agents in Myanmar to avoid duplication and waste of resources.

Policy advocacy, investor targeting and aftercare?

DICA has taken advantage of various technical assistance and capacity building activities at its disposal, ranging from participating in international events to actively seeking assistance locally. It uses a large number of tools and instruments in its policy advocacy efforts, ranging from tracking international rankings to formally providing feedback to government. The recently established Investment Promotion Committee is an example of a new platform that was established to drive investment climate improvements, inspired by the experience of leading Southeast Asian economies using such practices effectively, like Malaysia.

While DICA engages with foreign investors as way of gauging their experience in Myanmar, this could be done more systematically, including in the form of a survey of expatriate employees of multinational enterprises. Enterprise Georgia, for example, uses such surveys as a tool to gauge the satisfaction of foreign enterprises and their staff about living and operating in the country

In an attempt to focus resources and efforts, DICA's investment promotion is guided by a list of priority sectors listed in MIC's Notification No. 13/2017, which includes:

- Agriculture and related services, agricultural value-added production;
- Livestock production, breeding and fishery;

- Industries with export potential;
- Industries with import substitution potential;
- Power sector;
- Logistic industries;
- Education services;
- Healthcare industry;
- Construction of affordable housing;
- Establishment of industrial estate.

While having a clear list of priority sectors can be helpful in the investment promotion and facilitation activities of the IPA, such prioritising needs to be undertaken very carefully and be subject to regular reviews. The Myanmar Investment Commission (MIC) has a leading role in defining the list, but the list is not reviewed in a systematic manner. Ideally, the list should be the result of consultations with key stakeholders in the business community and specialised bodies. It is vital that the elaboration of the priority list be given due attention and efforts, especially as it can translate into special treatment such as in the form of faster replies to inquiries and tailored investment facilitation solutions (OECD IPA Survey of Myanmar, 2019). DICA's frequent contacts with a broad range of institutions can be used to this end. For example, it already interacts with companies, industry associations, chambers of commerce and financial institutions many times per month on average (Table 3.6)(OECD IPA Survey of Myanmar, 2019).

A list of priority sectors is part of the investor targeting activities of an IPA, but targeting is a difficult function, even for mature IPAs. According to the fundamentals of investment promotion, targeting is a third generation type of investment promotion activity, after liberalising FDI regimes and implementing market-friendly policies (first generation) and marketing the country as an investment destination (second generation) (OECD, 2005). Myanmar's investment landscape is still evolving and seems to have moved on to the second generation type of activities given its strong achievements in terms of opening up its investment regime.

DICA undertakes many aftercare activities, including structured troubleshooting with individual investors (using account managers) and ombudsman-like interventions and mitigation of conflicts. Here as well, digital solutions, such as a CRM, could help DICA enhance this critical function, particularly as the number of clients can be expected to keep increasing as the MyCo portal is rolled out. In the medium-term, DICA may need to consider establishing of a dedicated aftercare unit.

Capitalising on the various DICA mandates

As seen above, IPAs can be either fully dedicated to investment promotion and facilitation – and exclusively focus on the core functions mentioned above – or be part of a broader agency that includes additional mandates, such as the promotion of exports, innovation, regional development, outward investment and domestic investment, among others. In practice, most IPAs around the world have multiple mandates and conduct activities that go beyond inward foreign investment promotion. In OECD economies, the most frequent combination of mandates in IPAs are with export promotion (56% of agencies) and with innovation promotion (also 56%) (OECD, 2018a).

DICA currently fulfils a broad range of functions beyond investment promotion. Despite the current debates about DICA becoming an independent IPA with a focus on investment promotion, the current structure does allow it to create synergies across various units. The experience of agencies that have undergone a merger of various functions, such as the IPA of France that merged investment and export promotion in 2015, often refer to factors linked to enhanced cost-efficiency, policy coherence and technical synergies as key underlying motivations. Table 3.4 below highlights the potential benefits and pitfalls of joint investment and export promotion mandates.

Table 3.4. Advantages and disadvantages of joint investment and export promotion mandates

Advantages	Disadvantages
Better coordination between trade and investment policy issues	Different objectives and potential loss of focus
Shared business services (e.g.: human resource management, information systems, IT)	Different profile and mindsets between staff in export and investment promotion. Risk of management and coordination challenges.
Enhanced business intelligence for better policy and promotion efforts	Long-term investment promotion efforts can be undermined by quick wins from trade promotion
Enhance the remit of the OSS to also assist export-oriented investors	Risk of loss of attention and resources for investment policy and promotion
Synergies through joint branding and international promotion activities	Different client bases and business intelligence
Stronger policy advocacy by being able to tap into a wider range of clients	

Source: UNCTAD (2009), Wells & Wint (2000) and Business France (2018)

Given its vast remit, DICA faces many of the realities highlighted in Table 3.4. An additional element is coordination with the Ministry of Commerce, in charge of export and trade promotion. One obvious challenge going forward is the coordination between the one-stop shops in DICA and Thilawa on one hand and the ASEAN Single Window initiative embodied in the Myanmar Customs Intelligence System and the Myanmar Automated Cargo System implemented with the support of development partners. The Ministry of Commerce has also launched the e-CO system in 2018 to facilitate the application of Certificates of Origin for exporters.⁷

DICA could potentially be well placed to promote linkages between foreign investors and local companies, in an effort to foster technology and knowledge transfer to the Myanmar private sector. Currently, DICA provides information on local suppliers and arranges meetings between foreign investors and potential suppliers but does not keep a systematic database of local suppliers. It could also consider going a step further and organise capacity building for potential suppliers, using its proximity to investors to identify their needs and requirements. If it is not in a position to provide the capacity building itself, DICA should encourage enterprises to provide their own industry-specific business development services. It can promote and facilitate private sector investments in the TVET system for instance. Once vocational or TVET institutes build the necessary capacity to deliver training that responds to market demands, they can become vital partners for DICA and other relevant ministries in strengthening business linkages and broader SME promotion. Developing a national skills strategy, which addresses supporting such institutes to provide services demanded by industry is typically an area where development partners can offer support.

Through its company administration mandate, DICA has a large database of companies which can prove extremely useful for sectoral analysis, policy and strategy making. The new MyCo platform can greatly help in this regard if used strategically, for instance to create company profiles for the purpose of matchmaking services in the future. For this DICA should seek to ensure that information in platform is complete and accurate. Otherwise, the information will have little strategic value.

Domestic coordination for investment promotion and facilitation

Effective investment promotion and facilitation requires careful institutional and policy coordination. In many ways, the smoother inter-ministerial coordination is, the easier it will be for investors to find their way among the numerous policies and regulatory requirements. In addition to one-stop shops, an IPA needs to ensure it has an effective national and sub-national coordination mechanism in place. Table 3.5 below illustrates a general IPA coordination framework.

Table 3.5. General framework of IPA institutional co-operation and co-ordination

	Strategic alignment	Operational co-operation and co-ordination
International level (representation abroad)	<ul style="list-style-type: none"> Strategic marketing alignment (“one voice” / clear messaging) with authorities abroad 	<ul style="list-style-type: none"> Investment promotion co-ordination with diplomatic missions and governmental missions abroad
National level (central government and other national agencies and administrations)	<ul style="list-style-type: none"> Overarching national investment policy and other national economic policies (e.g. industrial development policies) National branding strategy Strategic reporting and planning to the Head of Government and Sponsor authorities 	<ul style="list-style-type: none"> Co-ordination with other national promotion agencies (e.g. innovation and export promotion agencies) and with industry-specific initiatives Co-ordination with national administrative bodies for facilitation services Co-operation and co-ordination for troubleshooting (can require strong interactions with different Ministries)
Sub-national level (sub-national authorities and agencies)	<ul style="list-style-type: none"> Attraction and promotion strategy formulation / offering definition Strategic marketing alignment (“one voice” / clear messaging) 	<ul style="list-style-type: none"> Investment promotion at sub-national level Investment facilitation services (e.g. site visits) Aftercare (e.g. local cluster programmes) Local administrative procedures (e.g. for local incentives) Troubleshooting at sub-national level

Source: OECD (2018a)

DICA has its established coordination network and as such fulfils a crucial role of interlocutor between the private sector and the government. Table 3.6 identifies DICA’s most strategic partners within the government. Not surprisingly, most interactions, at least once per month, take place with the agencies that have a close impact on the functioning of the regulatory framework for investment, such as the ministry responsible for investment, inter-ministerial investment committees, local governments and tax authorities. What is particularly promising is DICA’s regular interaction with the private sector, either through its weekly contacts with individual companies or the monthly meetings with chambers of commerce and industry association. If used strategically, these provide a good basis for informing DICA’s policy advocacy role.

Table 3.6. DICA’s institutional interactions

	Strategic	Non-strategic		
More than weekly	<ul style="list-style-type: none"> Ministry responsible for investment Subnational IPAs Individual private firms (e.g. consulting or legal firms) 			
Once or twice a month	<table border="0"> <tr> <td> <ul style="list-style-type: none"> Inter-ministerial Investment Committees Ministry of Finance Ministry of Foreign Trade Sub-national / local government Export promotion agency Land-related agencies </td> <td> <ul style="list-style-type: none"> Customs Tax Immigration Chambers of Commerce Industry associations Financial institutions International organisations </td> </tr> </table>	<ul style="list-style-type: none"> Inter-ministerial Investment Committees Ministry of Finance Ministry of Foreign Trade Sub-national / local government Export promotion agency Land-related agencies 	<ul style="list-style-type: none"> Customs Tax Immigration Chambers of Commerce Industry associations Financial institutions International organisations 	
<ul style="list-style-type: none"> Inter-ministerial Investment Committees Ministry of Finance Ministry of Foreign Trade Sub-national / local government Export promotion agency Land-related agencies 	<ul style="list-style-type: none"> Customs Tax Immigration Chambers of Commerce Industry associations Financial institutions International organisations 			
3 to 11 times a year	<ul style="list-style-type: none"> Embassies and consulates Ministry of education 	<table border="0"> <tr> <td> <ul style="list-style-type: none"> Innovation agency Tourism promotion agency Border regulatory agencies Competition authority Sectoral regulatory bodies (registration, permits etc.) </td> <td> <ul style="list-style-type: none"> Central Bank Statistical office Foreign Embassies Influencers Universities Academic organisations </td> </tr> </table>	<ul style="list-style-type: none"> Innovation agency Tourism promotion agency Border regulatory agencies Competition authority Sectoral regulatory bodies (registration, permits etc.) 	<ul style="list-style-type: none"> Central Bank Statistical office Foreign Embassies Influencers Universities Academic organisations
<ul style="list-style-type: none"> Innovation agency Tourism promotion agency Border regulatory agencies Competition authority Sectoral regulatory bodies (registration, permits etc.) 	<ul style="list-style-type: none"> Central Bank Statistical office Foreign Embassies Influencers Universities Academic organisations 			
Once or twice a year	<ul style="list-style-type: none"> Other National IPAs 			

Source: OECD IPA Survey of Myanmar (2019)

DICA has also embarked on an ambitious decentralisation agenda, including setting up 15 regional branches. Part of its activities include the upgrading of these branches, which is a key part of the overall effort to strengthen the federal system and decentralise public administration. Beyond business registration and basic administration aspects, the regional branches are key nodes in the interaction with investors and could play a role in identifying upfront potential investor grievances and in co-ordinating efforts to monitor and ensure investors' compliance with obligations in their permits and endorsements. This would require the establishment of appropriate mechanisms to engage with investors and local communities, as well as a system to share the information with DICA headquarters whenever necessary.

The Investor Grievance Mechanism to be established in 2020 will partly address this, at least in relation to the processes for dealing with investors' complaints, but further support is needed for regional branches to adequately play a role in the monitoring of investors obligations. Continuous capacity-building is needed to ensure staff are adequately trained to fulfil this role. DICA is aware of capacity constraints and has been engaged in providing further training to officials in regional offices. For example, DICA has reported that it is providing capacity building for officials in the regional offices to monitor responsible business conduct of the private sector and establish processes for addressing misconduct.

Beyond coordinating with relevant institutions, initiatives driven by other institutions can also affect DICA's performance. In terms of export promotion, the International Trade Centre with the support of UK Aid is assisting the Ministry of Commerce through a dedicated investment and trade project, including developing an updated national export promotion strategy for 2020-25 and supporting the export viability of specific products.⁸

To foster linkages, the efforts undertaken under the purview of the Ministry of Planning, Finance and Industry to strengthen SMEs' capacity are critical. The capacity of SMEs to deliver products and services of the quality and in the quantities required by corporate customers, including multinational enterprises, is essential if SMEs are to enter into business linkages. This is particularly relevant for SMEs interested in participating in export-oriented activities, and hence integrating global value chains. Discussions with business stakeholders have revealed weaknesses in this regard, highlighting severe shortcomings, even in basic products and services sometimes (e.g. packaging, cleaning services and food safety). Building up this SME capacity will also strengthen their ability to absorb foreign knowledge and technology, but government endeavours in this regard need to be developed in partnership with the private sector, which better positioned to understand and deliver on the industries-specific capacity building needs. The government has an important role to play in facilitating investments by the private sector in industry capacity building programmes, as well as in leveraging donor partnerships to support such initiatives.

SMEs account for 99% of all businesses and 70% of total employment in Myanmar, mostly concentrated in the food and beverage industry (67%), followed by construction (8%) and garments (4%) (OECD, 2018b). Informality of business in Myanmar is high, even by developing country standards (World Bank, 2016). Informal firms tend not to see the advantages of entering the formal sector, which can be an indication of still too heavy a regulatory burden that outweighs the potential benefits associated with formality, such as the access to officially supported SME financing schemes (*idem*). Strengthening SMEs is crucial for inclusive growth in Myanmar, and improvements to the legal and regulatory framework for SMEs, such as with the Myanmar Companies Law, are critical.

A well-functioning national certification and standardisation system, aligned with international standards, is also lacking. This is key to improved and maintained quality control and standards, monitored at reasonable cost. For a system to work and cater to the needs of the private sector, DICA and other private sector development agencies need to cooperate with the Ministry of Education and Science and Technology and Ministry of Planning, Finance and Industry. The inter-ministerial Investment Promotion Committee established in May 2019 and chaired by MIFER plans to address the issue of standardisation under its Task Force No. 4.

These are all elements that could feature in a national skills strategy. Such an initiative, if done correctly, would address the challenges the country faces in terms of the technical and vocational education and training (TVET), standardisation and metrology, as well as the tertiary education system. Building the bridges between the relevant line ministries (for example, while TVET is under the Ministry of Education, policies for standardisation and metrology are developed by the Ministry of Commerce) and will be key to the success of a national skills strategy.

Policy monitoring and evaluation

Governments are facing growing pressures to deliver more and better for less, as economic, social and environmental challenges are becoming increasingly complex. Policy monitoring and evaluation (M&E) has a critical role to play to effectively design, implement and deliver public policies and services.⁹ Ensuring that policymaking is driven by sound evidence on what works is essential to achieve key long-term objectives. M&E and its strategic use throughout the policy cycle from design and implementation to *ex post* assessment, can:

- Support strategic planning and policymaking by improving the links between policy interventions and their outcomes and impact;
- Enhance accountability and provide legitimacy for the use of public funds and resources;
- Promote learning and enhance policy efficiency and effectiveness.

M&E activities are important to manage FDI attraction and aftercare on the basis of results, to make sure that institutions and organisations learn from experience and improve, and to give new insights and innovation into the process. This also offers an opportunity to strengthen the national system so that other agencies with an investment promotion related mandate can understand the effect of different policies and strategies.

More generally, if an agency like DICA illustrates that it effectively monitors and evaluates its policies, measures and use of resources, it can act as a positive example for private sector development actors and the private sector itself. While the MIPP provides for a good macro-level set of targets that can allow for some M&E of the efforts undertaken in Myanmar, this should be cascaded down to the individual actors responsible for implementing the plan. This includes a relatively detailed action plan highlighting the action, the necessary measures (“promotional measures”) and an indication of whether the target is of a short-, medium- or long-term nature. This could include a more concrete timeline with actual deadlines, as well as responsibilities for the different targets assigned to specific agencies within the government.

This would also apply to DICA, which could then usefully use the targets attributed to it in the MIPP to shape its own strategy, activities and necessary budget and resources. DICA produces an annual report in Myanmar language, available on its website. It could consider translating it in English to increase overall transparency of the governmental system and accountability of the agency. For example, UK Department for International Trade reports on its core objectives (DIT, 2018), while the Economic Development Board of Singapore reports annually as per investment generated, the value added of the investment and the associated job creation (EDB, 2018).

International policy frameworks to facilitate investment to Myanmar

Investment promotion and facilitation measures are also an element of the international policy framework the country operates in. This includes bilateral investment treaties, regional integration efforts, as well as initiatives at the global level, such as in the current WTO context. As part of the ASEAN Economic Community, Myanmar is thus part of various regional initiatives that it can use in its efforts to attract both intra-ASEAN and global investors. Chapter 2 elaborates on the various regional and international agreements Myanmar is a party to.

As discussed earlier in this *Review*, the regional dimension in Southeast Asia is a key driver of investment-related reform. Regional infrastructure, transparency and regulatory policy harmonisation are all ASEAN priorities that would benefit each member state as an investment destination along the ASEAN regional value chain. SEZs across ASEAN also play a key role in this regard.

DICA also uses its participation in international forums effectively, with an active programme of speaking engagements and networking activities. These include various OECD and World Bank technical events, as well as the ASEAN Investment Forum. It perceives its interaction with other national IPAs as highly strategic (OECD IPA Survey of Myanmar, 2019).

References

- Behuria, Pritish (2018), “Learning from Role Models in Rwanda: Incoherent Emulation in the Construction of a Neoliberal Developmental State”, *New Political Economy*, 23:4, 422-440.
- Business France (2018), “Merging Investment and Export Promotion”, presentation at the OECD-MENA Workshop, EU-OECD Programme on Promoting Investment in the Mediterranean, Rabat, 31 Jan 2018.
- Channell, W., (2007), “Uses and abuses of Doing Business indicators”, Economic Growth Officers Workshop, United States Agency for International Development (USAID), Washington, D.C.
- Department of International Trade, UK (2018), *Annual Report and Accounts 2017-18*, United Kingdom, London, July.
- Lincoln Legal Services (Myanmar) Limited (2019), “Newsletter 69”, 5 December 2019.
- Livingstons Legal (2019), “Incorporating a Private Company Limited by Shares in Myanmar”, Yangon, Myanmar.
- Malesky, E., Dulay, D. and Jon Keesecker (2019), *The Myanmar Business Environment Index: Measuring Economic Governance for Private Sector Development*, The DaNa Facility and The Asia Foundation: Yangon, Myanmar.
- OECD (2019), “OECD Mapping of Investment Promotion Agencies - The Mediterranean, Middle East and North Africa”, OECD, Paris, October 22, <http://www.oecd.org/daf/inv/investment-policy/mapping-of-investment-promotion-agencies-med.htm>
- OECD (2018a), “Mapping of Investment Promotion Agencies in OECD Countries”, OECD, Paris, October 22, <http://www.oecd.org/investment/Mapping-of-Investment-Promotion-Agencies-in-OECD-Countries.htm>
- OECD (2018b), *Good Regulatory Practices to Support Small and Medium Enterprises in Southeast Asia*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264305434-en>
- OECD (2018c), *OECD Investment Policy Reviews: Cambodia 2018*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264309074-en>.
- OECD (2016), *Being an Independent Regulator*, The Governance of Regulators, OECD Publishing, Paris, <https://doi.org/10.1787/9789264255401-en>.
- OECD (2015a), *Policy Framework for Investment, 2015 Edition*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264208667-en>.
- OECD (2015b), *OECD Regulatory Policy Outlook 2015*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264238770-en>
- OECD (2012), *Recommendation of the Council on Regulatory Policy and Governance*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264209022-en>.
- OECD (2010), “One Stop Shops: an Overview of Best Practices Related to Three Key Issues”, Discussion Paper, MENA-OECD Training Workshop, Beirut, March 10-12, <http://www.oecd.org/mena/competitiveness/privatesectorinitiatives/44795978.pdf>

- OECD (2005), “A Policy Framework for Investment: Investment Promotion and Facilitation”, Discussion Paper, Conference on Investment for Asian Development: Lessons so far, Challenges for the Future, organised by the OECD, ADB, and UNESCAP, Jakarta, July 5-6, <https://www.oecd.org/investment/investmentfordevelopment/35034744.pdf>
- OECD (2000), “*Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*”, OECD, Paris, <https://www.oecd.org/gov/regulatory-policy/1910833.pdf>
- PriceWaterhouseCoopers (2019), “Myanmar Business Guide”, Yangon, Myanmar
- Singapore Economic Development Board (2018), “EDB Annual Report 2017/18”, Singapore.
- UNCTAD (2009), “Promoting Investment and Trade: Practices and Issues”, *Investment Advisory Services Series A, No. 4*, United Nations, New York.
- Wells, L. T. and Wynt A. G. (2000), “Marketing a Country”, *FIAS Occasional Paper, Vol. 13*, The World Bank Group, Washington D.C.
- World Bank (2019), *Doing Business 2020*, World Bank Group, Washington D.C.
- World Bank (2016), “Informal Firms in Myanmar”, *Enterprise Note Series No. 33*, Enterprise Survey, World Bank Group, Washington D.C.
- World Bank (2013), *Rwanda: fostering prosperity by promoting entrepreneurship*, World Bank Group, Washington D.C.
- World Bank (2013), *Doing Business 2014*, World Bank Group, Washington D.C.
- World Bank (2006), *Doing Business 2006: creating jobs*, The World Bank Group, Washington D.C.
- World Economic Forum (2018), *Global Competitiveness Index 2018*, WEF, Geneva.

Notes

¹ See OECD’s work on Investment Promotion and Facilitation for more information: <https://www.oecd.org/investment/investment-promotion-and-facilitation.htm>

² The terms investment promotion and facilitation are often used simultaneously but imply two very different functions. One is about promoting a country or region as an investment destination, while the other is about making it easy for investors to establish or expand their existing investments.

³ Extracted from newspaper article: MyanmarTimes (2019), “Better implementation of the law needed to draw foreign investors”, website article, June 10 (Accessed on 15 September 2019).

⁴ See the work of the OECD on Measuring Regulatory Performance: <http://www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm>

⁵ As of March 2019, four roadmaps had been elaborated.

⁶ See, for instance, newspaper article: Voice of Vietnam (2018), “Vietnam faces challenges in promoting trade facilitation”, website section, September 11 (accessed on 1 August 2019).

⁷ For further information, see the ASEAN Single Window (2019) website: “Myanmar General Information: Current Updates of Myanmar National Single Window”, website section (accessed on 1 August 2019).

⁸ For further information, see press release at ITC's website: ITC (2019), "ITC, UK and Myanmar join hands to launch the Trade and Investment Project", website news section, March 4 (accessed on 1 August 2019).

⁹ See OECD's work on policy monitoring and evaluation: <http://www.oecd.org/gov/policy-monitoring-evaluation.htm>

4. Promoting and enabling responsible business conduct

This chapter focuses on how promoting and enabling responsible business conduct in Myanmar could lead to far-reaching and strategic successes for promoting a more sound and sustainable investment climate, upgrading in global supply chains, encouraging the private sector contribution to the Sustainable Development Goals, while also protecting Myanmar's resources for the future. This chapter is part of a broader project on Responsible Supply Chains in Asia funded by the European Union.

Promoting and enabling responsible business conduct (RBC) is of central interest to policymakers wishing to attract quality investment and ensure that business activity in their countries contributes to broader value creation and sustainable development. RBC principles and standards set out an expectation that all businesses avoid and address negative impacts of their operations, while contributing to sustainable development where they operate.

RBC expectations are affirmed in international principles and standards and increasingly in legislation. Recent years have seen a proliferation of high-level statements, including at G7 and G20 forums, national legislation, economic instruments and industry initiatives on RBC. All recent ASEAN Blueprints include references to RBC. In particular, policy action has focused on promoting the integration of RBC in core business operations, including also in how companies manage and deal with their supply chain. Any company that wishes to integrate in the global economy and participate in trade and investment must be aware of the fact that their buyers, clients, and partners may have various obligations when it comes to RBC. Broadly speaking, RBC is also an entry point for any company that wishes to contribute to the Sustainable Development Goals (SDGs) or to achieve specific economic and sustainability outcomes.

Myanmar's liberalisation process initiated in 2011 has enabled greater integration in global supply chains, strengthened the rule of law, and enhanced civil society participation. The first *Investment Policy Review of Myanmar* highlighted the progress made in these areas and proposed options to leverage this context of reforms to promote and enable RBC (OECD, 2014). A number of policies and initiatives have emerged since then in support of RBC. The adoption of the Myanmar Investment Law, which includes explicit references to responsible investment, as well as the related legislative initiatives, was an important step in that regard. RBC commitments and provisions are also embedded in various national policies, strategies, and legal documents. The Myanmar Sustainable Development Plan (MSDP) 2018-2030 includes objectives for the expansion of the private sector as the engine of environmentally conscious and socially responsible growth. Promotion of responsible investment is also embedded in the vision of the Myanmar Investment Promotion Plan (MIPP) for the period 2016/17 – 2035/36.

Various initiatives have been spearheaded by international organisations, civil society and businesses. The UN Global Compact Myanmar chapter established in 2012 had 123 participants as of 2019. The Myanmar Centre for Responsible Business (MCRB), created in 2013 as a joint initiative of the Institute for Human Rights and Business and the Danish Institute for Human Rights, has become an important player for the promotion of RBC in the country. Business networks and associations such as the ASEAN CSR Network, UMFCCI, the American Chamber of Commerce and EuroCham organise regular events and make resources on RBC available to the public. The government and international organisations have collaborated with business networks to promote RBC on various occasions.

With Myanmar's greater openness and integration in global supply chains has also come increased international scrutiny. In a context where demands on RBC are rising globally, the recent political and humanitarian situation has attracted significant international attention and affected global perceptions on Myanmar, with direct and indirect economic impacts on investment and trade as well as on sectors such as tourism. Since 2018, the EU commission has launched a period of "enhanced engagement" with Myanmar in relation to the EU Everything But Arms (EBA) arrangement, which guarantees preferential access to the European market for all exports except for weapons and ammunition, due to alleged shortcomings in respecting core human rights and labour rights standards (EU, 2019).

To address reputational issues, support productivity gains and achieve its objective to attract responsible investments, Myanmar has every interest in working toward alleviating the concerns of investors and trade partners. This implies sustaining efforts to address human rights issues, minimise business exposure to RBC risks and strengthen the enabling framework for RBC. The government could also directly support businesses in implementing RBC principles and standards and help them navigate RBC risks. Communicating clear expectations and providing guidance as to what business responsibility entails, as well as disseminating and supporting implementation of relevant due diligence instruments in targeted

sectors such as raw materials and the garment industry, could be particularly effective. The government also has a role to play in providing strategic directions for RBC at country level and ensuring that all stakeholders work jointly toward the same goal and consistently contribute to national efforts to promote and enable RBC.

This chapter takes stock of the initiatives and various advances made in relation to RBC since the first *Investment Policy Review of Myanmar*, outlining steps taken by the government to promote and enable responsible business practices. Environmental considerations, as well as aspects related to SEZs and land rights are addressed in more detail in Chapters 6, 7 and 8, respectively. This chapter also highlights opportunities for the government to further support businesses in implementing RBC principles and standards in Myanmar's current context, as well as drive national efforts to promote RBC.

Main policy recommendations

- *Communicate clearly to businesses and investors what business responsibility entails in practice.* The government could ensure that international RBC standards are explicitly cited in relevant strategies, policies and laws and strengthen the review and approval processes on RBC for businesses falling under the scope of the Investment Law. A first step could be to issue, drawing on the example of the Thilawa SEZ's Notice No. 4/2015, a notification clarifying what is expected from investors in terms of responsible businesses conduct.
- *Support, enable and promote RBC due diligence among businesses.* Myanmar should promote broad dissemination and implementation of the relevant RBC international standards, notably the OECD due diligence instruments, and explicitly support collaborative industry initiatives.
- In particular, the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* provides a useful framework to help businesses identify and address human rights risks in the minerals and other raw materials sub-sectors, and avoid directly or indirectly financing or fuelling conflicts.
- Leveraging existing industry initiatives to promote and disseminate the *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* could enhance industrial relations and support trade and investment in the garment sector.
- *Pursue and intensify efforts to enhance transparency in extractive industries*, in particular and starting with state-owned enterprises. Due to their importance in Myanmar's economy, including in high-risk sectors and the government's significant leverage and ownership role, this could be a particularly effective way to help address and mitigate RBC impacts in Myanmar and foster better business practices in the market.
- *Develop a National Action Plan on RBC, in line with international best practice and in wide consultation with stakeholders.* A NAP process would help ensure that all actors are working in a consistent manner to contribute to the national RBC agenda. The process of developing the NAP could also support broad engagement with a wide range of stakeholders and contribute to building a national consensus on RBC priority issues and actions.

Scope and importance of RBC

Responsible business conduct (RBC) principles and standards set out an expectation that businesses should avoid and address negative impacts of business activities, while contributing to sustainable development in countries where they operate. RBC is an integral part of a quality investment climate and, as such, is at the heart of the OECD *Policy Framework for Investment* under which this review is being undertaken.

RBC means integrating and considering environmental and social issues within core business activities, including throughout the supply chain and business relationships. Many businesses, governments and stakeholders are familiar with the term corporate social responsibility (CSR) which has historically been used to describe business interactions with society. Over the last years, CSR has increasingly been used alongside RBC and Business and Human Rights (BHR), with some using the terms interchangeably (e.g. the European Union) (Box 4.1). All these concepts reflect the expectation that businesses should consider the impact of their operations and supply chains on people, the planet and society as part of their core business operations and not as an add-on. A key characteristic of CSR, RBC and BHR is that they refer to corporate conduct beyond simply complying with domestic law and call on business to contribute positively to sustainable development while managing risks and any harm that may result from their activities and from that of suppliers and partners. These concepts are not and should not be understood to be equivalent to philanthropy.

Box 4.1. Key International Instruments on RBC

The three main instruments that have become the key reference points for responsible business, and which lay out how companies can act responsibly are listed below. They are aligned with, and complement, each other.

The **OECD Guidelines for Multinational Enterprises** (the *Guidelines*) are recommendations from governments to businesses on how to act responsibly. They cover all areas of business responsibility, including labour and human rights issues, environment, disclosure, bribery, consumer interests, science and technology, competition, and taxation. The Guidelines were adopted in 1976 and last updated in 2011 to include a chapter on human rights aligned with the UN Guiding Principles. The chapter on Employment and Industrial Relations is aligned with ILO labour standards. The Guidelines also include a unique non-judicial grievance mechanism: National Contact Points (NCPs). The OECD Working Party on Responsible Business Conduct brings together the governments that have adhered to the Guidelines – currently 49 – whose mandate is to promote the implementation of the OECD MNE Guidelines and RBC policies.

The **ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy** (the *ILO MNE Declaration*) provides guidance to encourage the positive contributions companies can make to economic and social progress and to minimise and resolve difficulties in their operations. The principles addressed to business reflect good practice for all enterprises. The ILO MNE Declaration also provides policy guidance to governments as well as employers' and workers' organisations, which play central and distinctive roles in creating an enabling environment for responsible business. Its recommendations on employment, training, conditions of work and life, and industrial relations are based on international labour standards, including the fundamental Conventions underpinning the ILO Declaration on Fundamental Principles and Rights at Work (1998) which addresses forced labour, child labour, non-discrimination and freedom of association and collective bargaining. The ILO MNE Declaration was most recently updated in 2017 to include new labour standards and policy outcomes

and to make explicit references to global developments such as the adoption of the UN Guiding Principles and the 2030 Agenda for Sustainable Development.

The **UN Guiding Principles on Business and Human Rights** (*UN Guiding Principles*) focus on avoiding and addressing adverse business-related human rights impact. They are founded on three pillars: 1) the State duty to protect against human rights abuses by third parties, including business enterprises, 2) the independent responsibility of business enterprises to respect human rights, which means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved and 3) the need for those harmed by business-related activities to have access to effective remedy. These principles were unanimously endorsed in 2011 by the UN Human Rights Council. Both the Office of the UN High Commissioner for Human Rights (OHCHR) and the UN Working Group on Business and Human Rights (UN Working Group) are charged with promoting the *UN Guiding Principles* and their implementation, including by unpacking what the principles mean in practice with respect to different human rights issues, sectors and types of actors.

Source: OECD, OHCHR, EU and ILO (2019).

In recent years, concepts such as inclusive business and social enterprise have also gained ground globally including in Asia. Some countries have defined a set of criteria for some of these notions, including Inclusive Entrepreneurship, Social Cooperative, and Green Enterprise among others. For example, in Viet Nam, the 2014 Law on Enterprises introduced a legal form and definition for registering a social enterprise, whereby any enterprise with an objective to resolve social and environmental problems or to serve the public interest, and reinvesting at least 51% of its annual profits for these purposes, can be considered a social enterprise (OECD, 2018c). These concepts are not mutually exclusive and can intersect. For example, the concept of inclusive business, which tries to encompass business activities that go above and beyond the scope of 'traditional' business practices to integrate diversity or target the bottom of the pyramid, is connected to the concept of RBC. However, it is important to note that these concepts neither automatically nor systematically intersect: a business could be inclusive, but fail to take appropriate measures to identify, prevent and mitigate actual or potential adverse environmental or social impacts. RBC principles and standards apply to all businesses, including those that have a specific social or environmental focus (Box 4.2).

Box 4.2. Examples of social and inclusive business models and strategies

A variety of business models or business strategies have been developed to integrate social and / or environmental considerations into business activities. Some of these concepts intersect and reinforce each other. While there is no formal definition of these different approaches the below terminology has been associated with the described approaches.

Inclusive Business can be defined as a private sector approach to providing goods, services, and livelihoods on a commercially viable basis, either at scale or scalable, to people at the base of the pyramid by making them part of the value chain of companies' core business as suppliers, distributors, retailers, or customers (G20 Challenge, n.d).

Social Enterprise can refer to any private activity conducted in the public interest, organised with an entrepreneurial strategy, but whose main purpose is not the maximisation of profit but the attainment of certain economic and social goals, and which has the capacity for bringing innovative solutions to tackle socioeconomic and/or environmental problems (OECD, EU, 2013)

Green business can be defined as a way of doing business while sustainably harnessing business opportunities and without harming the environment. The concept of green business encompasses both the provision of environmentally friendly products or services, and the provisions of goods and services

through an environmentally-friendly process, or with the help of clean technologies which reduce any negative effects of the business (ILO, 2017).

Responsible Investing - often used as a catch all term that may encompass various strategies which take into account environmental and social issues in the context of investment (OECD, 2019c)

Environmental, Social, Governance (ESG) Integration - defined by the Principles for Responsible Investment (PRI) as “the explicit and systematic inclusion of ESG issues in investment analysis and investment decisions.” ESG criteria may be used primarily to identify financial risks posed by real or potential ESG impacts (OECD, 2019c).

Impact investment - products or strategies that seek to generate positive social or environmental impacts alongside a financial return (OECD, 2019c).

Ethical investment – products or strategies that are dictated by certain ethical or moral considerations. For example, exclusionary or screening processes which exclude investment in certain industries (e.g. tobacco) (OECD, 2019c).

The main OECD instrument for promoting and enabling RBC is the OECD *Guidelines for Multinational Enterprises* (the *Guidelines*). The *Guidelines* are practical recommendations from governments to businesses on how to act responsibly. They cover all areas of business responsibility, including information disclosure, human rights, employment and labour, environment, anti-corruption, science and technology, competition, taxation and consumer interests. To support implementation of the *Guidelines*, the OECD has developed due diligence guidance which provide practical recommendations to businesses on how to identify and respond to risks of adverse impacts associated with particular products, regions, sectors or industries. OECD RBC Due Diligence instruments are: the *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas minerals*, the *OECD-FAO Guidance on Responsible Agricultural Supply Chains*, the *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, the *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* and the *OECD Due Diligence Guidance for Responsible Business Conduct*.

To date, 49 countries - including 37 OECD members and 12 additional economies – have adhered to the *Guidelines*. Governments that adhere make a binding commitment to implement them and encourage their use. The *Guidelines* have a unique implementation mechanism – the National Contact Points (NCPs) which are agencies established by governments. Their mandate is twofold: to promote the *Guidelines*, and related due diligence guidance, and to handle cases (referred to as “specific instances”) as a non-judicial grievance mechanism. Adhering governments have an obligation to establish an NCP to further the effectiveness of the *Guidelines*.

With Myanmar’s greater openness and integration into global supply chains has come increased international scrutiny

The first *Investment Policy Review* highlighted the importance and potential avenues for Myanmar to promote and enable RBC in a context of reforms initiated in 2011 that had opened the way to greater integration with the world economy, strengthening of the rule of law, and enhanced civil society participation. A number of policies and initiatives emerged since then in support of RBC. In recent years however, the political and humanitarian context has attracted international attention and affected the way businesses operations in Myanmar are viewed.

Important reforms and initiatives to support RBC have been implemented since 2011

The MSDP 2018-2030 includes objectives related to the creation of quality jobs, together with the expansion of the private sector as the engine of environmentally conscious and socially responsible growth (Government of Myanmar, 2018). Promotion of responsible and quality investment is also embedded in the vision of the MIPP 2016/17 – 2035/36. The MIPP emphasises that investments must be responsible, comply with the principles of business conduct, and meet international standards. The MIPP also expresses the government's intention to consider social, cultural and environmental impacts of any proposed investment (MIC, 2018). The 2016 Investment Policy explicitly states that local and foreign investors shall comply with the principles for responsible investment and business conduct (Government of Myanmar, 2016a).

These commitments are reflected in a number of legal documents. The 2016 Myanmar Investment Law explicitly makes its first objective to “develop responsible investments which do not cause harm to the natural environment and the social environment for the interest of the Union and its citizens”. Under this law, investors shall obtain an approval from the Myanmar Investment Commission (MIC) to invest in certain types of projects, including notably those that are likely to cause a large impact on the environment and the local community (Government of Myanmar, 2016b). The 2017 Myanmar Investment Rules specify that to obtain such a permit, investors must demonstrate a commitment to carry out the investment in a responsible and sustainable manner, including by limiting potentially adverse environmental and social impacts (Government of Myanmar, 2017). Implementation of these provisions are discussed later in this chapter. The MIC, a government-appointed body responsible for verifying and approving investment proposals, and issuing notification on sector-specific developments, has an explicit mandate to safeguard environmental conservation, emphasise social impact, abide by existing labour laws and support corporate social responsibility (DICA, 2019).

The government has initiated reforms that strengthen the enabling framework underpinning RBC. As mentioned in Chapter 2 of this Review, the new Companies Law enacted in 2017 represents an important step forward in improving corporate governance and transparency. Important efforts have been made to promote transparency. Myanmar became a candidate country to the Extractive Industry Transparency Initiative (EITI) in 2014, and is a member of the Asia Pacific Group on Money Laundering (Baker McKenzie, 2019). As part of Myanmar's efforts to comply with EITI standards, the government instituted a requirement for companies operating in the extractive industry from 1 January 2020 have to disclose their beneficial owners. In addition, in November 2019, DICA issued a directive which requires all businesses to disclose the information pertaining to their beneficial ownership to DICA and the Internal Revenue Department, so as to enhance transparency and accountability. These developments are discussed in further detail later in this Chapter.

In 2017, the 2013 Anti-Corruption Law which established the Anti-Corruption Commission (ACC) was amended to reinforce the power of the ACC, giving it authority to launch preliminary investigations into information received (Chau, T., 2019). On 3 August 2018, DICA issued the Anti-Corruption Code of Ethics for Companies and Body Corporates, and urged companies to respect and adhere to the Code of Ethics for the development of the Myanmar business environment (DICA, 2018). The government is also collaborating with international organisations to promote RBC.¹

International organisations, civil society and businesses have played an important role in the promotion of RBC in Myanmar. The introduction of the UN Global Compact in 2012 was an important milestone in that regard (UN, 2012). The Compact counted 123 participants in Myanmar in 2019 (UNGP, 2019). The Myanmar Centre for Responsible Business (MCRB), created in 2013 as a joint initiative of the Institute for Human Rights and Business and the Danish Institute for Human Rights, is a key player for promoting RBC, providing research on key RBC issues in the country, organising seminars and dialogues, convening multi-stakeholder initiatives and actively contributing to law-making processes through submissions to the

government (MCRB, 2019). In 2018, MCRB, together with DICA and the OECD, kicked off a Responsible Business Seminar series intended to share practical experience of how to do business responsibly in Myanmar. (MCRB, 2018). The Responsible Business Fund (RBF) was launched in 2017 as part of a 3-year Danish assistance programme. RBF is an MMK 18 billion (USD 12 million) Challenge Fund to increase the competitiveness and responsible behaviour of Myanmar enterprises by providing partial grants to SMEs for the implementation of innovative projects in RBC-related areas. By December 2019, 635 projects had been approved across all 14 states and regions (RBF, 2019).

In 2018, the Myanmar Institute of Directors (MIOD) was established to promote corporate governance standards and best practices in Myanmar. An independent organisation governed by a board of directors comprising both public and private sector representatives, the institute was formed with support from the International Finance Corporation (IFC), and the governments of Australia and the United Kingdom (MIOD, 2019). The Myanmar government has collaborated with the DaNa Facility, a UK-funded private sector development programme, on various activities support inclusive and sustainable private sector business growth. This includes a scoping study and the development of recommendations endorsed in 2018 to promote inclusive business. As a follow up from this work DICA has been assigned to co-ordinate the implementation of a strategic framework for inclusive business (DICA, 2018). It will be important to ensure alignment among various initiatives that target private sector contribution to the SDGs, including the various efforts to promote RBC. In the context of this review, DICA has communicated to the OECD that initiatives such as these are targeted at promoting “smart” development.

Various initiatives have been spearheaded by business networks and associations as well. UMFCCI has established a CSR Committee, and actively promotes RBC in Myanmar through various events. In May 2019, UMFCCI, with the support of the ILO, organised a two-day forum on Business and Human Rights to facilitate learning, experience sharing and planning on implementing RBC (ILO, 2019). The ASEAN CSR network is implementing a programme called “ASEAN CSR Fellowship” which aims to create RBC ambassadors. Myanmar was included in the programme in 2017 and 2018 (ASEAN CSR, 2019). The American Chamber of Commerce launched a CSR Excellence Recognition Programme in 2015 to recognise companies that create long-term economic and social benefits in Myanmar communities (AmCham, 2019). EuroCham Myanmar created the CSR Advocacy Group in 2017, which became in 2019 the EuroCham Myanmar Responsible Business Initiative to promote RBC among its members (EuroCham, 2019).

Coupled with rising global demands on RBC, the national political and human rights context has heightened international scrutiny as to how investments might affect people, the environment and society at large

RBC has increasingly become a priority for policymakers, businesses and stakeholders globally, including in Asia. Rising RBC demands and expectations are reflected in various high-level statements and commitments, such as in ASEAN blueprints. The ASEAN Socio-Cultural, Economic, and Political-Security Community Blueprints 2025 all mention CSR. Myanmar has been one of the leaders in the regions with the explicit references to responsible investment in the Investment Law as well as the related legislative initiatives. Leaders at G7 and G20 forums have made important commitments to promote RBC principles and standards. Several countries have passed laws that require businesses to manage RBC risks associated with their operations, including throughout their supply chains. RBC provisions are also increasingly embedded in economic instruments (Box 4.3).

Box 4.3 Rising demands on RBC

The 2030 Agenda for Sustainable Development and the 17 Sustainable Development Goals (SDGs) adopted in 2015 call for robust involvement of the private sector in global development efforts. UN member states have also committed to foster a well-functioning business sector and protect labour rights and environmental and health standards in accordance with relevant international standards. Several high-level commitments to promote RBC in line with internationally recognised standards at G20 and G7 forums have also made it clear that RBC issues were a priority in the international agenda. Within the ASEAN context, all the new ASEAN Blueprints include references to RBC and ASEAN labour Ministers adopted specific Guidelines for Corporate Social Responsibility on Labour.

RBC expectations are also reflected in domestic legislation. Several countries have passed legislation to strengthen due diligence requirements to address supply chain and sustainability risks. The UK Modern Slavery Act, adopted in 2016, requires that commercial organisations prepare an annual statement and report on their due diligence processes to manage the risks of slavery and human trafficking within their operations and supply chains. Australia passed a similar act on 29 November 2018, which includes expectations for the government itself to report on its own activities. In France, since 2017, the French Due Diligence law requires certain companies to develop and implement due diligence plans to identify and address risks related to human rights, fundamental freedoms, health and safety, and the environment. In the United States, the US Trade Facilitation and Trade Enforcement Act of 2015 repealed the exceptions to the prohibition on imports of goods mined, produced or manufactured in any foreign country by forced or indentured labour, including child labour.

RBC is also increasingly referenced in various economic instruments, such as trade or co-operation agreements. For example, the EU commonly includes RBC in its Trade and Sustainable Development chapters. The EU-Viet Nam FTA signed in 2019 includes an agreement to promote RBC taking into relevant international instruments including the Guidelines. The OECD *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence* encourages members, via their Export Credit Agencies, to promote the *Guidelines*, consider the outcomes of NCP cases when undertaking project reviews, as well as to give consideration to policy coherence with the *Guidelines*.

These developments affect the way investors make decisions at home and abroad. In that sense, while Myanmar's liberalisation process has allowed greater integration in global supply chains, it has also increased scrutiny as to how investments would affect people, the environment and society. The human rights context is an area of attention for businesses. The OECD *Guidelines* include a dedicated chapter on human rights and recommend that businesses carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts. The UN *Guiding Principles* explicitly aim to enhance standards and practices with regards to business and human rights.

The first *Investment Policy Review* highlighted progress made in strengthening human rights protection in Myanmar, including progress towards establishing the rule of law and opening space for civil society. The review also recognised potential constraints that the government could face in enforcing new human rights and labour standards throughout its territory, especially in border areas often still highly militarised. Further progress has been made in a number of areas discussed in the first *Investment Policy Review*. The ratification of the International Covenant on Economic, Social and Cultural Rights in 2017, was a positive development in that regard (OHCHR, 2019a). Myanmar is still not a party of most major international conventions however, having ratified 4 out of 9 UN Core Conventions, and 3 out of 8 ILO Fundamental Conventions (OHCHR, 2019a; ILO, 2019).²

The Myanmar Human Rights Commission (MNHRC) Law passed in 2014 aimed to reinforce the MNHRC membership, power, duties, support and structure and align it with the UN Paris Principles, which set the international standards for National Human Rights Institutions (Liljeblad, 2016). Despite progress made since the establishment of the MNHRC in 2011, the capacity assessment conducted by the MNHRC in 2018 with support from the Asia Pacific Forum of National Human Rights Institutions, UNDP and OHCHR identified remaining challenges in strengthening the MNHRC's mandate, independence and trust among civil society and NGOs (MNHRC, 2018). As of March 2019, the MNHRC was deemed partially compliant with the UN Paris Principles based on the review conducted by the Global Alliance of National Human Rights Institutions (GANHRI) in 2015 (GANHRI, 2019).

In recent years, however, the resurgence and expansion of internal conflicts in parts of Myanmar has attracted considerable international attention, including in relation to human rights. In 2014, the UN Special Rapporteur on the Situation of Human Rights in Myanmar, while stressing the importance of the far-reaching reforms which transformed the political, economic, social and human rights landscape after 2011, also identified signs of possible backtracking which, if left unchecked, could undermine Myanmar's efforts in this area. The report called for attention to shrinking democratic space, respect for rule of law, discrimination against ethnic minorities, forced labour, land grabbing and forced evictions (OHCHR, 2014). Rebounds of violence in conflict-affected zones have led to humanitarian crises and massive population displacements since 2017. The situation in Rakhine State is at the centre of proceedings at the International Court of Justice (ICJ) based in the Hague (ICJ, 2019).

This context affects the way businesses perceive the investment landscape and conduct their operations. The 2018 World Bank Economic Monitor highlighted the effect of the political and humanitarian situation on global perceptions of Myanmar and their indirect effects on sectors such as tourism, which experienced a 50% decline in the number of tourists from the United States and Europe in the first half of 2018. The report also notes that the slowdown in FDI commitments could reflect uncertainty in the investment climate related to the Rakhine crisis (World Bank, 2018). For example, the EU Everything But Arms (EBA) arrangement, which guarantees Myanmar tariff-free access to the European market for all exports except for weapons and ammunition, is tied to a commitment to respect the values enshrined in 15 fundamental conventions of the United Nations and the International Labour Organisation. Since 2018, the EU Commission launched a period of "enhanced engagement" involving intensified dialogue and monitoring with Myanmar, as well as with Cambodia and Bangladesh, over human rights concerns (EPRS, 2019). In February 2020, the EU partially withdrew the tariff preferences granted to Cambodia under the EBA trade scheme due to the alleged serious and systematic violations of the human rights principles enshrined in the International Covenant on Civil and Political Rights (EU, 2020a).

Clarifying expectations on RBC

Alleviating the concerns of investors and trade partners implies sustaining efforts to minimise business exposure to RBC risks in Myanmar. This means, for example, ensuring that a robust legal framework is in place, and that it is implemented. As mentioned earlier, important reforms have been made in recent years to strengthen the RBC framework. While the notion of responsibility is embedded in several policies and laws, laying out clearly what business responsibility entails and providing guidance to businesses and investors could support them in meeting these expectations.

The 2016 Investment Law, in particular, has an objective to develop responsible businesses that do not cause environmental or social harm. The law also gives a mandate to the MIC to review and make decisions on certain investment proposals, including large investments in strategic sectors covering energy, infrastructure, and extraction of natural resources; investments in border or conflict-affected areas; projects that could adversely affect land rights; investments that use state-owned land and buildings (see Chapter 8). Article 64(d) of the Myanmar Investment Rules specifies that the MIC must assess every

proposal and consider whether the investor or the proposal has demonstrated a commitment to carry out the investment in a responsible and sustainable manner, including by, as relevant, limiting any potentially adverse environmental and social impacts. This gives the MIC an opportunity to communicate to investors what expectations are with respect to RBC at different stages of the review and monitoring process, and explicitly refer to the main international instruments on RBC.

As noted in Chapter 2 of this review, concerns have been raised with regards to the application of Art. 64(d) of the Myanmar Investment Rules. Stakeholders consulted for this review reported that the MIC typically requires investors to commit to spend 2% of profits in corporate social responsibility activities, while no clear guidelines define what activities qualify as CSR for this purpose. Some countries have experimented with similar requirements, notably India, with mixed results.

Clarifying to applicants what RBC entails and whether and how philanthropic activities may qualify for this purpose alongside other corporate practices addressing standard RBC expectations of limiting any adverse environmental and social impact arising from business operations, including from suppliers and partners, would significantly improve regulatory legibility and help businesses channel resources into more meaningful RBC practices. Philanthropic activities and RBC are not mutually exclusive; however, it is important that the two are not conflated. The government could consider issuing guidance laying out clear expectations on RBC, as has been done for example in the Thilawa SEZ with the Notice No 4/2015 to ensure the Responsible Investment in the Thilawa Special Economic Zone. In drafting such guidance, the Government may consider making explicit reference to key international instruments on RBC, such as the OECD *Guidelines* and the OECD Due Diligence instruments among others, for reinforcing the significance of such policy and providing additional guidance to companies and practitioners of high-level standard expectations they should aim for when adopting RBC practices.

As part of this guidance and throughout the process of applying for an investment permit, investors should be encouraged to conduct risk-based due diligence in line with OECD Due Diligence instruments relevant to the sector in which the investments are being made, and to communicate on their due diligence efforts. This could have the dual advantage of both promoting RBC among investors, and ensuring that the proposal assessment teams have relevant information available to assess the RBC aspects of investment proposals. Under the current process, when they submit a proposal to DICA, investors are requested to provide information on their social security for employees, social welfare plans, and evaluation environmental impact arrangements (DICA, 2019c, 2018a). Additional information on RBC policies and due diligence efforts could provide DICA with relevant elements to consider when assessing a proposal. Due consideration should be given to how the 2% rule fits within these goals. It should be also noted that, while charity is a legitimate form for businesses to engage with the society, RBC is more comprehensive and focuses on integrating environmental and social considerations into core business operations.

When applying for a permit or endorsement from the MIC, investors could commit in writing to carry out their activities in accordance with specific RBC standards, such as the OECD Guidelines and the UN Guiding Principles. Such an explicit commitment to observe international RBC standards would be relevant for MIC's consideration and should be included in the application and endorsement forms signed by the applicants.

As highlighted in Chapter 3 of this Review, strengthening co-ordination between DICA and the Environmental Conservation Department (ECD), responsible for Environmental Impact Assessments (EIA), is necessary and could go a long way in clarifying expectations related to environmental impacts, besides reinforcing the adequate application of environmental safeguards. Under the MIL and the MIR, any project that falls under the scope of the Environmental Conservation Law, Rules and Environmental Assessment Procedures needs to obtain a MIC permit. For "EIA-Type" projects, any permit granted by MIC is still subject to compliance with EIA obligations. Stakeholders consulted as part of this review have reported that this requirement is not always understood and respected by investors. In addition, capacity issues within ECD and delays in completing EIA processes, as described in more detail in Chapter 6 of this report, may give additional incentives to investors to ignore or resist implementation of EIA requirements.

Communicating clearly, at all levels of the government and during the entire process, the importance and legal obligations relating to Environmental Laws is an important aspect of ensuring that proposed investments are responsible and do not harm the environment. This could include, for example, giving more prominence to this conditionality on MIC's permits and throughout the screening and approval process. Streamlining the approval processes carried out by DICA and ECD, as proposed in Chapter 3 of this review, could also be effective in that regard. In addition, this would facilitate taking a comprehensive look at projects' impacts and avoid treating social and environmental issues in silos.

Communication by businesses on how they address their risks and impact is an important step and an integral part of a risk-based due diligence process. The OECD *Due Diligence Guidance for Responsible Business Conduct* recommends that, as part of their due diligence, businesses communicate externally relevant information on due diligence policies, processes, activities conducted to identify and address actual or potential adverse impacts, including the findings and outcomes of those activities (OECD, 2018b).

In several countries, publicly reporting on how RBC risks are managed has become a legal requirement. In the EU, under Directive 2014/95/EU, certain large companies have to publish reports on the policies they implement in relation to environmental protection, social responsibility and treatment of employees respect for human rights, anti-corruption and bribery, and diversity on company boards. Although the directive gives companies significant flexibility to disclose relevant information on what they consider useful, it specifies that companies may rely on standards such as the OECD Guidelines, UN Global Compact or ISO 26000 to produce their statements (EU, 2014). Examples of national measures are provided in Box 4.3.

Under the MIR, after screening an investment proposal, the MIC must publish a summary of the proposal within 10 working days after the date of receipt and before issuing the MIC Permit. In 2019, there were reports that this was not systematically done or in a way that could provide sufficient information to the public on the proposed investments (Chau, 2019). DICA could further support businesses and facilitate communication with stakeholders and affected communities by both systematising the publication of investment proposals in line with the 2016 Investment Law and ensuring that comprehensive information on steps taken by investors to address environmental and social risks is made available.

In order to effectively review and assess investments against RBC standards, proposal assessment teams could be offered targeted and regular training on RBC standards and risk-based due diligence. Clear risk categories and priorities could be defined at DICA's level to support an assessment of prospective investors commensurate with the severity and likelihood of RBC risks associated with the investments. In line with its current mandate, the Investment Monitoring Division at DICA should ensure that approved investments continue to meet RBC expectations throughout the lifetime of the project. Ensuring that a formal and systematic process is in place to assess investors on RBC would be important to support effective monitoring of the sustainability risks identified at investment review stage. Building the capacity of the Investment Monitoring Division on RBC standards and risk-based due diligence could also be useful in that regard. Some trainings have already taken place and could be built upon.

Supporting businesses in navigating RBC risks and implementing RBC principles and standards

The government could support businesses in navigating risks and implementing RBC standards by supporting due diligence efforts. Various actors have called for action in that regard. In 2018, the UN Special Rapporteur on the human rights situation in Myanmar concluded that all businesses investing in Myanmar should conduct rigorous human rights due diligence in accordance with international standards, and all the more so in areas affected by violence and conflict (OHCHR, 2018).

Various internationally recognised instruments, including the OECD *Due Diligence Guidance for Responsible Business Conduct*, and the UN Guiding Principles, recognise that some operating contexts, including those affected by conflicts, may increase the likelihood of being associated with adverse impacts (OECD, 2018; UN, 2011). Responsible businesses seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. It is also the role of the government to provide an enabling framework for businesses to ensure that they are not associated with adverse impacts as recognised by the OECD *Guidelines*, as well as the UN *Guiding Principles*. This section provides examples of actions the government could take to help enterprises manage risks in Myanmar and enable them to bring a positive contribution to the country's economic and sustainable development.

Facilitating RBC due diligence in raw materials sub-sectors

Myanmar enjoys abundant natural resources including oil and natural gas, hydropower potential, various minerals, precious stones and gems, precious metals, timber and forest products, among others. These resources have the potential to generate income, growth, sustain livelihoods and foster local development. However, many of these resources are exposed to environmental and social risks, and located in conflict areas where risks are heightened. In particular, businesses operating in certain raw materials sub-sectors including jade, timber, as well as rubber and other agricultural products, may face heightened risks of directly or indirectly financing armed groups and armed group leaders (Woods, 2019). In 2019, the UN Special Rapporteur on the situation of human rights in Myanmar stated that “as with hydro-power projects, the extraction of natural resources, including gems and timber, continued to be inextricably linked to the cycle of armed conflict and human rights violations in Myanmar”, including displacement, environmental destruction and corruption at the hands of the military, militias, ethnic armed organisations and private actors. The report called on any business enterprise purchasing natural resources from Myanmar, in particular, jade and rubies, and timber from Kachin and Shan States, to conduct heightened due diligence (OHCHR, 2019b).

Harnessing the potential of Myanmar's rich natural endowments requires managing them in a transparent, inclusive and sustainable way, and creating an enabling environment for businesses operating in these sectors to act responsibly.

Agriculture and forestry

Myanmar's economy relies extensively on primary sectors, although the importance of industry and services sectors have grown in recent years. In 2018, agriculture, forestry and fishing, still accounted for 24.5% of the country's GDP according to the World Bank. Due to the prevalence of informality in the sector, the contribution of forestry and fishing to the economy is not fully reflected in national statistics (Fodor and Ling, 2019).

Myanmar's agriculture and forestry supports employment and livelihoods for a large part of the population, and is particularly essential for poverty reduction. However, unsustainable use of some of Myanmar's resources poses environmental risks and compromises the potential of the sector in bringing development benefits to the population. These issues are further discussed in Chapter 6 of this review. Chapter 8 provides details as to how land issues affect farmers and smallholder farmers in particular, and can be addressed to safeguard the rights of farmers and local communities and involve them in the country's development. Chapter 8 also lays out key considerations to support responsible investors in conducting due diligence in the agriculture sector. The government should support these efforts and promote awareness of these considerations as well as internationally recognised frameworks to facilitate RBC due diligence in the sector. The OECD-FAO *Guidance for Responsible Agricultural Supply Chains*, in particular, provides a useful framework in that regard and should be widely promoted and disseminated within Myanmar's agriculture and forestry sector (Box 4.4).

Box 4.4. The OECD-FAO Guidance for Responsible Agricultural Supply Chains

Agriculture can be an effective strategy for economic growth and poverty reduction in rural areas, but agri-business investments can also have adverse social and environmental impacts, particularly in countries with weak governance frameworks. Conflicts between investors and affected stakeholders can lead to social polarisation and political instability, and translate into reputational, operational and, thus, financial risks for investors. For instance, if land tenure rights are not well defined and protected, small land tenure rights holders may enter into unfair contracts with large agri-business investors that have higher bargaining power.

Businesses have a key role to play in ensuring that their operations do not have adverse impacts and benefit local communities and host countries. Their observance of responsible business conduct standards, as outlined in the 2016 OECD-FAO *Guidance for Responsible Agricultural Supply Chains* that aims to aid the implementation of the *Guidelines for Multinational Enterprises* can ensure that they contribute to sustainable development. The *Guidance* calls on companies to:

- Ensure that their operations contribute to food security and nutrition and sustainable and inclusive rural development;
- Continuously assess and address the actual and potential impacts of their operations, processes, goods and services over their full life-cycle;
- Disclose timely and accurate information related to risk factors and their responses to particular environmental, social and human rights impacts;
- Respect human rights and core labour standards and strive to increase employment opportunities;
- Establish and maintain an appropriate environmental and social management system and continuously improve their environmental performance; and
- Prevent and abstain from any form of corruption and fraudulent practices.

Source: OECD, FAO (2016), *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, OECD Publishing, Paris. <https://doi.org/10.1787/9789264251052-en>

Mining

Myanmar is well-known for its substantial mineral deposits. The country is notably home to the world's largest and most valuable jade deposits in Kachin state. Around 90% of the world's jade and ruby is mined in Myanmar (NRGI, 2018a). Rubies of Myanmar are particularly sought after and have been considered of the finest quality in the world (UNIDO, 2017). Myanmar also enjoys significant deposits of lucrative metals and industrial minerals, including gold, tin, tungsten, copper, zinc, among others (OBG, 2019).

The mining sector is primarily governed by the Mining Law, which applies to all minerals except gemstone, and the Gemstone Law. Despite the important potential of these resources, the contribution of the mining sector to Myanmar's economy remains relatively limited, estimated at 1.1% of the country's GDP in 2016-2017 (MEITI, 2019b). The sector has however attracted attention due to reported issues with environmental and social practices, high-profile disputes with local communities and alleged links with conflicts (NRGI, 2016). Various reports have highlighted the existence of risks in Myanmar's jade and other gemstones industry. Reportedly, the rapid expansion of jade mining in Kachin states with the use of heavy machinery since 2000 has been reported to have impacts on human rights and the environment, including reports of child labour, loss of land and livelihoods, polluted groundwater, land slides and flooding. Jade production and trade has also allegedly contributed to conflict in Kachin and Shan states, with similar

parallels also being reported in the ruby sector (Swedwatch, 2018; OHCHR, 2018; Global Witness, 2015; OHCHR, 2019, NRGI, 2018b).

It has been estimated that 60 to 80% of gemstones mined in Myanmar are undeclared and traded outside of the formal system (OBG, 2020). This results in lost revenues for the government, while preventing citizens from sharing in the sector's potential benefits. In addition to large mechanised operations, Myanmar's jade and gemstone sector includes significant artisanal and small-scale mining (ASM) (NRGI, 2019a). The Gemstone Law as of 2016 recognises the right to engage in ASM, but it has been reported that ASM actors often negotiate deals with permit holders and informally pick through the waste generated by industrial mining operations, leading to hazardous working conditions and abusive working arrangements (NRGI, 2019a; Hammond, Mon, 2019).

The government has made efforts to address the situation. In 2016, the government made the decision not to renew mining permits after their expiration, until reforms took place in the gemstone sector (Sway, 2016) and initiated the development of a national gemstone policy meant to set consistent practices and guidelines for the industry, create a fair business environment and protect the public interest (Htwe, 2018). A draft policy, developed through a multi-stakeholder process including government, industry representatives, civil society and with the assistance of foreign experts, was in its final stage in late 2018 (MEITI, 2019b). The draft policy reportedly incorporates issues related to managing environmental impact, ensuring sustainable mining of jade and gemstones, creating a level playing field for businesses operating in the sector and a system of accountability to the state and local communities (Htwe, 2019).

In early 2019 a new law governing the gemstone sector was passed, with the aim to eradicate illegal mining and extraction of gems, tackle illicit gemstone trade, and reduce the environmental impact of extraction activities (Chau, 2019c). Civil society organisations have however raised concerns that the process for drafting the new gemstone law did not follow the participatory approach of the gemstone policy to integrate stakeholders' views. Reportedly, the law does not integrate some of the provisions aimed at enhancing the environmental management of mine sites of the gemstone policy (which has not yet been approved) (Global Witness, 2018; Hindstrom, 2018).

Governance experts and civil society organisations have also expressed concerns that the new law does not address several fundamental issues and risks in the sector, including conflicts of interest, opacity of licensing procedures, corruption and revenue collection (Chau, 2019c; NRGI, 2019a). The enactment of this new law could be an important starting point for further reforms in the industry, building on the findings of the multi-stakeholder consultations led in the context of the development of the gemstone policy. The government could consider using the momentum of the recently enacted Gemstone Law to adopt the Gemstone Policy, and ensure coherence and consistency between the different frameworks. It would be important to consider how the two interest and complement each other.

Reforms have also taken place in the non-gemstone minerals sector. Field research on limestone, gold and tin mining in Myanmar led by MCRB in 2018 highlighted some negative impacts including child labour, notably among migrant children in subsistence gold mining areas; hazardous working conditions; work without contracts; environmental damage; and loss of land and livelihoods. Several of these issues are interconnected, with for example environmental issues affecting the health of local communities. The report also found that armed groups were involved in the extraction of the three minerals (MCRB, 2018). The research identified environmental and social risks specific to subsistence, artisanal and small-scale mining activities, which accounts for the majority of production of gold, tin and industrial minerals. In the case of gold, the report estimated that as much as 90% of production and 95% of employment comes from ASM. ASM is also considered to account for more than 60% of tin production (Pact, 2019). While offering economic opportunities for many poor communities, these largely informal practices are characterised by the use of rudimentary, labour-intensive techniques for mineral extraction, often under hazardous conditions (MCRB, 2018).

The government has been working towards addressing some of these issues. Several environmental and social provisions were added by the 2015 amendments to the Mines Law and the 2018 Mines Rules. Under the Mines Law, mines are required to minimise environmental damage and negative impacts on local communities, and to make an annual contribution to a fund for environmental conservation. They also need to contribute to a Mine Closure Fund for environmental rehabilitation and reforestation. The Mines Rules include requirements for the company to submit at the time of its application for a Production Permit the evidence that it has undertaken negotiations with local communities about local social responsibility, and obtained their agreement (MCRB, 2018). Interviews conducted by the Natural Resources Governance Institute (NRGI), however, indicated that in practice, mining permits often automatically confer land rights (NRGI, 2019b).

The passage of the amendments of the Myanmar Mines Law in 2015 and promulgation of the 2018 Mines Rules have also opened the way for a decentralisation of permitting powers for ASM, by granting state and regional permit scrutiny boards the power to award ASM permit. These developments could play a positive role in reducing informality and enhancing governance in the ASM sector (NRGI, 2019b). Special attention however needs to be paid to building capacity at state and regional level, and ensuring co-ordination between the national government – which makes decisions over the issuance of medium and large-scale licences – and the states and regions to avoid overlapping claims between ASM and large-scale operators. One aspect to it is to ensure that a robust land management framework is in place and that customary rights are adequately recognised and enforced. This question is further examined in Chapter 8 of this review.

Co-ordination, clarity and consistency across various laws and processes more broadly is key to attract responsible investments and facilitate RBC. This includes for example ensuring alignment between mining licensing permits and other relevant processes stemming from the MIL and Environmental Conservation Law. Under the current framework, inconsistencies relating notably to thresholds and project cycles have been noted between EIA requirements and the Mines Rules (MCRB, 2018). Ensuring clarity and consistency across oversight and monitoring processes is key to enable RBC.

Ensuring that a robust framework is in place and adequately implemented is essential to facilitate implementation of RBC standards by businesses. The government could also support businesses' due diligence efforts in line with internationally recognised instruments in the mining sector. This would help enhance the reputation of the sector and support businesses in meeting the requirements set by foreign investors and trade partners. For example, in January 2021, the EU Conflict Minerals Regulation will enter into force. This regulation mandates due diligence in line with the OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (the OECD Minerals Guidance) to EU importers of tin, tungsten, tantalum, and gold, to ensure that EU companies in the supply chain import these minerals and metals from responsible and conflict-free sources only (EU, 2017). The United States also has specific requirements applying to companies importing these minerals under section 1502 of the Dodd-Frank Act, including filing a conflict minerals report. Since 2012, the US Securities and Exchange Commission recognises the OECD *Minerals Guidance* as an international framework for due diligence measures undertaken by companies that are required to file such a report (Box 4.5).

Targeted at companies operating in the minerals supply chains, the OECD *Minerals Guidance* provides a framework to help companies sourcing from or directly operating in conflict-affected areas prevent or mitigate adverse impacts, including financing conflict or fuelling, facilitating or exacerbating conditions of conflict. The *Minerals Guidance* also provides recommendations to help companies minimise the risk of marginalisation of the artisanal and small-scale mining sector, particularly the victims of extortion, while promoting conflict-free supply chains, thereby creating economic and development opportunities for artisanal and small-scale miners, including through formalisation and legalisation efforts. The government should consider broadly disseminating it and supporting its uptake by businesses.

Several countries have taken measures to support and facilitate implementation of the *Minerals Guidance*, including publicly endorsing it, and integrating into legislation. For example, the EU Regulation on

Responsible Mineral Supply Chains (Regulation (EU) 2017/821), which lays down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas is based on the OECD *Minerals Guidance* (Box 4.5). A number of national and global industry initiatives aim to help and encourage businesses in the minerals sector to align their practices with the *Minerals Guidance*. Governments can also play a role in convening, steering and supporting such initiatives.

Box 4.5. Examples of initiatives to support and facilitate implementation of the OECD Due Diligence Guidance for Responsible Mineral Supply Chains

The OECD *Due Diligence Guidance for Responsible Mineral Supply Chains* (the *Minerals Guidance*) is the leading international standard on sourcing in the minerals sector. Developed through a multi-stakeholder process with in-depth engagement from OECD and eleven countries of the International Conference on the Great Lakes Region (Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia), industry, civil society, as well as the United Nations Group of Experts on the DRC, the *Minerals Guidance* is the first example of a collaborative government-backed multi-stakeholder initiative on responsible supply chain management of minerals from conflict-affected areas.

Various governments, stakeholders and industry actors have endorsed the *Minerals Guidance* and taken measures to support its implementations. It is referenced in a range of international declarations, regulations and initiatives.

In December 2010, the 11 Heads of State of the International Conference on the Great Lakes Region endorsed the *Minerals Guidance* as crosscutting to the Regional Initiative on the Fight against Illegal Exploitation of Natural Resources, and called on companies sourcing minerals from the Great Lake region to comply with the guidance (ICGLR, 2010). The governments of Burundi, the Democratic Republic of Congo, and Rwanda have integrated it into their legal frameworks. The US Department of State endorses the *Guidance* and encourages companies to draw upon it as they establish their due diligence practices. Since 2012, the US Securities and Exchange Commission recognises the *Minerals Guidance* as an international framework for due diligence measures undertaken by companies that are required to file a conflict minerals report under the final rule implementing section 1502 of the Dodd-Frank legislation (OECD, 2016). In May 2017, the European Union adopted Regulation (EU) 2017/821 which lays down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas in accordance with the 5 steps of the OECD *Guidance*. The EU Regulation will enter into force in January 2021.

In 2015, the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains which is based on the *Minerals Guidance* was adopted as a result of co-operation between developed as a result of cooperation between the China Chamber of Commerce Metals, Minerals & Chemicals Importers and Exporters and the OECD. The Guidelines are designed to align Chinese company due diligence with international standards and allow for mutual recognition with existing international initiatives and legislations. In 2019, the Responsible Jewellery Council revised its Code of Practices to include due diligence requirements based on the *Minerals Guidance*. In the metals sector, an international multi-stakeholder agreement was launched in The Hague in 2019 to promote RBC and address severe negative impacts on people and the environment connected to the metals supply chains which the participants would otherwise not be able to tackle on their own. The signatories to the agreement are companies, the government, industry associations, NGOs and trade unions.

Source: OECD (2016).

Pursuing efforts to enhance transparency in extractive industries

The importance of promoting and enhancing transparency in global supply chains, particularly when it comes to understanding various supplier/buyer relationships, has gained increased attention in recent years. Governments have an important role in that regard. For example, in 2015, G7 leaders urged private sector implementation of human rights due diligence, and committed to take action to promote better working conditions by increasing transparency, promoting identification and prevention of risks and strengthening complaint mechanisms. G7 leaders also committed to take action to ensure greater transparency of financial flows and contribute to the work of the Financial Action Task Force (FATF), an inter-governmental body that sets international standards to prevent global money laundering and terrorist financing (G7, 2015; FATF, 2019).

Some businesses have also been at the forefront of transparency efforts and have published supplier lists and committed to dialogues with civil society and trade unions on this topic.³ Civil society organisations as well as industry actors have also launched initiatives to promote open and transparent supply chains. In the garment and footwear sector, for example, the Open Apparel Registry maps and provides open access information on garment facilities worldwide (OAR, 2020). In extractive industries, the Extractive Industries Transparency Initiative (EITI) provides a global standard to promote the open and accountable management of oil, gas and mineral resources. Implemented by 53 countries and supported by a coalition of government, companies, and civil society, the EITI standard requires the disclosure of information along the extractive industry value chain from the point of extraction, to how revenues make their way through the government, and how they benefit the public (EITI, 2020).

Myanmar committed to implement the EITI in 2012 and was accepted as an EITI Candidate in July 2014. Through this process, important progress has been achieved in the promotion of transparency in Myanmar's extractive sector. The first EITI report published as a candidate country in 2016 was hailed as a major step toward transparency and accountability in Myanmar's natural resource governance (EITI, 2017). Following the publication of the EITI annual progress report for 2018-2019, the EITI Board commended Myanmar for its progress with respect to EITI implementation, including in relation to policy reforms, transparency in extractives data, and public dialogue. The Board also stressed the need to further improve the environment for civil society participation, particularly in subnational regions. The Board also encouraged Myanmar to further improve public disclosure, particularly related to licence allocation, gemstone production data and state economic enterprises (SEEs), and emphasised the need for Myanmar to ensure that the status of military-affiliated extractive companies is clarified and their activities are comprehensively addressed in accordance with the EITI Standard (EITI, 2019).

In 2016, EITI instituted a requirement for EITI member countries to mandate the disclosure of beneficial ownership information of companies operating in the extractives industry. The impetus for beneficial ownership disclosure was reinforced by Myanmar's participation as a member to the Asia/Pacific Group on Money Laundering (APG), a regional inter-governmental body that promotes the effective implementation of internationally accepted anti-money laundering and counter-terrorist financing standards, including notably the FATF Recommendations. Developed by the FATF, the FATF Recommendations, include specific recommendations to enhance the transparency and availability of beneficial ownership information of legal persons and arrangements (FATF, 2019). In its 2018 Mutual Evaluation Report of Myanmar, APG rated Myanmar as non-compliant with the FATF Recommendations related to transparency and beneficial ownership of legal persons and arrangements. This rating was maintained in APG's first follow up report on the Mutual Evaluation of Myanmar published in August 2019 (APG, 2018-2019).

Against this background, in October 2019 the Office of the President issued, as previously mentioned, a notification (Notification No. 104/2019) requiring that companies operating in the extractive industry, including state-owned enterprises, disclose their beneficial owners. The introduction of this requirement, which became effective on 1 January 2020, is a laudable achievement. The notification also appointed

DICA as a focal point for the Beneficial Ownership Task-Force Agency formed to support the implementation of beneficial ownership disclosure requirements (MEITI, 2019a). DICA has made basic beneficial ownership disclosure information available on an open access database available on DICA's website. In February 2020, out of 163 companies falling under the scope of the Presidential Notification, 121 extractive companies and state-owned enterprises both disclosed and submitted their beneficial owners and related information (DICA, 2020).

In addition, on 15 November 2019, DICA issued a directive which requires all businesses incorporated in Myanmar to disclose the information pertaining to their beneficial ownership to DICA and Internal Revenue Department (DICA, 2019d). While this is another important move towards more transparency, several civil society organisations and experts have raised concerns that the directive could create confusion over Myanmar's beneficial ownership rules. Key questions include the legal basis and practical modalities for including companies, beyond extractive industries within the scope of the directive, as well as alignment of the beneficial ownership threshold introduced by the Directive with existing laws and regulations (Chau, 2020a; Global Witness, 2019).

For example, the directive defines beneficial owners as someone with more than 5% of shares with voting rights, while the Central Bank of Myanmar, in Directive 18/2019 on customer due diligence related to anti-money laundering and counter-financial terrorism, sets the threshold at 20% (Chau, 2020a ; CBM, 2019). The 2014 Anti-Money laundering law, on which DICA's directive is based, defines a beneficial owner as someone who "exercises effective control over any company or arrangement" but does not state a specific percentage (Chau, 2020a; Myanmar Government, 2014). Questions also relate to the implementation of the directive, as recent reviews of information disclosed by companies have identified gaps, notably with regards to politically exposed persons (Chau, 2020b; Global Witness, 2020). Going forward, ensuring clarity and consistency of the beneficial ownership requirements, and establishing adequate accountability mechanisms would be important to further DICA's objectives to enhance transparency, deter tax evasion, money laundering and terrorist financing.

Despite the above-mentioned initiatives, in February 2020 Myanmar was placed back on the anti-money laundering "grey list" of FATF – a watchlist Myanmar had been removed from in 2006. In making its decision, the FATF highlighted a high degree of criminal activity and insufficient understanding of money-laundering risks in key areas (Allard, 2020; Global Witness, 2020). These observations echo previous findings by the APG which had identified high money-laundering threats, with higher risk predicate offences including drug production and trafficking, environmental crimes (including illegal resource extraction such as jade, wildlife smuggling and illegal logging), human trafficking, corruption and bribery. The evaluation highlighted complex contextual issues that increased Myanmar's exposure to transnational profit-driven crime and related money-laundering, including the involvement of non-state actors controlling significant territories and economic resources in Myanmar. The report also noted the existence of governance weaknesses in SEEs and the involvement of politically exposed persons, making SEEs particularly vulnerable to fraud and corruption (APG, 2018)

Enhancing the transparency and governance of SEEs

SEEs play an important role in Myanmar's economy, generating approximately 50% of fiscal revenues, largely from the natural resource sector (NRGI, 2018a). As such, they have significant leverage to improve the business climate and promote RBC. Doing so is aligned with the OECD *Guidelines* which apply to all entities within the enterprise in all sectors, whether of private, state or mixed ownership. The same is true for the UN *Guiding Principles*, which apply to all states and all enterprises. UN Guiding Principle 4 stipulates that states "should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence" (UN, 2011). The 2015 OECD

Guidelines on Corporate Governance of State-Owned Enterprises also recommend that the state ownership policy make clear any expectations the state has in respect of RBC by SOEs. The *SOE Guidelines* further recommend extensive measures to report on foreseeable risks, including human rights, labour, the environment, and risks related to corruption and taxation (OECD, 2015a).

The first OECD *Investment Policy Review* already mentioned that important reforms were initiated in the mid-1990s and accelerated from 2012 to restructure and privatise SEEs. The review also stressed the importance of further improving the framework for SEE governance and ensuring that RBC-related policies and laws are implemented, including within the military-controlled conglomerates (OECD, 2014). Enhancing the efficiency of SOEs still ranks high on the government's agenda. The MSDP 2018-2030 includes specific policies to improve the operations of SEEs and privatise those that have the potential to be reformed. In 2016, the government announced a plan to privatise state-owned factories in four years to allow for greater competition and foster industrial development (Government of Myanmar, 2016c). In 2019, government officials reiterated the need to restructure and privatise loss-making state-owned factories (Htwe, 2019b).

While the privatisation of unprofitable SEEs might ease the financial burden for the Union budget and has the potential to generate efficiency gains, emphasis should also be placed on improving the transparency, oversight and accountability of entities that remain under the control of the state. Various observers have noted that reforms introduced to make SEEs more financially independent have created new challenges in that respect. Since 2012, SEEs have been retaining 55% of their profits in independent account known as "Other Accounts" that are not subject to the same rules as other government funds. The accumulation of large reserves over the years in "Other Accounts" has limited transparency and comprehensiveness of information as to how these resources are used and recorded in national budgets (NRGI, 2018a; World Bank, 2018; OECD, 2015b). Questions have also been raised with regards to the extent and nature of military involvement in the management of SEEs, as well as the economic interests of the military in private companies (NRGI 2016, 2018a; UN, 2019). In 2019, the EITI board called on Myanmar to clarify the status of military-affiliated companies and ensure that their activities are comprehensively addressed in accordance with EITI standards (EITI, 2019).

Progress has already been made in this area. The recently introduced requirement to disclose information on beneficial owners and their links to politically exposed persons (see section above) could significantly advance transparency and accountability of Myanmar's SEEs. Ensuring effective implementation of this requirement will be an important task for the government. The government has also announced reforms that would abolish the "Other Accounts" of SEEs and transfer all income from these accounts to the Union Government (NRGI, 2019a). This is a positive evolution and the government should continue and intensify its efforts to promote transparency and good governance in SEEs. The government should ensure that SEEs implement RBC standards and in particular conduct risk-based due diligence in accordance with relevant due diligence instruments, such as the OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* and the OECD *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*.

Supporting collaborative industry initiatives promoting RBC, such as in the garment sector

Myanmar's political context affects all sectors in various ways. All businesses regardless of the sector in which they operate need to take adequate steps to identify and address environmental and social harms. This includes for example protecting workers and other vulnerable groups and avoiding directly or indirectly contributing to financing or fuelling conflicts. Such measures are more easily implemented and effective if undertaken collectively. The Myanmar garment sector provides an example of how industry players can organise themselves and collaborate to promote RBC. Its experience may serve as an example for other industries.

Several industry actors in the garment sectors have collaborated to propose options to help businesses source and operate responsibly in Myanmar. Such initiatives have the potential to help address reputational risks and bolster export growth in the sector, which is particularly relevant in the garment sector. In Myanmar, garment exports have been growing fast, boosted by preferential access to the EU market under the EBA scheme since 2013. Myanmar's garment exports rose from USD 349 million in 2010 to nearly USD 4.6 billion in 2018, accounting for about 10% of the country's export revenues. The EU represents about 60% of Myanmar's garment exports. Potential withdrawal of the EBA scheme over human rights and labour rights concerns could be particularly detrimental to the garment sector (Thomas, 2019).

Specific concerns have been raised including poor living conditions, work without contract, undue fines and salary deductions, excessive or forced overtime, child labour, and unhealthy and unsafe working conditions. A study conducted with 403 workers from twelve factories located in different industrial zones found, for example, that a little over half workers had signed a contract, only about one fifth had received a copy and many earned significantly less than the minimum legal wage. Interviews also revealed that workers could be fined for taking sick leave, for being late at work or other minor infractions such as not wearing shoes or a complete uniform. At all investigated factories, workers worked six days a week and they all reported that they regularly work overtime hours, sometimes forcibly, for example to avoid wage cuts. The research also found indications of the existence of child labour. Workers had very limited knowledge of their rights to join and form trade unions, or knew of the existence of formal procedures to raise complaints (SOMO, 2017).

Myanmar's garment production is concentrated in industrial zones and SEZs. As mentioned in Chapter 8 of this review, land allocations of large land areas, including for SEZs and industrial zones, have not always followed international good practice in respecting the existing land use rights of local communities. In addition, as indicated in Chapter 7, SEZs are governed by a special regime. Although national laws relating to land, labour and environment still generally apply, civil society organisations have argued that the legal framework for SEZs in Myanmar does not establish clear procedures and lines of responsibility and accountability, weakening the human rights and labour rights framework and constraining workers' access to grievance mechanisms (MCRB, 2018 ; Fairwear, 2018).

Several initiatives have been launched to address decent work issues in the Myanmar garment sector. For example, Action, Collaboration, Transformation (ACT) was set up in 2015 and brings together brands, retailers, manufacturers and trade unions to address the issue of living wages in the textile and garment supply chain. In November 2019, ACT brand suppliers and IndustriALL affiliated sectoral union agreed upon and launched the Myanmar Freedom of Association Guidelines which aims to secure constructive relations between employers and workers and to specify the practical application of the principles of Freedom of Association under international labour standards, as well as the timeline for collective bargaining (ACT, 2020). The Ethical Trading Initiative (ETI) has addressed letters to the Myanmar government on behalf of ETI member companies that were then sourcing from Myanmar, or considering investing in the country, in reaction to Myanmar's employers vote against a minimum wage. Fair Wear Foundation has developed a costing tool, which includes a labour minute calculator for Myanmar, to help suppliers and buyers ring-fence labour costs and wage increases within price negotiations.

Multiple industry actors have called on businesses to apply due diligence when sourcing from or operating in Myanmar. For example, in 2018, the Fair Wear Foundation (FWF) requires its members to take additional specific measures when sourcing from Myanmar, in addition to what FWF requires of its member companies in other high-risk production countries. These measures include maintaining an updated list of suppliers being used in Myanmar in FWF's database, to be made available to the public; conducting due diligence in accordance with the OECD *Guidelines*; auditing suppliers in Myanmar; promoting processes to ensure Freedom of Association and enhance social dialogue at suppliers; payment of at least the legal minimum and work towards the payment of a living wage; follow FWF guidance on age verification to avoid risks of child labour (FWF, 2018).

The ETI has released guidance to help businesses act responsibly in the current context while retaining a role in providing decent work and fostering respect for human rights. While recognising the challenges of conducting due diligence in certain contexts (for example because of the difficulty to access information and to map risks and actors) ETI proposes a four-point plan to help businesses have a positive impact in the country. The plan includes specific recommendations to ensure that workers have access to effective grievance mechanisms, and to engage collectively with the Myanmar government, national trade associations and other relevant parties (ETI, 2019).

Such initiatives underscore the positive role that responsible businesses can have on economic, environmental and social progress. The government would benefit from convening, engaging and supporting them. It could also leverage these initiatives to actively disseminate guidance on RBC tailored to the specific needs of the industry, such as the OECD *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*.

Promoting meaningful stakeholder engagement

Meaningful stakeholder engagement is an essential aspect of a risk-based due diligence process. The OECD *Due Diligence Guidance for Responsible Business Conduct* lays out clear expectations that due diligence should be informed by meaningful engagement with stakeholders such as workers, workers' representatives, trade unions (including Global Unions) community members, civil society organisations, investors and professional industry and trade associations. Meaningful stakeholder engagement is characterised by two-way communication, through which enterprise and stakeholders freely express opinions, share perspectives and listen to alternative viewpoints to reach a mutual understanding. The government can play an important role in supporting this process by ensuring that stakeholders may express their views and engage with businesses. More broadly, creating an environment where stakeholders are empowered to express their views and actively participate in policy design as well as consultations organised by businesses, the government or a group of stakeholders, is essential to ensure effective promotion and implementation of RBC.

The first OECD *Investment Policy Review* highlighted progress made since 2011 in enabling civil society participation in the public debate. The review also noted the importance and potential for Myanmar to further expand the role of civil society, including to help ensure that laws protecting worker and human rights are effectively implemented (OECD, 2014). In 2014, however, the Special Rapporteur on the situation of human rights in Myanmar identified signs of backtracking that could threaten the achievements of the previous years and called for more public freedoms. The Special Rapporteur highlighted attempts to impede the activities of civil society and the media through intimidation, arrests and prosecutions (OHCHR, 2014). Since then, various international observers have raised concerns over the treatment of human rights defenders in Myanmar facing pressures, prosecution and arrests (FIDH, 2018; Amnesty International, 2019; Human Rights Watch, 2019). In 2019, the EITI board noted concerns regarding civil society's freedoms of expression and of operation, and emphasised the need for the government to take corrective actions to ensure that there is an enabling environment for civil society beyond the multi-stakeholder group engaging in the EITI process (EITI, 2019). These concerns were echoed in early 2020 by the EU in a report highlighting key concerns to be addressed in Myanmar, including discrimination, hate speech, freedom of media and labour rights (EU, 2020b).

In recent years, concerns have also been raised with regards to online threats that activists may face on social media, as well as the spread of abusive speech targeted ethnic minorities, human rights defenders, women and others, and called on both companies and the government to do more to fight incitement to violence, discrimination and hatred (OHCHR, 2019c ; Ellis-Pettersen, 2018). The role of social media in spreading content potentially leading to real discrimination and violence has been found to be significant by the independent international fact-finding mission on Myanmar (OHCHR, 2018). Over the last decade, online platforms have become increasingly essential parts of daily life for much of the world. While creating

opportunities for workers and society at large, they may also face challenges when it comes to RBC and should take a robust and tailored approach to prevent and address any adverse impact that may result from their activities (OECD, 2019b).

Stakeholders are important actors of RBC promotion and implementation. Creating a safe space for participation in the public debate, policy design, identification of RBC risks and issues, as well as dialogue with both businesses and government, is essential to enable RBC. Reinforcing the legal and institutional framework to ensure that civil society actors are encouraged to freely express their views, in line with various calls from international organisations, CSOs and trade partners is critical in that regard. Businesses, including in the digital world, also have a responsibility in creating an environment conducive to stakeholder participation and dialogue.

Channelling national efforts to promote RBC in Myanmar

As mentioned earlier, RBC initiatives have proliferated since 2011. This is a positive evolution that creates a strong footing to foster broad implementation of RBC standards. However, several international and local organisations have raised the risk of fatigue around the topic, and emphasised the importance of co-ordination and consistency in policies and initiatives on RBC. All actors involved have a responsibility to ensure that initiatives build on each other, and that expectations on RBC are clearly and consistently communicated.

More efforts are needed to ensure that the various government objectives on responsible investment are implemented. It is the government's role to provide the strategic direction in this regard, such as by developing a national action plan or making targeted efforts to integrate RBC in key strategic areas. For example, the government can consider working with stakeholders to develop a National Action Plan (NAP) on RBC. This could be an effective way to ensure that all stakeholders work consistently toward the same goal and consistently contribute to national efforts to promote and enable RBC.

To date, 20 countries have already produced a NAP on Business and Human Rights, and 21 more are in the process of developing or have committed to developing one. On 29 October 2019, Thailand was the first country in Asia to adopt a NAP on Business and Human Rights. The scope of NAPs varies from country to country. Some go beyond the theme of business and human rights by encompassing the environment (for example France and Italy) and RBC more generally, such as the United States. Considering the importance of national resources in Myanmar, the country's vulnerability to climate change and ongoing government efforts to promote RBC, ensuring that a NAP in Myanmar covers the broad range of RBC policy areas would be particularly relevant.

Although Myanmar does not yet have a formal process to develop one, first steps toward the development of a NAP have been taken. In February 2015, the then Economic Adviser to the government of Myanmar, expressed interest in doing so. In 2016, the International Corporate Accountability Roundtable (ICAR) and the Alternative ASEAN Network on Burma (ALTSEAN-Burma) joined forces to support the development of a NAP and published a "shadow" baseline assessment in 2017 (ICAR, 2019). In 2016, the MNHRC together with the ASEAN-CSR network and UMFCCI held a consultation workshop focused on NAP development (DIHR, 2019). In December 2019, the OECD and DICA jointly hosted a consultation and policy dialogue including a dedicated session on NAP, delivered with support from the Thailand Ministry of Justice and UNDP. In 2019, UNDP initiated a project to support NAP development in Myanmar.

Developing a NAP could be an effective way to map risks and identify RBC priorities for Myanmar as well as gaps in protection in consultation with stakeholders. This constitutes a first step to determine how to address such risks at national level, but also provides information that supports businesses in the identification and prioritisation of risks, which is an important step in a risk-based due diligence process. NAP processes can also provide a platform for engaging with stakeholders on RBC issues. As indicated in the Guidance on National Action Plans for Business and Human Rights developed by the UN Working Group on Business and

Human Rights (UNWG), NAPs need to be developed in inclusive and transparent processes, taking into account the views of relevant stakeholders, which may include civil society organisations, national human rights institutions, trade unions, business enterprises and associations, as well as representatives of population groups that may be particularly vulnerable to business-related human rights abuse, such as children, women, indigenous peoples, ethnic minorities and persons with disabilities. Broad stakeholder engagement is essential to build the legitimacy and effectiveness of the NAP (UNWG, 2016)

There is no one-size-fits-all approach to developing a NAP. The success of NAPs largely hinges on identifying gaps in the existing regulatory framework, and on developing concrete commitments in a country-specific context. Past experience has shown that without strong political will, commitments to develop NAPs can be slow to materialise, and sometimes result in NAPs that do not sufficiently rely on stakeholders' knowledge to select evidence-based priorities, or remain limited to existing initiatives without taking a forward looking approach (EU, 2017). In Myanmar, while the momentum for NAP development is reflected in the various expressions of interests and above-mentioned initiatives, a meaningful and explicit commitment to develop a NAP would be important to support a successful NAP process. Ensuring that the government has the capacity to lead such a process would also be essential.

The UNWG Guidance recommends that once the government has formally committed to engage in a NAP process, it should establish a format for coordination and communication between relevant government entities, for example a cross-departmental working group (UNWG, 2016). Creating such an institution could be relevant in Myanmar within and beyond the NAPs process to facilitate communication with all relevant actors in Myanmar, and support policy coherence on RBC. So far DICA has played an important coordinating role in this regard within the government, including also by supporting efforts by expert members of the MIC to promote RBC, as well as by promoting RBC at the sub-national level. Such coordination could be relevant for the NAP process as well. The UNWG guidance further recommends that once a formal cross-ministerial or cross-departmental working group is established, one or several government entities should be designated to lead the process, including coordinating collaboration within government and with non-governmental stakeholders, as well as leading the drafting process. The NAP process could be an important conduit to promote RBC in Myanmar more broadly, including for translating and adapting relevant RBC instruments and making them widely available to the public, developing guidance on Myanmar-specific RBC issues and topics, and engaging with businesses, civil society organisations, international CSOs, international organisations and all relevant actors on an ongoing basis.

Ensuring access to effective remedy is an important aspect of RBC and as such should be covered under the NAP process. In Myanmar, various judicial and non-judicial dispute grievance mechanisms are already in place, with different mandates, structures, and capacities. Some of them are described in this Review. For example, as mentioned in Chapter 8, three bodies (Central FAB, Central VFV Committee, the Central Committee for Re-inspection of Confiscated Farmlands and Other Lands) have some mandate to resolve land disputes. Under the MIL, an investment-state grievance mechanism is to be established in 2020 to prevent and resolve disputes before they escalate to a legal dispute. As mentioned in Chapter 2 of this Review, a notification issued on 7 April 2020 clarifies some details regarding the composition and mandate of this mechanism. The MNHRC has a mandate to verify and conduct inquiries in respect of complaints and allegations of human rights violations (MNHRC, 2019). Mediation and dispute resolution mechanisms also exist at community level – primarily village tract administrators, village elders and religious leaders and co-exist with the official system. The development of a NAP could provide an opportunity to map all existing dispute resolution mechanisms and identify gaps and potential solutions to ensure that stakeholders have a venue to bring and resolve issues that may occur when businesses fail to meet RBC standards.

References

- Action Collaboration Transformation – ACT (2020), “ACT brand suppliers and industrial affiliated sector union agree on freedom of association guidelines in Myanmar”, ACT Website content, <https://actonlivingwages.com/act-brand-suppliers-and-industrial-affiliated-sectoral-union-agree-on-freedom-of-association-guideline-in-myanmar/> (accessed on 18 March 2020).
- Allard, T (2020), “Myanmar put on money-laundering watchlist”, website article, <https://www.reuters.com/article/us-faft-myanmar/myanmar-put-on-money-laundering-watchlist-idUSKBN20F26Q> (accessed on 15 December 2019).
- AmCham (2019), “AMCHAM CSR Excellence (ACE) Recognition Program”, website content, <https://www.amchammyanmar.com/accm/asp/general.asp?MenuCatID=7&MenuItemID=120&SponsorID=0> (accessed on 15 December 2019).
- Amnesty International (2019), “Myanmar 2019”, website content, <https://www.amnesty.org/en/countries/asia-and-the-pacific/myanmar/report-myanmar/> (accessed on 19 March 2020).
- Asia / Pacific Group on Money Laundering – APG (2019), *First Follow up Report: Mutual Evaluation of Myanmar*, Sydney, Australia. <https://www.fatf-gafi.org/media/fatf/documents/reports/fur/APG-Follow-Up-Report-Myanmar-2019.pdf>
- Asia / Pacific Group on Money Laundering – APG (2018), *Anti-money laundering and counter-terrorist financing measures – Myanmar: Mutual Evaluation Report*. Sydney, Australia <http://www.apgml.org/members-and-observers/members/member-documents.aspx?m=e0e77e5e-c50f-4cac-a24f-7fe1ce72ec62>
- Asian Development Bank – ADB (2017), *Country Partnership Strategy 2017-2021: Building the Foundations for Inclusive Growth*, Manila, Philippines.
- ASEAN CSR (2019), “ASEAN CSR Fellowship 2018”, website content, <https://www.asean-csr-network.org/c/programs/1195-asean-csr-fellowship-2018> (accessed on 15 December 2019).
- Baker McKenzie (2019), “Myanmar introduces Mandatory Disclosure of Beneficial Ownership of Companies”, Client Alert, December.
- Central Bank of Myanmar – CBM (2019), *Directive No. (18/2019)*, Unofficial Translation, The Republic of the Union of Myanmar, https://www.cbm.gov.mm/sites/default/files/cdd_directive_amendment_eng_13-11-2019_0.pdf
- Chau, T (2020a), “Confusion over Myanmar’s new beneficial ownership rules”. Myanmar Times. <https://www.mmtimes.com/news/confusion-over-myanmars-new-beneficial-ownership-rules.html> (accessed on 1 April 2020).
- Chau, T (2020b), “Beneficial-owner database lauded despite some weaknesses”. Myanmar Times. <https://www.mmtimes.com/news/beneficial-owner-database-lauded-despite-some-weaknesses.html> (accessed on 1 April 2020).
- Chau, T. (2019a), “Myanmar Investment Commission accused of transparency failures”, website article, <https://www.mmtimes.com/news/myanmar-investment-commission-accused-transparency-failures.html> (accessed on 15 December 2019).
- Chau, T. (2019b), “Myanmar works to improve corruption image” website article, <https://www.mmtimes.com/news/myanmar-works-improve-corruption-image.html> (accessed on 15 December 2019).
- Chau, T. (2019c), “Parliament passes gemstone bill amid criticism” website article, <https://www.mmtimes.com/news/parliament-passes-gemstone-bill-amid-criticism.html> (accessed on 20 March 2020).
- DICA (2020). “Beneficial Ownership Disclosures”. Website content, <https://bo.dica.gov.mm/en/beneficial->

- [ownership-disclosures](#) (accessed on 20 February 2020)
- DICA (2019a), “About the MIC”, website content, <https://www.dica.gov.mm/en/information-myanmar-investment-commission-mic> (accessed on 15 December 2019).
- DICA (2019b), “MIC application process”, website content, <https://www.dica.gov.mm/en/step-by-step/mic-application-process> (accessed on 15 December 2019).
- DICA (2019c), “Proposal form (2)”, Government of Myanmar.
- DICA (2019d), *Directive No (17/2019) on Disclosure of Beneficial Ownership Information*, The Government of the Republic of the Union of Myanmar, Ministry of Investment and Foreign Economic Relations. https://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/directive_engfinal_0.pdf
- DICA (2018a), *Investment application guidebook*, Government of Myanmar.
- DICA (2018b), *Anti-corruption Code of Ethics for Companies and Body Corporates*, Announcement of The Government of the Republic of the Union of Myanmar Ministry of Planning and Finance Directorate of Investment and Company Administration Announcement, August 3.
- DICA (2018c), *Inclusive Business in Myanmar. An Agenda to Catalyse Social Impact*. https://www.dica.gov.mm/sites/dica.gov.mm/files/news-files/inclusive_business_in_myanmar.pdf
- DIHR (2019), “National Action Plans on Business and Human Rights: Myanmar”, website content, <https://globalnaps.org/country/myanmar/> (accessed on 15 December 2019).
- Ellis-Petersen (2018), “Facebook among firms named on Myanmar human rights 'dirty list'”, The Guardian, December 12, <https://www.theguardian.com/world/2018/dec/12/facebook-among-firms-named-on-myanmar-human-rights-dirty-list> (accessed on 15 December 2019).
- EITI (2020), “Who we are”, Website content, <https://eiti.org/who-we-are> (accessed on 1 April 2020).
- EITI (2017), *Draft Beneficial Ownership Roadmap of Myanmar*, Myanmar EITI, February.
- ETI (2019), *Responding to the human rights crisis in Myanmar: a four-point plan for responsible businesses*, Ethical Trading Initiative, London, February 7.
- EPRS (2019), *Everything but Arms: The case of Cambodia*, European Parliament Research Service at a Glance, April.
- European Commission – EU (2020a), “Trade/Human Rights: Commission decides to partially withdraw Cambodia's preferential access to the EU market”, press release, February, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_229 <https://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/> (accessed on 23 March 2020).
- European Commission – EU (2020b), *Report on EU Enhanced Engagement with three Everything But Arms beneficiary countries: Bangladesh, Cambodia and Myanmar*, Accompanying the document Joint Report to the European Parliament and the Council, Report on the Generalised Scheme of Preferences covering the period 2018-2019, February. <https://ec.europa.eu/transparency/regdoc/rep/10102/2020/EN/SWD-2020-19-F1-EN-MAIN-PART-1.PDF>
- European Commission – EU (2019), “Generalised Scheme of Preferences (GSP)”, website content, <https://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/> (accessed on 23 March 2020).
- European Commission – EU (2017), “The Regulation Explained”, Website content, December 13, <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/> (accessed on 23 March 2020).
- European Parliament – EU (2017), *Implementation of the UN Guiding Principles on Business and Human Rights*, EP/EXPO/B/COMMITTEE/FWC/2013-08/Lot8/09, Directorate-General For External Policies, Policy Department, February.

- European Parliament – EU (2014), “Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups”, *Official Journal of the European Union L 330/I*, November 15.
- EuroCham (2019), “EuroCham Responsible Business Initiative”, website content, <https://eurocham-myanmar.org/emrbi/about> (accessed on 15 December 2019).
- EuroCham (2018), “Garment Guide 2019”, website content, Yangon.
- FairWear Foundation – FWF (2018), “Enhanced monitoring programme Myanmar – update 2018”, April.
- Financial Action Task Force – FATF (2019), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, FATF, Paris, www.fatf-gafi.org/recommendations.html
- FIDH (2018), “Myanmar: Human Rights NGOs call for robust EU action for justice”, Statement, *September*. <https://www.fidh.org/en/region/asia/burma/myanmar-human-rights-ngos-call-for-robust-eu-action-for-justice> (accessed on 15 December 2019).
- Fodor, Martin, and Stephen Ling (2019), *Myanmar - Country Environmental Analysis: A Road towards Sustainability, Peace, and Prosperity: Synthesis Report*, World Bank: Washington DC, May.
- G7 (2015), “Leaders’ Declaration”, G7 Summit, June 7-8, https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf
- G20 Challenge (n.d), “What is Inclusive Business?”, Website content, (accessed on 20 March 2020)
- Global Alliance of National Human Rights Institutions – GANRHI (2019), “Chart of the Status of National Institutions Accredited by the Global Alliance of National Human Rights Institution”, March 4.
- Global Witness (2020), “Global Witness Statement on New Myanmar Extractive Industry Transparency Initiative (MEITI) Report on Disclosure of Beneficial Ownership Information”, Press Release. <https://www.globalwitness.org/en/press-releases/global-witness-statement-new-myanmar-extractive-industries-transparency-initiative-meiti-report-disclosure-beneficial-ownership-information/>
- Global Witness (2019), “Comment in Response to DICA “Request for Suggestion on the Transparency of the Company”, January 30, https://www.globalwitness.org/documents/19870/20200131_-_Global_Witness_DICA_BO_submission.pdf
- Global Witness (2018), “Myanmar’s flawed new gemstone law set to restart gemstone permits in tainted sector”, Press Release, December 20, <https://www.globalwitness.org/en/press-releases/myanmars-flawed-new-gemstone-law-set-to-restart-gemstone-permits-in-tainted-sector/> (accessed on 15 December 2019).
- Global Witness (2017), “Myanmar peace talks must address natural resources management”, Press Release, May 23, <https://www.globalwitness.org/en/press-releases/myanmar-peace-talks-must-address-natural-resource-management/> (accessed on 15 December 2019).
- Global Witness (2015), “Jade: Myanmar’s Big State Secret”, Multimedia Report, October 23, <https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/myanmarjade/> (accessed on 15 December 2019).
- Government of Myanmar (2018), *Myanmar Sustainable Development Plan (2018 – 2030)*, Ministry of Planning and Finance: Nay Pyi Taw, August.
- Government of Myanmar (2017), *Myanmar Investment Rules*, Notification No. 35 / 2017, Ministry of Planning and Finance: Nay Pyi Taw, March. 30.
- Government of Myanmar (2016a), *Investment Policy*, Directorate of Investment and Company Administration, Yangon.
- Government of Myanmar (2016b), *Myanmar Investment Law*, Nay Pyi Taw.
- Government of Myanmar (2016c), “State-owned factories to be privatised in four years”, Ministry of

- Information, Nay Pyi Taw, <https://www.moi.gov.mm/moi:eng/?q=news/13/11/2018/id-7519> (accessed on 15 December 2019).
- Government of Myanmar (2014), *Myanmar Anti-Money Laundering Law*, Nay Pyi Taw.
- Hammond, C., Mon, Y. (2019). “The jade mining crisis”, Frontier Myanmar, website article, June 3, <https://frontiermyanmar.net/en/the-jade-mining-crisis> (accessed on 15 December 2019).
- Hindstrom, H. (2018), “Back to business as usual in Myanmar’s jade mines?”, Frontier Myanmar, website article, November 28, <https://frontiermyanmar.net/en/back-to-business-as-usual-in-myanmars-jade-mines> (accessed on 15 December 2019).
- Human Rights Watch – HRW (2019), *World Report 2019: Events of 2018*, United States, https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2019.pdf
- Human Rights Watch – HRW (2018), *Nothing for our land: Impact of land confiscation on farmers in Myanmar*, United States, July.
- Hwte, Chan Mya (2019a), “Expiring mine permits should be renewed under new gemstone policy: insiders”, Yangon, January 28, <https://www.mmtimes.com/news/expiring-mine-permits-should-be-renewed-under-new-gemstone-policy-insiders.html> (accessed on 15 December 2019).
- Hwte, Chan Mya (2019b), “Loss-making factories should be privatised, officials say”, Yangon, November 21, <https://www.mmtimes.com/news/loss-making-factories-should-be-privatised-officials-say.html> (accessed on 15 December 2019).
- Hwte, Chan Mya (2018), “New jade and gemstone policy expected to boost the industry”, Yangon, August 13, <https://www.mmtimes.com/news/new-jade-and-gemstone-policy-expected-boost-industry.html> (accessed on 15 December 2019).
- ILO (2019), “Myanmar Responsible Business and Human Rights Forum”, website content, June 12, https://www.ilo.org/yangon/press/WCMS_710160/lang--en/index.htm (accessed on 15 December 2019).
- ILO (2017), *Green Business Booklet*, Geneva, https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/publication/wcms_555274.pdf
- International Court of Justice – ICJ (2019), “The Republic of The Gambia institutes proceedings against the Republic of the Union of Myanmar and asks the Court to indicate provisional measures”, Unofficial Press Release No. 2019/47, November 11.
- International Conference of the Great Lake Region – ICGLR (2010), “Lusaka Declaration of the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources of the Great Lake Region”, Lusaka, December 15.
- Kollert, Walter and Kleine, Michael (2017), *The Global Teak Study Analysis, Evaluation and Future Potential of Teak Resources*, International Union of Forest Research Organizations (IUFRO) World Series Volume 36, IUFRO, June.
- Liljeblad, J. (2016), “The 2014 Enabling Law of the Myanmar National Human Rights Commission and the UN Paris Principles: A Critical Evaluation”, *Journal of East Asia and International Law* 9(2), pp. 427-428.
- Myanmar Center for Responsible Business – MCRB (2019), “home”, website content, <http://www.myanmar-responsiblebusiness.org/> (accessed on 15 December 2019).
- Myanmar Center for Responsible Business – MCRB (2018a) “Responsible Business Seminar Series kicks off with a discussion of due diligence”, website content, <https://www.myanmar-responsiblebusiness.org/news/seminar-series-due-diligence.html> (accessed on 15 December 2019).
- Myanmar Centre for Responsible Business (2018b), *Sector Wide Impact Assessment of Limestone, Gold and Tin Mining in Myanmar*, Yangon.
- Myanmar Extractive Industries Transparency Initiative – MEITI (2019a), *Notification No. 104/2019 of the*

- Republic of the Union of Myanmar Office of the President (Unofficial Translation)*, October 2.
- Myanmar Extractive Industries Transparency Initiative – MEITI (2019b), *The Fourth Myanmar EITI Report for the Period 1 April 2016 to 31 March 2017, (FY 2016 - 2017) Oil and Gas, Gems and Jade, Other Minerals and Pearl*, March 30.
- Myanmar Institute of Directors – MIOD (2019), “About us”, website content, <http://myanmariod.com/> (accessed on 15 December 2019).
- Myanmar Investment Commission – MIC (2018), *Myanmar Investment Promotion Plan 2016/17 – 2035/36*, Government of Myanmar.
- MNHRC (2019a), “Home”, website content, <http://www.mnhrc.org.mm/en/> (accessed on 28 February 2019).
- MNHRC (2019b), “MNHRC Strategic Plan 2020-2024”, October 23.
- MNHRC (2018), *Capacity Assessment Report*, December.
- NRGI (2019a), *Losing luster: addressing tax evasion in Myanmar’s Jade and Gemstone Industry*, Natural Resources Governance Institute, February, <https://resourcegovernance.org/sites/default/files/documents/losing-luster-addressing-myanmar-tax-evasion.pdf>
- NRGI (2019b), *Unpacking Decentralization: Improving How States and Regions in Myanmar Issue Artisanal and Small-Scale Mining Permits*, Natural Resources Governance Institute, October, <https://resourcegovernance.org/sites/default/files/documents/unpacking-decentralization-improving-myanmar-artisanal-small-scale-mining-permits.pdf>
- NRGI (2019c), *NRGI Impact: Myanmar Ends Opaque Banking of Proceeds from State Enterprises*, Natural Resources Governance Institute, November, <https://resourcegovernance.org/analysis-tools/publications/nrgi-impact-myanmar-opaque-proceeds-state-enterprises>
- NRGI (2018a), *Myanmar’s Jade: From Mine to Market*, Natural Resources Governance Institute, <https://resourcegovernance.org/sites/default/files/documents/jade-info-booklet.pdf>
- NRGI (2018b), *State-Owned Economic Enterprise Reform in Myanmar: The Case of Natural Resource Enterprises*, Natural Resources Governance Institute, January, https://resourcegovernance.org/sites/default/files/documents/state-owned-economic-enterprise-reform-in-myanmar_0.pdf
- NRGI (2016), *Mineral and Gemstone Licensing in Myanmar*, Briefing, Natural Resources Governance Institute, April, https://resourcegovernance.org/sites/default/files/documents/mineral-gemstone-licensing-myanmar_0.pdf
- OECD (2019a), “Responsible Supply Chains in Asia – Myanmar”, OECD, Paris, <https://mneguidelines.oecd.org/EU-ILO-OECD-Responsible-Supply-Chains-in-Asia-MYANMAR.pdf>
- OECD (2019b), “Platform companies and responsible business conduct”, OECD, Paris. <https://mneguidelines.oecd.org/RBC-and-platform-companies.pdf>
- OECD (2019c), *OECD Business and Finance Outlook 2019: Strengthening Trust in Business*, OECD Publishing, Paris, <https://doi.org/10.1787/af784794-en>.
- OECD (2018a), *Good Regulatory Practices to Support Small and Medium Enterprises in Southeast Asia*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264305434-en>
- OECD (2018b), *OECD Due Diligence Guidance for Responsible Business Conduct*, OECD Paris, <https://www.oecd.org/.../due-diligence-guidance-for-responsible-business-conduct.htm>.
- OECD (2018c), *OECD Investment Policy Reviews: Viet Nam 2018*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264282957-en>.
- OECD (2016), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, OECD Publishing, Paris,

- <http://dx.doi.org/10.1787/9789264252479-en>
- OECD (2015a). *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264244160-en>
- OECD (2015b), *Multi-dimensional Review of Myanmar: Volume 2. In-depth Analysis and Recommendations*, OECD Development Pathways, OECD Publishing, Paris, <https://doi.org/10.1787/9789264220577-en>.
- OECD (2014), *OECD Investment Policy Reviews: Myanmar 2014*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264206441-en>.
- OECD (2011), *OECD Guidelines for Multinational Enterprises, 2011 Edition*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264115415-en>.
- OECD, EU (2013), *Policy Brief on Social Entrepreneurship: Entrepreneurial Activities in Europe*, Publications Office of the European Union, Luxembourg.
- OECD, OHCHR, EU and ILO (2019), “Responsible Business: Key messages from international instruments”, <https://mneguidelines.oecd.org/Brochure-responsible-business-key-messages-from-international-instruments.pdf>
- OHCHR (2019a), “Status of Ratifications Interactive Dashboard”, website content, <http://indicators.ohchr.org/> (accessed on 15 December 2019).
- OHCHR (2019b), “End of mission statement by the Special Rapporteur on the situation of human rights in Myanmar”, website content, January 25, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24114&LangID=E> (accessed on 15 December 2019).
- OHCHR (2019c), “Myanmar: UN expert calls for tolerance and safety from reprisals after online threats to activists”, website content, December 10, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25411&LangID=E> (accessed on 18 March 2020).
- OHCHR (2014), “Statement of the Special Rapporteur on the Situation of Human Rights in Myanmar”, website content, July 26, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14909&LangID=E> (accessed on 15 December 2019).
- Open Apparel Registry – OAR (2020), “What is the Open Apparel Registry?”, website content, <https://info.openapparel.org/how-it-works> (accessed on 1 April 2020).
- Oxford Business Group – OBG (2020), “New legislation expected to regulate Myanmar's gemstone industry”, in *The Report: Myanmar 2020*, Oxford Business Group.
- Oxford Business Group – OBG (2019), “Policy reforms and infrastructure upgrades promise growth in Myanmar mining”, in *The Report: Myanmar 2019*, Oxford Business Group.
- PACT (2019), *The State of Artisanal Mining in Myanmar: Including field study and Human Centred Design (HCD) workshops with gold mining communities in Homalin Township, Sagaing Region*, May.
- RBF Myanmar (2019), “Home”, website content, <http://www.rbfmyanmar.com/> (accessed on 15 December 2019).
- SOMO (2017), *The Myanmar Dilemma: Can the Myanmar Industry Deliver Decent Jobs for Workers in Myanmar?*, The Netherlands, August.
- Sway Kyi Kyi, Ye Mon (2016), “Jade mining permit extensions suspended”, Myanmar Times, Yangon, July 27.
- Swedwatch (2018), “Overlooked and Undermined. Communities affected by jade operations in Myanmar and the responsibility of companies providing machinery”, *Report No. 91*, June 20.
- Thomas, J. (2019), “Revamping Myanmar’s garment industry”, The ASEAN Post, website article,

- <https://theaseanpost.com/article/revamping-myanmars-garment-industry> (accessed on 15 December 2019).
- United Nations (2020). “Top UN court orders Myanmar to protect Rohingya from genocide”, website content, January 23, <https://news.un.org/en/story/2020/01/1055841> (accessed on 15 May 2020).
- United Nations (2012), “Introduction of Global Compact in Myanmar ‘Milestone’, Says Secretary-General, Describing Country as ‘Well Placed to Leap-Frog Up Development Ladder’”, Press Release No. SG/SM/14267-ECO/209, May 1.
- United Nations (2011), *UN Guiding Principles on Business and Human Rights*, New York and Geneva.
- UNDP (2019), “On International Human Rights Day, EU and UNDP Sign Partnership Agreement to Address Human Rights Issues in Business Operations in Asia”, website content, December 10, <https://www.asia-pacific.undp.org/content/rbap/en/home/presscenter/pressreleases/2019/EU-UNDP-Partnership-BHR.html> (accessed on 15 December 2019).
- UNIDO (2017), “Supporting Myanmar SMEs through investment promotion and technology transfer”, website content, <https://www.unido.it/myanmar/index.php?&lang=eng> (accessed on 21 March 2020).
- UN Global Compact (2019), “Myanmar”, website content, <https://www.unglobalcompact.org/engage-locally/asia/myanmar> (accessed on 15 December 2019).
- UN Human Rights Council (2019), *The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar*, A/HRC/42/CRP.3, August 5.
- UN Human Rights Council (2018), *Report of the independent international fact-finding mission on Myanmar*, A/HRC/39/64, September 10-28.
- UN Working Group on Business and Human Rights – UNWG (2016), *Guidance on National Action Plans on Business and Human Rights*, Geneva, November.
- Woods, K. (2019), “In Myanmar, conflicts over land and natural resources block the peace process”, East-West Center, website article, <https://www.eastwestcenter.org/news-center/east-west-wire/in-myanmar-conflicts-over-land-and-natural-resources-block-the-peace> (accessed on 15 December 2019).
- Woods, K. (2018), “The Conflict Resource Economy and Pathways to Peace in Burma”, *Peaceworks*. No. 144, United States Institute of Peace, November.
- World Bank (2018), *Myanmar Economic Monitor: Navigating Risks*, Myanmar Economic Monitor, World Bank Group: Washington, D.C., December.

Notes

¹ In 2018, the OECD, together with ILO and the EU, launched a 3-year programme to promote responsible supply chains in Asia in partnership with six Asian economies including Myanmar. A number of events including workshops targeted at businesses and a policy dialogues co-hosted with DICA have been held in Myanmar under this programme (OECD, 2019a). In December 2019, UNDP and the EU announced the launch of a 4-year programme to promote the implementation of the UN Guiding Principles on Business and Human Rights in six countries including Myanmar (UNDP, 2019).

² The UN Core Conventions not yet ratified are: International Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Civil and Political Rights (CCPR), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), International Convention for the Protection of All Persons from Enforced Disappearance (CPD); The ILO Fundamental Conventions not yet ratified are: Right to Organize and Collective Bargaining Convention

Equal Remuneration Convention, Abolition of Forced Labour Convention, Discrimination (Employment and Occupation) Convention, Minimum Age Convention.

³ For example, Nestle and Unilever published their palm oil supply chains in February 2018, making them the first companies to do so. <https://seekingalpha.com/article/4152771-chain-unilever-and-nestl-publish-detailed-supplier-lists>

5. Infrastructure connectivity

This chapter provides an overview of transport connectivity in Myanmar. It takes stock of recent reforms, identifies key remaining hard and soft transport infrastructure connectivity challenges, and proposes recommendations for improving the mobilisation and efficiency of investments in transport infrastructure connectivity.

Myanmar has come a long way in improving the investment climate in recent years, notably by laying down the basic legal foundations for a thriving business environment to emerge with the new Investment and Companies Laws, as well as the Special Economic Zones Law. Unfortunately, however, these reforms alone, although important building blocks, are not sufficient to fully deliver upon expected investment attraction and development objectives. Policy complementarities play a critical role in nurturing an enabling environment for investment and for sharing the benefits with society at large.

A few high-priority issues have already been prominently addressed in other chapters, such as investment promotion and facilitation, special economic and industrial zones, responsible business conduct, green growth and land tenure and administration. Infrastructure connectivity is another equally important area requiring particular attention from the authorities as it plays a critical role in facilitating efficient business operations and any possible linkages between incoming foreign investments and the local economy.

Myanmar's political transition has been accompanied by substantial economic reforms to open the economy and to build a growth trajectory based on export-led development fuelled in part by foreign investment. The Myanmar Sustainable Development Strategy (MSDP) 2018-2030 clearly attests to this objective by embracing a private sector-led growth strategy and recognising its role as a potential engine of environmentally conscious and socially responsible economic growth. Acknowledging Myanmar's current economic structure, the MSDP gives priority to supporting the development of agriculture and Small-Medium Enterprises (SMEs). In conjunction, the government aims to promote manufacturing, industrial and service sectors development to induce faster structural transformation and generation of higher quality jobs, as well as facilitate the transition to a digital economy in the future.

A critical ingredient for attracting export-oriented manufacturing investments and improving agricultural development as sought in the MSDP is access to markets and good international gateway conditions. Better transport infrastructure connectivity can help ensure more efficient and reliable supply chain networks, raising opportunities for firms to integrate global value chains (GVCs) and for countries to reap the benefits of participation.

This calls for integrated strategies that combine investment, trade and infrastructure policies. Investment promotion and facilitation policies, for instance, need to go hand-in-hand with trade and infrastructure policies to be effective. This is equally the case for infrastructure. The quality of hard infrastructure is enhanced when an efficient soft infrastructure system is in place, including in terms of trade facilitation and logistics services. There are often cases where hard infrastructure has been developed without accompanying trade and business regulatory reforms or where it lacked the necessary multi-modal approach to deliver the expected results. Overcoming a fragmented approach is thus critical for strengthening the investment climate and leveraging positive spill-overs and complementary effects. In this respect, it is worth noting that the inter-ministerial Investment Promotion Committee established in 2019 has created a dedicated task force (No. 3) to address infrastructure issues (see Chapter 3 for more information on the IPC).

Since the lifting of economic sanctions, Myanmar has drastically expanded its trade, with exports and imports growing by 82% and 362%, respectively, between 2010 and 2017 (Central Statistics Office Myanmar 2019). The country's large and growing population fuels demand for imports while abundant labour and natural resources provide a fertile supply for its exports. Its geographic position also benefits overall trade, strategically located between some of the world's fastest growing economies: India, China and ASEAN countries. Infrastructure connectivity and expansion of logistics networks are therefore indispensable to Myanmar's sustained economic growth through greater integration into the world economy and to rising living standards of urban and rural populations.

Current infrastructure connectivity in Myanmar is still underdeveloped and fails to keep pace with pressing demands. With just over a third of its roads paved and port capacity limited, quality of hard infrastructure can be considered poor within the region (ADB, 2014). A high concentration of transport on roads and lack of multimodality infrastructure contribute to relatively high transport costs (ADB, 2016b). Overall Myanmar's

logistics performance is said to significantly lag behind the performance of its regional peers, especially with regards to trade-related infrastructure (World Bank, 2014). Limited transparency and predictability in border procedures further add to the cost of doing business in the country by making it more burdensome to move goods across the border (OECD, 2018). Stakeholders consulted during this review also complained about the presence of various formal and informal toll gates across important routes, such as along the major road from Yangon to Hpa-An (part of the East-West Economic Corridor), adding further costs and delays to transport.

There is a dire need for domestic connectivity to be improved through increasing transport investment from the current level of 1%-1.5% GDP. In comparison, China, Thailand and Viet Nam spend over 4% of their respective GDP on transport. The ADB (2016a) advocates that Myanmar should also aim to increase its transport investments to 3–4% of its GDP annually, through increasing user fees in line with operational expenses, nudging SOEs to reach financial sustainability and actively involving private sector participation through concessions and PPPs.

Infrastructure investment planning and delivery would need a real boost to enable more efficient expenditure on infrastructure. Transport infrastructure governance would generally benefit from the consistent use of proper feasibility studies, stakeholder consultation and project appraisal frameworks, taking into account any potentially negative social and environmental externality up-front, as well as from the introduction of long-term transport investment programmes and better monitoring and reporting (ADB, 2016a). More efficient planning and delivery, such as strengthening governance in project selection, delivery and maintenance, can help to significantly save in infrastructure spending (McKinsey, 2016).¹ In doing so, the government should give particular attention to modernising the use of its road assets, by improving efficiency, such as allowing trucks on the Yangon-Mandalay expressway or increasing its legal axle loading, as well as by improving main trade corridors, such as the Greater Mekong Subregion North Road corridor to China and the GMS East-West Road corridor to Thailand (ADB, 2016b).

Trade facilitation also remains weak within the region and will need to be strengthened. Myanmar can better facilitate trade through introducing the possibility to request advance rulings about the customs treatment of goods prior to their importation and reducing formalities at the border, in particular promoting automated processing for customs across all major border points, reducing the number of documents required for trade, and simplifying procedures in terms of associated time (OECD, 2018).

The government is, nonetheless, stepping up efforts to tackle these connectivity deficiencies. It has established overarching goals and strategies in the MSDP and in the new National Logistics Master Plan 2018-2030 (NLMP). In 2019, it passed the regulation which will permit investments in much needed bonded warehouses. The government has also introduced a project bank of prioritised public investments which will facilitate co-ordination of donor support and the participation of the private sector. At the moment, Myanmar is already benefiting from support from the Asian Development Bank and JICA for the improvement of the main corridors. Their support is needed to scale up and upgrade existing transport connectivity infrastructure and, consequently, for attracting export-oriented investments that can better spur linkages with the domestic economy.

Main policy recommendations

- Increase investments in transport and logistics infrastructure: raise additional funding through adjusting user fees in line with operational expenses where affordability assessment allows, addressing the financial health of state-owned infrastructure companies and encouraging private sector participation.
- Further improve infrastructure investment planning and delivery, through strengthened feasibility and appraisal frameworks, taking into account potentially negative social and environmental externalities up-front, stakeholder consultations, long-term infrastructure programmes and appropriate monitoring of projects.
- Modernise the existing infrastructure assets, with particular focus on the main trade corridors, such as the Greater Mekong Sub-region North Road corridor to China and the GMS East-West Road corridor to Thailand.
- Make a more efficient use of existing infrastructure assets, for instance, by allowing trucks on the Yangon-Mandalay expressway or increasing its legal axle loading.
- Strengthen trade facilitation and other soft infrastructure, through reducing formalities and upgrading trade supporting facilities.

Myanmar's trade structure and potential for export-oriented investment development

A strategic position within a buoyant region yet to be exploited more extensively

Myanmar is bordered by China, India, Thailand, Bangladesh and Lao PDR, which together represent a fifth of global GDP and 40% of the world's population (IMF-WEO, 2019). Given its central location, Myanmar can act as a lifeline between South and Southeast Asia and China. Historically, the majority of Myanmar's overall trade has been with these neighbouring countries, with China accounting for the largest share, but in recent years, the European Union has also increased its share to 5% of total trade in 2017, primarily driven by Myanmar's preferential access to the EU market (Table 5.1).

Table 5.1. Myanmar regional trade: Exports and imports (USD millions)

	2012	2013	2014	2015	2016	2017
India	1 320	1 637	1 341	1 712	1 943	1 469
(% Total)	7%	7%	5%	6%	7%	4%
China	4 958	7 016	9 696	10 993	10 805	11 785
(% Total)	27%	28%	33%	40%	37%	35%
ASEAN	8 411	11 055	12 610	10 432	9 618	11 802
(% Total)	47%	44%	43%	38%	33%	35%
Region Total	14 690	19 709	23 649	23 137	22 366	25 057
(% Total)	81%	79%	81%	83%	77%	75%

Source: Central Statistics Office, 2019.

Despite its strategic position and ample endowments, Myanmar's trade with the region still represents a fraction of overall intra-regional trade, with exports as a percentage of GDP at 20% and imports at 28% (WITS, 2019). After years of economic isolation, it is not a surprising that the level of trade integration

remains depressed and by a considerable margin. An early estimation indicated Myanmar's trade level in the 2006-10 period to be about 15% of its innate predicted potential, *i.e.* in terms of the ratio of actual to gravity-predicted exports (ADB 2013), although this may change rather rapidly in the near term. Imports of consumer goods have been rising rapidly and investments into labour-intensive export-oriented industries, such as garments, have also intensified in recent years. The pace of adjustment will, nonetheless, depend also on how some policy factors evolve. Improvements to Myanmar's trade-related infrastructure, especially of road transport and at international gateways, is certainly among those key factors that would allow Myanmar to catch up with its trade potential more rapidly.

Raw materials still dominate exports, but rising potential is observed in labour-intensive manufacturing and agribusiness

Myanmar's current bilateral trade relationships are concentrated in its region, with neighbouring countries accounting for over 60% of its exports and nearly half of its imports (Table 5.2 and Table 5.3). China, in particular, accounts for over a third of total trade. With strong economic growth in the region, Myanmar's trade relationships with its neighbours are deemed to naturally increase, but if accompanied with appropriate policies, they can be further strengthened and more broadly diversified, notably as Myanmar's trade complementarity with key trading partners is increasing (World Bank, 2016).

In addition, with connectivity expected to improve under the Belt and Road Initiative (BRI), trade volume for the China-India or Thailand route will likely continue growing and there is significant space for Myanmar to facilitate the trade flow. Not only may Myanmar benefit from the potential of increasing its own exports to satisfy the growing demand in the region, it may also act as the main corridor between Southeast Asia and South Asia, strengthening its intermediary trading role between India, China and Thailand (Ras, 2016). Under appropriate arrangements with its neighbours, for instance by negotiating their support to key infrastructure projects and projects that would mitigate potential negative externalities, both sides can benefit from transiting trade through Myanmar.

Table 5.2. Myanmar top 5 export partners in 2017 (USD millions)

Market	Exports	Share (%)
China	5 699	38%
Thailand	2 846	19%
Japan	956	6%
Singapore	754	5%
India	608	4%

Source: Central Statistics Office, 2019.

Table 5.3. Myanmar top 5 import partners in 2017 (USD millions)

Market	Imports	Share (%)
China	6 087	33%
Singapore	3 085	17%
Thailand	2 229	12%
Japan	967	5%
Malaysia	867	5%

Source: Central Statistics Office, 2019

Myanmar's main traded products are fuels, exporting natural gas and importing oil, and a variety of agricultural products, notably rice, beans, maize and fish products (Table 5.4). Myanmar is currently the world second largest exporter of beans and among the top 15 largest exporters of rice. The agricultural sector, which currently employs about 70% of the total labour force and generates about 30% of its GDP, has a strong potential to play a bigger role in exports and in furthering agribusiness downstream potential with an improved infrastructure system for rural-urban transport (ADB, 2018). Rising living standards in neighbouring countries, as well as their upward move on agricultural value chains, could propel further demand for agricultural products from Myanmar.

Table 5.4. Myanmar top 5 trade products in 2017 (USD million)

Gross Exports	Value	Gross Imports	Value
Natural Gas	2 987	Oil	3 381
Rice	813	Sugar	833
Beans	747	Trucks	729
Copper	490	Vegetable fats/oils	512
Sugar	420	Fabrics	472

Source: World Bank World Integrated Trade Solution, 2019.

While neighbouring China dominates trade with Myanmar, the concentration of export partners varies significantly across commodities: agricultural products, such as beans and seafood products, are exported to a diversified trade partners, while gas goes solely to China and Thailand (Table 5.5).

Table 5.5. Myanmar principal commodity exports by destination in 2017 (mt)

Commodity	Bangladesh	China	India	Japan	Singapore	Thailand
Rice (Incl. Brown Rice)	0.5	94.7			1.0	
Maize		55.6				0.1
Beans and seed	0.8	23.8	65.8	2.3	11.6	0.8
Seafood products	1.2	3.2	0.1	0.6	1.8	4.8
Base metal and ores		14.5			0.5	1.8
Gas (mil.cu.ft)		27 679.6				32 568.9

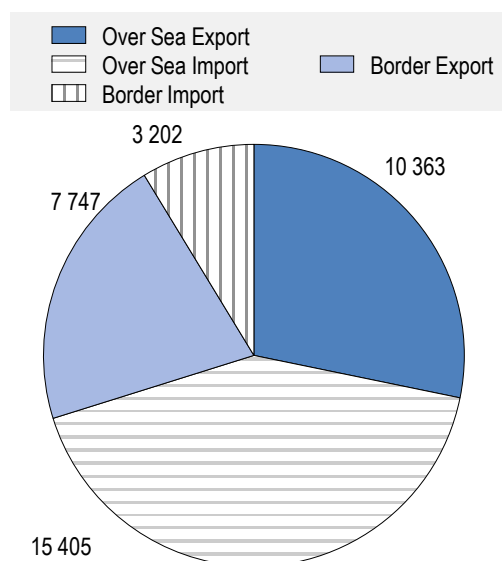
Source: Central Statistics Office Myanmar 2019.

Yangon International Port is the main international gateway, but border checkpoints with Thailand and China channel over half of agricultural exports

Over half of Myanmar's exports and over three-quarters of its imports currently run through its ports according to official statistics, excluding oil and gas transported by pipeline (Figure 5.1). Yangon International Port is the most important of the nine existing ports and almost the only one handling international trade. The port has been holding on to its position as the main international gateway for imports overtime, but the share of exports being channelled through the port has consistently declined since Myanmar's economic and political transition.

Most of the minerals and almost all forest products continued to be exported through its ports, whereas roughly 60% of crops exports and the vast majority of its marine exports take place over land gateways, notably with China and Thailand. For China much of the border trade (over 80%) is concentrated in the town of Muse, in northern Shan State of Myanmar, which borders Yunnan province in China. Border trade with Thailand is typically carried out through Myawaddy and Nabulae border checkpoints (Table 5.6).

Figure 5.1. Myanmar trade over sea vs border, 2019 (USD million)



Note: Excluding pipeline trade.

Source: Ministry of Commerce of Myanmar, Customs Department, 2019.

Table 5.6. Myanmar border trade by border stations (USD million)

Country	Border Station	Opening Year	2018-19		
			Export	Import	Total
China	Muse	1998	3 156	1 762	4 918
	Lwejel	1998	123	22	145
	Chin Shwehaw	2003	460	81	542
	Kanpitete	2009	264	32	296
	Kyaing Tong	NA	7	2	9
Thailand	Tarchileik	1996	20	78	98
	Myawaddy	1998	211	758	970
	Kawthaung	1996	175	39	214
	Myeik	1999	121	118	240
	Nabulae	2012	2 468	144	2 612
	Mawtaung	NA	12	7	19
	Mese	NA	1	0	1
Bangladesh	Sittwe	1998	13	1	14
	Maung Daw	1995	9	0	9
India	Tamu	2005	95	1	97
	Rhi	2003	82	22	105

Source: Ministry of Commerce of Myanmar, Customs Department, 2019.

Transport connectivity weaknesses in the main economic corridors and international gateways

The National Logistics Master Plan 2018-2030 has identified six main logistics corridors forecasted to handle about 312m tonnes of cargo by 2030 or a 1.8 times increase from the estimated 2015-base year level (169m tonnes) (Table 5.7). This represents an expected annual growth rate of 4.2%. Containerised and international trade cargo are expected to increase even more, about 3.4 times from around 1.5 million twenty-foot equivalent unit (TEUs) to 5.1 TEUs. The bulk of the freight transport demand is expected to remain within the North-South axis which links the two main economic and industrial centres (Yangon – Mandalay). According to data shared by the authorities, the corridor is the main link for ten out of 19 industrial zones currently in operation and representing about three-quarters of the total number of firms located inside industrial zones and about 95% of the labour employed in the zones. The government plan is also to upgrade and develop new links for international trade that will enhance connectivity of Yangon or Bago with cross-border facilities along the Chinese, Indian and Thai borders (JICA *et al.*, 2018).

In support of the plan, the government has identified a total of 189 projects to be implemented up to 2030 (167 hard infrastructure and 22 soft infrastructure projects) on the basis of their capacity to strengthen regional and domestic connectivity (with neighbouring countries and between growth centres and rural areas in Myanmar), their economic benefit in terms of savings on transport costs (e.g. higher speeds and load factor, shortened dwell times and savings by shifting to more efficient transport modes), and lastly their capacity to sustain a more equitable development throughout the territory. The total development cost of these projects is estimated at MMK 41 trillion or USD 30 billion, of which about 30% is expected to be implemented with private support (JICA *et al.*, 2018).

Top priority projects are expected to be implemented in an initial stage by 2020, and the effective execution of these projects will set the tone for Myanmar's ability to implement future infrastructure projects. The upgrade of the USD 3 billion, 620 km Yangon-Mandalay rail line, one of the major links in the logistics plan, for instance, began in late 2018 and is expected to reduce the travel time between the country's two largest commercial cities from 12 to 8 hours (Oxford Business Group 2019).

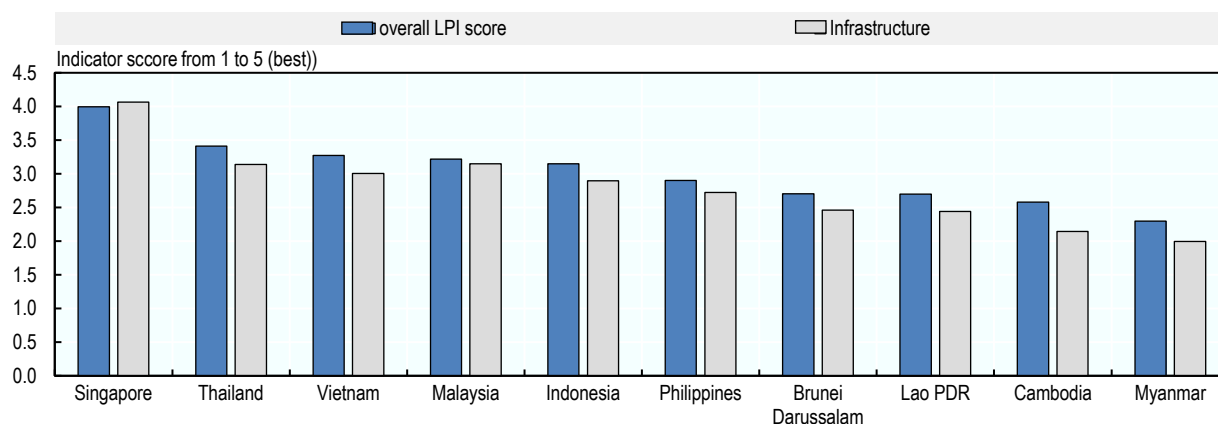
Table 5.7. Myanmar national logistics master plan 2018-2030: Main corridors

Logistic Corridor Name	Main Links / Terminal	Approx. length (km)	Annual Cargo Volume, 2015 ('000 tonnes)	Projected Annual Cargo Transport Volume ('000 Tonnes per Year in 2030)				Population influenced ('000)
				Total	Road	Railway	Waterway	
1) Myanmar-India	Mandalay – Tamu / Monywa	400	3 800	12 400	4 400		8 000	8 300
2) North-South	Yangon – Bago – Mandalay – Muse	990	41 100	172 800	127 200	45 600		11 600
3) South-East	Dawei – Thanbyuzayat – Mawlamyaing – Myawaddy / Bago	290	31 200	143 500	113 100	30 400		4 500
4) Main River	Yangon – Mandalay	1 230	7 700	19 600			19 600	9 000
5) Trans-Myanmar	Kyauphyu – Magway – Mon Lah	960	9 400	14 900	14 900			3 900
6) Coastal route	Sittwe – Yangon	1 885	4 200	12 000			12 000	5 000

Source: JICA *et al.* (2018).

Without entering into a discussion of the appropriateness and viability of the plan and selected projects, few would disagree with the NLMP's general diagnostic: Myanmar needs a real boost to its infrastructure connectivity network. Overall, Myanmar's logistic performance remains below that of its regional peers, and notably so in terms of its infrastructure (Figure 5.2).

Figure 5.2. The World Bank’s 2018 Logistics Performance Index: ASEAN comparison



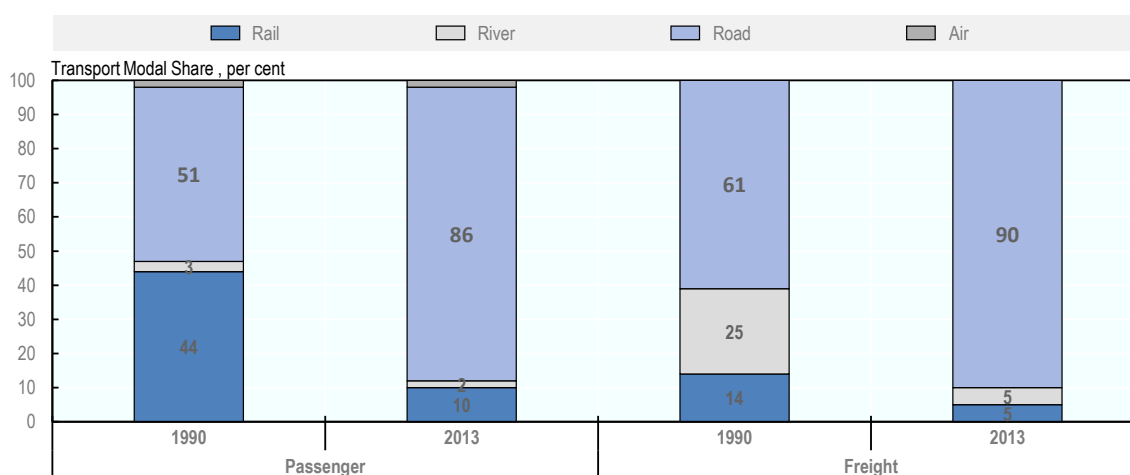
Note: The LPI is based on a worldwide survey of operators on the ground (global freight forwarders and express carriers), providing feedback on the logistics “friendliness” of the countries in which they operate and those with which they trade. It measures performance along six dimensions of the logistics supply chain, including: 1) Efficiency of the clearance process (i.e., speed, simplicity and predictability of formalities) by border control agencies, including customs; 2) Quality of trade and transport related infrastructure (e.g., ports, railroads, roads, information technology); 3) Ease of arranging competitively priced shipments; 4) Competence and quality of logistics services (e.g., transport operators, customs brokers); 5) Ability to track and trace consignments; 6) Timeliness of shipments in reaching destination within the scheduled or expected delivery time.

Source: World Bank Logistics Performance Index.

Quality of hard infrastructure

Road transport largely dominates passenger and freight movements, with some estimates indicating that cars and buses move about 85% of people over long distances, and that trucks are used in around 90% of Myanmar’s inland freight transport needs (Figure 5.3). Such a concentration of movement through the road network is to a great extent explained by the lack of multimodal facilities and the deteriorated conditions of competing infrastructures.

Figure 5.3. Trends in long-distance transport by mode, 1990-2013



Note: Long-distance refers to movements above 100km.

Source: ADB (2016b).

Myanmar has a total road network of about 157 000km, of which only about 20% is paved, despite recent government efforts which increased paved highways by 35% in the last 4 years (ADB, 2016d). The rate rises to 53% when considering only the trunk road network, which spans over 40 000km approximately; but about 42% of the paved trunk road network is in poor to very bad condition and around two-thirds of it is considered too narrow (12ft wide), much below Asian Class III highway standards (22ft in width). Besides safety issues, this typically slows down traffic even on relatively low traffic volume routes. While congestion is not particularly high, such poor conditions lead to slow vehicle speeds, typically 30km per hour (kph) for a truck and 40kph for a bus, and put cargo at greater risks of damage during transport (ADB 2016b). Stakeholders consulted during this review also reported that in some cases the speed problem is compounded by various formal and informal toll gates across important routes, such as along the major road from Yangon to Hpa-An, which is part of the East-West Economic Corridor.

Such difficult road network conditions are an impediment to developing Myanmar's agriculture and export-oriented manufacturing sectors as sought in the MSDP. To date, many farmers still remain deprived of adequate farm-to-market transport infrastructure, contributing to pressures on both cost and revenue sides. ADB (2016c) reports that 70% of all villages in Myanmar do not have all-season road access, which affects a population of around 20 million people. The share of the rural population living within 2km of an all-season road, an international measure of rural accessibility, is estimated at only 36%. Animal power or tractors are still often used for villages with no motor rail, resulting in high freight transport cost of USD 2-10-per ton-km (ADB, 2016c).

These weaknesses are not a peripheral challenge as they also affect the backbone of Myanmar's transport system: the main economic corridor between Yangon–Mandalay and the main trading routes with China and Thailand (Table 5.8). The Yangon–Mandalay corridor, which accounts for about 60% of all transport in Myanmar, is in relatively better shape, particularly for passengers that can use the expressway. But trucks need to travel along the parallel highway, which is in much poorer conditions; average vehicle speed is about 24kph on the highway (ADB, 2016b).

Table 5.8. Conditions in Myanmar's backbone freight transport corridors

	Distance (km)	Average Travel Time (hour)	Average Commercial Speed (kph)	Average Payload (ton)	Share of freight by 4-axle & Trailer Trucks (%)	Average payload of 4-axle & Trailer Trucks (ton)
Yangon-Mandalay	710.0	29.4	24.1	18.2	80.0	22.8
Mandalay-Muse (border with China)	450.0	24.0	19.4	24.2	73.0	27.0
Yangon-Myawaddy (border with Thailand)	450.0	25.6	17.8	13.9	-	-

Source: ADB, 2016b and 2016d; author calculations.

The Northern Road corridor linking Mandalay to Muse (border with China), through which about 17% of all freight in Myanmar is carried and which is the gateway for 70–90% of its official border trade, has various sections in extremely poor condition despite being a paved a road. This heavily constrains vehicle speeds to about 20kph on average. The East–West Road corridor to Thailand, which is the shortest and main trading route from Yangon to Thailand (Myawaddy border) channelling 10–30% of total official border trades, is ill-dimensioned in some sections (single lane with alternate circulation) and in generally poor condition. Likewise, average vehicle speed is low at 20kph.

Efforts are underway to improve the corridor with the support of the government of Thailand and other donors (ADB, 2016b). Freight traffic is expected to continue growing rather rapidly along this route. The alternative sea route from Yangon to Bangkok takes about 21 days (about 67% of imports and 12% exports rely on the sea route), against 3.5 days through the Myawaddy border station (JICA *et al.*, 2018b). The time required is expected to be shortened further with the recent completion of the second friendship bridge

in early 2019, which allow trucks with 40-foot containers to go through, once upgrade and rehabilitation projects of the road network between Yangon and Miywaddy are finalised.

Myanmar's port and inland water transport systems also face significant limitations. The most important international gateway, handling the large majority of Myanmar's seaborne trade (above 80%), is the Yangon river port complex, which comprises both Yangon's main port and Thilawa port, located next to the Thilawa Special Economic Zone (SEZ). These are the only container handling ports in Myanmar, which are largely destined to industrial zones in the west bank area of the Yangon River (e.g. Hlaing industrial area) (JICA *et al.*, 2014). The Yangon ports have limited accessibility, being only able to serve vessels up to 15 000–20 000 deadweight and 167–200 meters long, respectively, preventing larger vessels to call at the ports, but dredging works are underway to increase up to 35 000 deadweight vessel capacity. At present, regular dredging is needed to secure access to the port, notably in the dry season (Nederland Maritiem Land 2016).

Partly due to this condition, the Yangon port is mainly served by feeder container transshipment vessels linking it with Singapore or Port Kelang of Malaysia. As container traffic volume continues to increase – between 2010 and 2017, total container handling has tripled to over one million TEUs in the Yangon port (MPA, 2019) – it will put additional strain in the current system. There is little scope to add capacity at the main port given its proximity to the city, limiting possible increases to operational efficiency gains. More sustained capacity increases can only come from the expansion of container terminals at the Thilawa Port area. Efforts are underway in this respect: a new terminal is planned for 2025, but JICA *et al.* (2019) estimates that a capacity shortage is already expected by 2023 based on a middle-case demand forecast scenario. Even after completion of planned container terminal development projects, a new deep-sea port would have to be developed at a brand new location to cover capacity recurring shortages expected in 2030.

The other eight major coastal ports essentially handle general cargo for the domestic market. But despite the theoretical potential of coastal and inland water transport (IWT) for the movement of low-value and bulky cargoes, their use has declined substantially over time. The absence of terminal facilities (most ports are only landing beaches, with loading and discharging being carried by labour) and limited river navigation capacity during the dry season *inter alia* leads to long turnaround times at ports and lower vessel utilisation rates. As such, coastal and river shipping have lost competitiveness even in bulk markets (e.g. construction materials, sand, stone and ore) where they typically hold a comparative advantage (JICA *et al.*, 2019). Their share of total long-distance transport fell from 3.5% to 1.5% for passengers and from 22% to 3.5% for freight over 1990–2013 (ADB, 2016d).

Lastly, Myanmar hosts the longest railway network within ASEAN, totalling about 6 000 km, but some missing links with neighbouring countries, the lack of multi-modality infrastructure, and the poor condition of existing tracks and rolling stock preclude almost entirely its use in domestic and international freight transport. At present, the network is mainly used for long-distance passenger transport by the state-owned company Myanma Railways which holds the monopoly over operation and management of the railway network. As of 2015, its market share was only 10% for passengers and 1.5% for commercial freight (ADB, 2016e).

Past investment decisions supported an unsustainable spread of the network, including to areas where demand was significantly compressed, to the detriment of needed maintenance expenditures in key network parts. As such, the situation of various lines is untenable without continuous government support (ADB, 2016e). The ADB estimates that about 60% of the network serve fewer than 1 000 passengers/day, which is assessed as too low to justify even maintaining rail services. Maintenance expenditures have also been 2–3 times below needed levels.

The consequence is the deterioration of the service offer, notably against alternative transport modalities. In the Yangon-Mandalay line, for instance, where demand is the largest, average train speed is 40kph, taking about 16 hours to complete the trip against 8–9 hours by buses. Average train speeds on other lines are even lower at 20–30kph. Overall, trains are said to operate at 50% of their potential speed. To

compensate, Myanma Railways offers rates which are 40% cheaper on average than bus rates or about half the cost of truck rates in the case of freight, but revenues cover only about half of operational costs and the company survives on the basis of government subsidies. The situation for freight is less troublesome as related revenues are able to cover service running costs, albeit not all infrastructure depreciation and capital costs (ADB, 2016e).

Quality of trade-supporting infrastructure

While road transport has become the dominant mode of freight traffic in Myanmar, there is potential for alternative modes to gain market share and contribute to more efficient logistics systems across the various production value chains. For this, investments in the rehabilitation and upgrading of existing infrastructure networks need to be coupled with the development of adequate multimodal facilities.

Despite the Multimodal Transport Law issued in 2014, multimodal infrastructure is still in its infancy. The first dry ports opened in Yangon only in late 2018 (Myanmar Times 2018). Nevertheless, multimodal infrastructure is expected to be strengthened over the next decade under the National Logistics Master Plan 2018-2030. The establishment of various multimodal freight logistics hubs is foreseen at strategic nodes along the main logistics corridors. They are expected to provide various logistics services (e.g. warehouses, freight station, cargo terminals, inland container terminals, customs office etc.). The development of these hubs may help to alleviate some of the pressure arising from limited or inadequate logistics facilities, such as warehousing, cold storage facilities and mechanically equipped domestic truck terminals (JICA *et al.*, 2018).

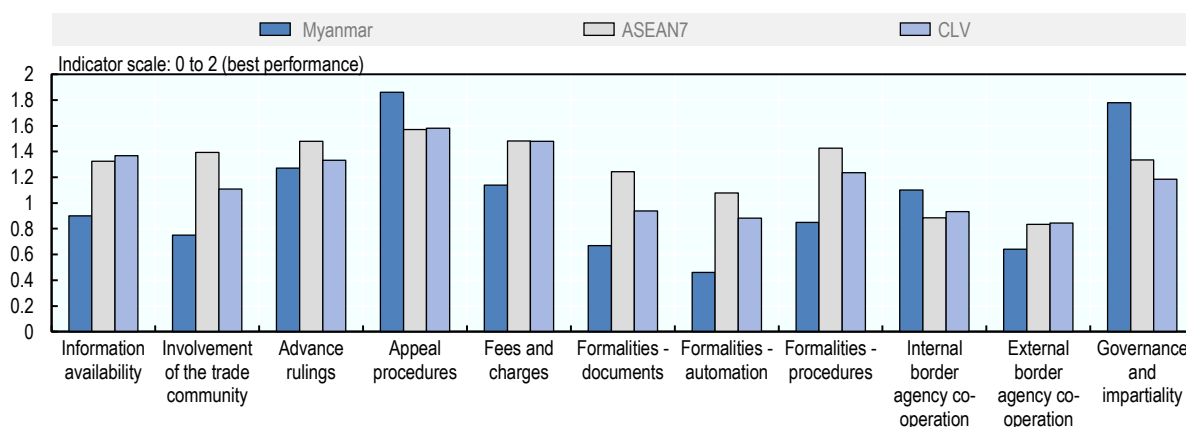
Better support facilities at the borders and port gateways are likewise needed. Bonded container transport and warehousing is yet to be developed, except in the Thilawa SEZ where it exists already, although this may change soon with the passing of the regulation on bonded warehousing in 2019. Hence, cargoes need to go through customs clearance at the port or at the border checkpoints. Cargo trans-loading is necessary but the capacity to handle cargo at border checkpoints is generally insufficient, thereby extending the cargo dwell time and increasing transport costs. Cargo trans-loading is typically carried by manual labour as seamless container transport is limited (JICA *et al.*, 2018).

Quality of soft infrastructure

Seamless trade infrastructure is yet to be fully deployed in Myanmar. The agribusiness sector is particularly affected because it is highly sensitive to delays. Myanmar's attempt to attract investment in light manufacturing activities associated with high-tech global value chains is equally undermined for the same reason.

Some progress has been made with the simplification of needed documents and procedures over the past few years, but still remains weak compared with its ASEAN peers, excluding Singapore and Brunei Darussalam, as well as against the group of less developed ASEAN economies, namely Cambodia, Lao PDR and Viet Nam (Figure 5.4). Evidence suggests that reforms simplifying and streamlining formalities, enhancing information availability and improving the governance of trade-associated institutions and processes typically bear significant fruits for countries at income levels of Myanmar (OECD, 2018). As such, the government may consider stepping up efforts to advance with reforms in these areas, as there is still considerable room for Myanmar to align with better practices observed across its regional and income peers. This will contribute to significantly reducing trade costs, allowing more firms to engage in international trading, particularly small-and-medium sized firms for which costs are generally disproportionate.

Figure 5.4. OECD 2017 Trade facilitation indicators



Note: The eleven TFIs take values from 0 to 2, where 2 designates the best performance that can be achieved. The variables in the TFI dataset are coded with 0, 1, or 2. These seek to reflect not only the regulatory framework in the concerned countries, but delve, to the extent possible, into the state of implementation of various trade facilitation measures. ASEAN7 includes: Cambodia, Indonesia, Lao PDR, Malaysia, Philippines, Thailand and Viet Nam. CLV includes Cambodia, Lao PDR and Viet Nam.

Source: OECD Trade Facilitation Indicators, <http://www.oecd.org/trade/topics/trade-facilitation/>.

The government is pursuing the implementation of a National Single Window system that will link with the ASEAN Single Window, but this is not yet operational. E-clearance systems have been deployed at Yangon's port and airport, as well as at the Thilawa SEZ, but not fully at border checkpoints (only at Myawaddy station). Risk-based inspections and advance ruling systems have been introduced and integrated into the e-system, although there is still room for improving their performance. An Authorised Economic Operator programme has been established, which will facilitate customs processing for those operators with a good compliance track record. Ports efficiency has been improved with the adoption of an e-system allowing the exchange of key information for port entry declaration and clearance and other documentation related to cargo handling and storage at the port. Nonetheless, customs clearance at ports, airports and cross-border points still takes much time to complete (7 days at the port)(JICA et al., 2018a,b, 2019).

Myanmar is party to the GMS Cross-Border Transport Agreement since it was ratified in 2011. The agreement is designed to support faster border crossing and eliminate costly and time-consuming transshipment requirements but implementation has been limited. Myanmar entered into a MoU with Thailand only in 2019 to operationalise the agreement, allowing 100 vehicles to transport goods across the border on specific routes. Thai operators can only transit to the Thilawa SEZ, where they will be subject to customs procedures (Bangkok Post 2019). All other cross-border transport will continue to be subject to border trans-loading. Single inspection systems are also missing, requiring cargo to go through inspection twice on each side of the border, and customs systems across borders do not communicate with each other to facilitate the sharing of information.

Further streamlining is also needed with regard to import and export licences. Currently, over 4 500 items (by HS code) require import licences by the Ministry of Commerce under Myanmar's Import Negative List (MoC Notification No. 22/2019) and all but 1000 items require export licences. Procedures for obtaining licences remains generally complex, notwithstanding recent improvements such as the possibility of online applications in the case of a few hundred items. For most others, however, applicants need to obtain prior recommendation by the relevant line ministry before applying with the MoC.

Another important issue that merits government-wide attention is quality control and standards. The continued development and integration of Myanmar firms into regional and global value chains can only

be sustained if producers are capable of meeting export market standards and technical specifications. At present, this seems a challenge for most export-oriented production in Myanmar, including in top export product markets (e.g. rice) (World Bank, 2016). Efforts to strengthen the national quality standards and control systems and enhance their alignment with standards and regulations of export markets are complementary and would benefit from an integrated approach with export and investment promotion strategies. The government and industry associations have an important role to play in this respect, since they can actively contribute to reducing information failures and building industry capacity to meet international requirements.

Quality of the logistics industry

The freight transport and logistics services industry in Myanmar also needs to be improved in order to support growing trade demand. The government may consider strengthening the promotion of investments in the sector for the purpose of facilitating capacity expansion and supporting auxiliary logistics services development.

Recent evidence suggests that some modernisation is already taking place. In road freight transport, for instance, the ADB (2016b) reports a significant expansion and renewal of the trucking fleet since the government removed constraints on imports of trucks in 2011. The lower operating costs of the newer larger-sized truck fleets have helped to bring down freight rates in the main corridors. Fleet replacement is not a reality for other transport mode operators however. Myanmar Railway's rolling stock is still dominated by relatively old locomotives, which consume around twice as much fuel as more modern ones. Similarly, Myanmar's current vessel fleet is also aging and small: average 28 years and 3 716 gross tonnages in size (Nederland Maritiem Land, 2016).

The use of modern logistics services and managerial practices is also limited in most areas, often resulting in inefficient asset utilisation and lower profitability. Average cargo load factors, for instance, are generally low across transport modes, sometimes even in some key routes, e.g. in the road links with Thailand where levels of trucks running empty backhaul trips reaches 25-50%. Even in routes where average load factors are relatively high (e.g. Yangon-Mandalay), return cargo arrangements are not secured in advance. JICA *et al.* (2018) estimate that only 10% of return cargoes are arranged by agents. Most cargo owners arrange return cargos by themselves after departure. Limited cargo handling capacity at terminals add to this problem. As such, dwell times at truck terminals are generally high at around 37 hours in Yangon-Mandalay, about half of the truck turnaround time, both of which are considerably high for a 650km route. Further market development for freight agents and logistics services providers, as well as the development of cargo-truck matching services, should help to improve the situation (JICA *et al.*, 2018).

Investments into transport infrastructure: more resources and efficiency needed

The MSDP sets the national development vision for 2018-2030. Under the MSDP, the government aims to move from project selection based on budgetary constraints to effective selection, prioritisation and implementation of projects with a focus on development sustainability and harmonious co-ordination. The MSDP is structured around three pillars, peace and stability, prosperity and partnership, and people and planet, under which there are 28 strategies and 251 action plans. Line ministries are required to develop their respective plans and strategies in alignment with the MSDP. The Ministry of Transport and Communications has established the National Logistics Master Plan 2018-2030 to improve long-term logistics capacity and support the achievement of the goals under the MSDP.

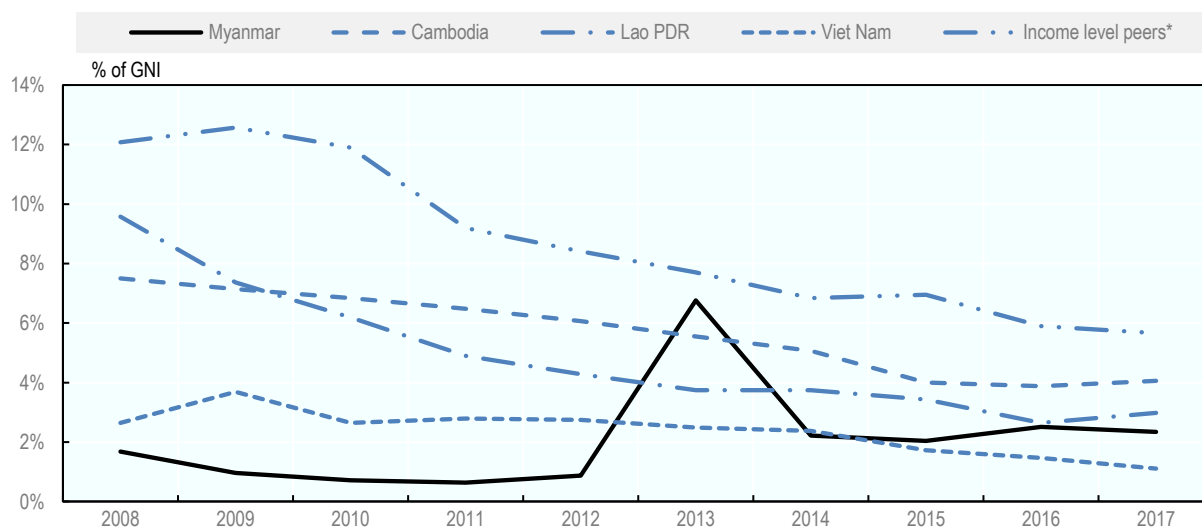
Official development assistance will play an increasing role in infrastructure financing

The large scale investment programme envisaged under the National Logistics Master Plan will require a large mobilisation of resources. A few recent reports suggest that Myanmar has spent and continues to spend much less than needed to improve general public services and transport infrastructure connectivity more specifically. The World Bank (2017) estimates that general government spending at 15% of GDP in 2017 is low given needs, and is well below the rate of 20% of GDP observed in other countries at a similar level of development. In transport infrastructure, estimates suggest a more acute situation. Annual investments needed to scale up and upgrade infrastructure in line with growth prospects are estimated at 3-4% of GDP, but spending over the past decade has amounted to only 1-1.5% of GDP on average. Again, other countries at similar development stage typically invest 3-5% of their GDP in transport infrastructure (ADB, 2016a).

Scaling up investments in transport infrastructure may prove to be a rather long-term endeavour. The fiscal space to raise capital expenditures in a financially sustainable manner is somewhat constrained by structural and capacity limitations: dependency on commodity receipts and exposure to natural disasters, current narrow production base and reliance on hard-to-tax sectors dominated by SMEs, and large public spending inefficiencies (World Bank, 2017). Limited domestic financing options further add to this. Efforts are underway to develop the domestic debt market – the government has expanded Treasury bill and bond auctions since 2016 – but these are still at early stages and are unlikely to become a major source of financing for long-term capital expenditures needed in the near term.

Most of the financing will, therefore, need to come from improved efficiency in public spending and increased donor support, besides any possible increase in revenue collection. Despite a significant increase since 2011, Myanmar still receives relatively little official development assistance (ODA) in comparison to other countries at comparable income levels and relative to some of its regional peers (Figure 5.5).

Figure 5.5. Net ODA (% of GNI): Myanmar and selected peers, 2008-2017



Note: Net official development assistance (ODA) consists of disbursements of grants or loans at concessional terms (net of principal repayments) by official donor country agencies and multilateral institutions for the promotion of economic development and welfare in the recipient economy. (*) Income level peers refers to a group of up to 37 countries whose GNI per capita was between half and 1.5 times the Myanmar's level.

Source: OECD Development Finance Statistics.

A Project Bank to facilitate the co-ordination and transparent implementation of prioritised projects

An important step to further tap into development finance resources will be the implementation of the online Project Bank announced in early 2019. If properly developed, this can be a valuable tool to further the mobilisation and efficient channelling of additional resources into priority projects. This would complement the earlier efforts to strengthen co-ordination in the country through the Development Assistance Coordination Unit.

The Project Bank brings an element of consistency and planning to projects. It will facilitate the co-ordination between ministries and the prioritisation of project proposals in line with the MSDP. Projects will be appraised, selected and prioritised before entering the bank, and their financing strategies will likewise be assessed beforehand. The centralised database will further include technical specifications, contract type and other information necessary for transactions with potential investors. Projects identified to be developed under public-private partnerships (PPP)-like schemes will be subject to competitive tendering (including unsolicited proposals) and any government support (e.g. viability gap funds and guarantees) and their modalities would be registered. It is also expected to be used for the monitoring of projects throughout their lifecycle (VDB-Loi, 2019).

Project selection and prioritisation needs to improve to achieve better value-for-money in public infrastructure spending

On the public spending side, there is plenty of room to improve efficiency going forward, including by enhancing value-for-money appraisal frameworks and reallocating expenditures to priority areas across and within sectors and improving the governance of state economic enterprises (SEEs) and (World Bank, 2017; ADB, 2016b). Budget reallocations across sectors, which is typically a politically-charged and long-term enterprise requiring the involvement of various parts of the government and society, may be challenging in the near term. In the meantime, there is significant room to achieve greater value-for-money within-sectors.

A few of the challenges discussed in the section above are representative of the types of efficiency gains possible. Investments into the expansion of the railway network, for instance, were substantial from 2000 to 2017, allowing the network to increase by almost 30% according to the Myanmar's online Statistical Information Services. But as already mentioned above, about 60% of the network currently serves fewer than 1000 passengers per day, a level assessed to be too low to justify maintaining rail services (ADB (2016a)). At the same time, average speeds are very low even on the high-demand routes. A similar situation is observed in the road network. The ADB (2016d) reports that only 5 000km of roads have traffic above 1 000 vehicles per day, and almost 74% of the trunk network – including 50% of the paved roads – have traffic below 200 vehicles per day, which is often seen by practitioners as the minimum threshold for justifying paving a road.

There may have been cases where such investments were appropriate, but such orders of magnitude point to potential weaknesses in past decision-making frameworks. Some investments seem not commensurate with their financial and economic viability, having likely occurred at the cost of other needed investments, such as for the maintenance of the existing network and fleet renewal for instance. All of this may also have contributed to put the related institutions and SOEs at greater financial strain.

The current and future governments will have to address these legacies. To date, project selection has been largely based on simple budget considerations as stated in the MSDP 2018-2030. The World Bank (2017) reports that projects are typically selected in an *ad hoc* manner by ministerial committees with insufficient technical appraisal and prioritisation. Some scrutiny takes place at a later stage in parliament, but these are equally not supported by thorough analysis.

The current legal setting does not require proposed projects to be formally appraised before being considered for budget; and poor institutional capacity also prevents more thorough assessments (e.g. externalities are not typically accounted for and consultation with users and affected communities are rare). To some extent, the expectation is that this will improve as the government accumulates experience in implementing the Environmental and Social Impact Assessments procedures issued back in 2016. Poor project selection and development at initial stages makes their subsequent execution more difficult, often leading to delays. This is further compounded by the lack of multi-year capital allocation, which coupled with procurement delays, gives rise to stop-and-go funding situations leading to increased costs and delays in project implementation (World Bank, 2017).

Again, the Project Bank initiative is a positive step in the direction of improving spending efficiency as it allows for greater scrutiny of projects by stakeholders and enhances transparency in decision-making. In conjunction, it is important for the government to step up efforts to improve the process of project selection, prioritisation and assessment. This is ever more important now that the government is looking to enhance private sector participation in infrastructure through Public-Private Partnerships as per the MSDP 2018-30. A sound legal and institutional framework is needed to both to effectively attract private sector interest and ensure that PPPs can deliver on value-for-money expectations. Myanmar's current PPP framework is largely incomplete (World Bank, 2018). Decision-making should fully take into account all fiscal implications of PPPs, including any possible contingent liability. The use of PPPs as a vehicle for escaping budgetary discipline by hiving financial commitments off public sector balance sheets often leads to problems.

Rehabilitating and modernising state-owned economic enterprises

The modernisation and rehabilitation of transport SEEs, such as Myanma Railways and Inland Waterway Transport, is another important point in the agenda. At present, these companies function as departments in their respective line ministries, relying on annual budget allocations for their operations, rather than as publicly-owned autonomous entities. Their corporatisation coupled with greater managerial autonomy to allow them to better focus on commercial activities would likely be beneficial to restoring their financial sustainability and diminishing their reliance on public subsidies. Their improved governance should also facilitate channelling resources in public services obligations more efficiently.

Official development aid from advanced economies that see the positive externalities for their trade and investment with Myanmar is supporting part of the gap, but to sustain the funding gap, especially for smaller, domestic infrastructure projects, private participation will be needed in the long run. According to the World Development Indicators database, private participation has been the lowest in the region and purely in the energy sector for 2000-14. Increase in the future financing for the main projects should be leveraged from private capital, in particular from Myanmar's trading partners, as the private sector may deliver projects more efficiently and in a more user-friendly manner, while allowing for technology and knowledge spillover. Indeed, Japanese firms have invested in Thilawa, while Chinese firms are offering investments for infrastructure around the China-Myanmar border.

The BRI infrastructure projects may play an important role in attracting Chinese investments to improve Myanmar's connectivity along the India-Bangladesh-Myanmar-China corridor. A steering committee for implementation of works related to BRI was established in September 2018. The committee, chaired by the State Counsellor and comprised of other ministers, is tasked with establishing the China-Myanmar economic corridor and the border economic cooperation zone. It has been recently announced that three locations were identified under an MoU for the border economic cooperation core zones (BECZ), which would, under the Investment Law and Special Economic Zone Law, have duty-free concessions and trade supporting facilities such as an export product manufacturing and import processing and warehouse, hotels and banks, although bonded warehouses and access to dry port are yet to be seen. In the BECZ, foreign investors may participate up to 35% equity (Myanmar Times 2019d).

References

- ADB (2018), *Asian Development Outlook 2018 How Technology Affects Jobs*, ADB Publication, April 2018.
- ADB (2017), *Myanmar, 2017-2021 Building the Foundations for Inclusive Growth*, ADB Country Partnership Strategy 2017.
- ADB (2016a), *Myanmar Transport Sector Policy Note How to Reform Transport Institutions*, ADB Publication, 2016.
- ADB (2016b), *Myanmar Transport Sector Policy Note How to Reduce Transport Cost*, ADB Publication, 2016.
- ADB (2016c), *Myanmar Transport Sector Policy Note Rural Roads and Access*, ADB Publication, 2016.
- ADB (2016d), *Myanmar Transport Sector Policy Note Trunk Roads*, ADB Publication, 2016.
- ADB (2016e), *Myanmar Transport Sector Policy Note: Railways*, ADB Publication, 2016.
- ADB (2014), *Myanmar Unlocking the Potential Country Diagnostic Study*, ADB Publication, August 2014.
- ADB (2013), "Myanmar's Trade and its Potential", *ADB Economics Working Paper Series*, No. 325, January 2013.
- Bana, Naresh and Yhome, K. (2017), "The Road to Mekong: the India-Myanmar-Thailand Trilateral Highway Project", *ORF Issue Brief Issue No. 171*, February 2017.
- Bangkok Post (2019), "Thai-Myanmar pact to boost cross-border transport", website section, 1 June 2019, <https://www.bangkokpost.com/business/1687344/thai-myanmar-pact-to-boost-cross-border-transport> (accessed 24 September 2019).
- Das, Ram Upendra (2016), *Enhancing India-Myanmar Border Trade Policy and Implementation Measures*, Department of Commerce Ministry of Commerce and Industry Government of India.
- Htun, K. W., N. N. Lwin, T. H. Naing and K. Tun (2011), "ASEAN-India Connectivity: A Myanmar Perspective", in Kimura, F. and S. Umezaki (eds.), *ASEAN-India Connectivity: The Comprehensive Asia Development Plan*, Phase II, ERIA Research Project Report 2010-7, Jakarta: ERIA, pp.151-203.
- JICA et al. (2019), *The Data Collection Survey for the Development of Yangon Port in Republic of the Union of Myanmar: Final Report*, February.
- JICA et al. (2018), *Data collection survey on national logistics in the republic of the union of Myanmar: final report*, volume 1: main text, March.
- JICA et al. (2014), *The Survey Program for the National Transport Development Plan in the Republic of the Union of Myanmar: Final Report*, September.
- Ling, Yaw Zar (2017), *An Analysis of the Effect of Border Trade Value on Myanmar Economic Growth*, 11th Asia-Pacific Conference on Global Business, Economics, Finance and Business Management (AP17Thai Conference), Thailand: Bangkok, February 16-18.
- McKinsey Global Institute (2016), *Bridging Global Infrastructure Gaps*, Technical Report, September 2016.
- Ministry of Transport and Communications (2017), *Status and Future Plan for National Logistics Master Plan*, Ministry of Transport and Communications, 30 November, 2017.
- Myanmar Times (2019a), "Chinese courier takes stake in Yoma's logistics arm", website section, March 13, <https://www.mmtimes.com/news/chinese-courier-takes-stake-yomas-logistics-arm.html> (accessed 24 September 2019).
- Myanmar Times (2019b), "Govt announces 'project bank' to get Myanmar building", website section, January 31, <https://www.mmtimes.com/news/govt-announces-project-bank-get-myanmar-building.html> (accessed 24 September 2019).
- Myanmar Times (2019c) "Bonded warehouse programme set to provide boost to Myanmar industries", website section, May 1, <https://www.mmtimes.com/news/bonded-warehouse-programme-set-provide-boost-myanmar-industries.html> (accessed 24 September 2019).

- Myanmar Times (2019d), Three locations identified for China-Myanmar Economic Corridor, website section, June 7, <https://www.mmtimes.com/news/three-locations-identified-china-myanmar-economic-corridor.html> (accessed 24 September 2019).
- Myanmar Times (2018), Myanmar's first dry port opens for business, website section, November 12, <https://www.mmtimes.com/news/myanmars-first-dry-port-opens-business.html> (accessed 24 September 2019).
- Nederland Maritiem Land (2016), *Myanmar Maritime Quickscan*, Nederland Maritiem Land.
- OECD (2018), *Trade Facilitation and the Global Economy*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264277571-en>
- Oxford Business Group (2019), "How Myanmar is improving its transportation", website section, April 30, <https://oxfordbusinessgroup.com/news/how-myanmar-improving-its-transportation> (accessed 24 September 2019).
- UNCTAD (2017), *Review of Maritime Transport 2017*, United Nations Publication UNCTAD/RMT/2017.
- VDB-Loi (2019), "Project Bank Notification for PPP Projects", website section, February 21, http://www.vdb-loi.com/mm_publications/project-bank-notification-for-ppp-projects/ (accessed 24 September 2019).
- World Bank (2018), *Procuring Infrastructure Public-Private Partnerships Report 2018: Assessing Government Capability to Prepare, Procure, and Manage PPP*, World Bank: Washington D.C.
- World Bank (2016), "Myanmar: an analysis of farm production economies", *Economic and Sector Work Report No. 100066-M*, World Bank: Washington D.C., February 26.
- World Bank (2014), "Myanmar: capitalizing on rice export opportunities", *Economic and Sector Work Report No. 85804*, World Bank: Washington D.C., February 28.

Notes

¹ McKinsey Global Institute examined more than 100 case studies (of the 400 cases carried out overall) that quantify the impact of a range of improvement levers from across three broad categories of opportunity: improving project selection and optimizing infrastructure portfolios; streamlining delivery; and making the most of existing infrastructure assets. The case studies come from a range of countries covering different geographies and development profiles. Some of these cases were drawn from McKinsey's work, and some from external literature and interviews. They mostly come from 2008 to 2013, with a few going back as long as 2003.

6. Investment framework for green growth

This chapter describes Myanmar’s policy framework to support investment for green growth, providing an overview of the state of play and progress made in supporting green investment. It revises the current policy framework in place to promote green growth and climate change, including policies that help to improve the environmental quality of investments in general, and examines existing efforts and the potential to engage the private sector to scale up investment in renewable energy. It also highlights issues related to financing green projects in the country.

Green growth offers Myanmar an opportunity to foster economic growth and development while ensuring that natural assets continue to provide the resources and environmental services on which the well-being of its people relies. A critical aspect of green growth is catalysing investment and innovation in environmentally sound technologies and infrastructure which both helps to sustain growth and gives rise to new economic opportunities (OECD, 2011). In addition, with the increasing need for global action to address climate change, investment for green growth must promote a transition to a low-emissions, climate resilient development pathway (OECD, 2017). Investment for green growth includes, among other things, investment in infrastructure – such as renewable energy, energy efficiency, water purification and distribution systems, transport and housing – as well as in conservation and efficient usage of natural resources, and waste management (OECD, 2015).

A green investment framework has much in common with a general policy framework for investment, but an investment-friendly policy framework does not necessarily result in green investment unless certain elements are also in place. These include: a strong governmental commitment at both the national and international levels to support green growth and to mobilise private investment for green growth; policies and regulations to provide a level playing field for more environment friendly investments; policies to encourage more environmentally responsible corporate behaviour; an institutional capacity to design, implement and monitor policies to foster green growth objectives; financial mechanisms for green investment (OECD 2015).

Currently, Myanmar is facing several environmental and development challenges. It has seen year on year economic growth since its transition to a democracy, but the unsustainable use of natural resources is exacerbating development challenges. Primary sectors support employment and GDP growth, and the poorest populations live in rural and remote areas where livelihoods rely on small-scale agriculture, fisheries and use of forest resources. Illegal logging and other economic development activities have resulted in widespread degradation of natural resources, with Myanmar estimated to have lost 10 million hectares of forest cover between 1990 and 2015 (Fodor and Ling, 2019). Increasing air and water pollution in urban areas is exacerbated by poor waste management, including of hazardous waste in industrial zones, uncontrolled construction activities and growth in vehicle usage. Myanmar is also one of the most vulnerable countries globally to climate change.

Promoting green investment is an opportunity for Myanmar to avoid locking in environmentally and economically unsustainable development. The country faces a major gap in infrastructure provision, with an estimated 40% of its roads being paved (Asian Development Bank, 2017a) and 50% of the population having access to electricity from the national grid in December 2019 according to the authorities. These gaps present an opportunity for Myanmar to invest in greener infrastructure alternatives and avoid locking-in environmentally unsustainable infrastructure for the next two decades. Utility scale, on-grid renewables can help reduce the carbon intensity of the electricity supply, and off-grid solutions can support increased access to energy while grid expansion takes place.

The government has taken steps towards promoting green investment, with several new strategies and actions being put in place in the last year. The Myanmar Sustainable Development Plan 2018-2030 clearly integrates environment and climate change as one of five pillars for development. The country's Climate Change Strategy and Action Plan 2018-2030 promotes climate action, and Myanmar's Nationally Determined Contribution outlines mitigation and adaptation priority actions. The National Environment Plan 2018-2030 promotes integration of environmental issues across sectors, and the Environment Conservation Law 2012, underpinned by the Environment Conservation Rules 2014 and other regulations, promotes the greening of investments by assessing and mitigating against negative environmental impacts.

Taken together these policies represent a coherent framework for green growth in Myanmar, however, inclusion of targets or clear goals on specific areas relevant to green growth (e.g. renewable energy, emissions reductions) could present a stronger signal to investors. Significant efforts will be needed to

implement these policies, and to raise public and private resources for green investments. All government agencies, and especially those in close contact with investors, such as the Directorate of Investment and Company Administration (DICA) among others, need to be well-aware and educated about these strategies, as well as disseminate them and integrate them early-on in their services and interactions with investors. This helps to clarify expectations and facilitates policy implementation and compliance.

Main policy recommendations

- Ensure that environmental considerations are included in early screening of proposed investments by MIFER, MONREC and line ministries, and that this is a joined-up process involving all relevant Ministries (see related recommendation in Chapter 3).
- Promote the greening of investments by continuing to strengthen the implementation of environmental impact assessment (EIA) systems, including by building capacity at national and subnational levels to review EIAs and reduce delays in this process, and improving the transparency and information systems supporting EIAs.
- Integrate environmental criteria in the future development of Myanmar's project bank. Myanmar is developing a project bank to prioritise investments in infrastructure and attract investors. In the future, integrating environmental considerations into the identification of projects, including through strategic environmental assessments, could help catalyse investment for greener projects.
- Promote utility-scale solar and wind-based electricity generation more aggressively within the country's energy plans, including through the formal recognition of the role of non-hydro renewables in the country's power expansion plans, the introduction of standardised power-purchase agreement templates, facilitating the land acquisition process etc.
- Support roll-out of off-grid renewable energy solutions, including by promoting opportunities for private companies and impact investment.
- Improve access to climate finance and other concessional environment-related finance, and target the use of these strategically to develop projects and build capacity for green investment, and improve climate resilience.

Green growth and investment in Myanmar: seizing the opportunity to transition to an environmentally sustainable development pathway

Myanmar's path to green growth faces both challenges and opportunities. Challenges include a heavy dependence on natural resources and unsustainable use of these resulting in degradation of land and water, a major investment gap for basic infrastructure and increasing vulnerability to climate change and extreme weather. Addressing these challenges also presents an opportunity for Myanmar to promote green investment. The imperative to urgently scale up access to electricity and promote energy security, the country's high renewable energy potential and the need to improve the efficiency of how natural resources are used illustrate the potential for green investment in Myanmar. A measured and inclusive approach, based on a sound policy framework that promotes investment in green sectors and facilitates the greening of investment overall, can help address challenges and promote sustainable development in Myanmar.

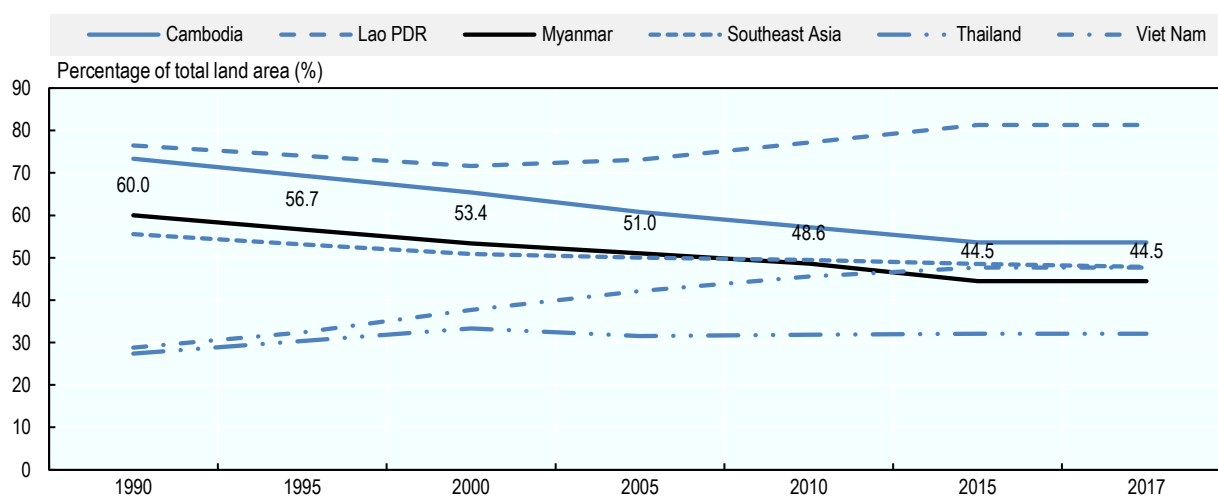
Natural resources and the environment are critical for continued development and poverty reduction in Myanmar

Myanmar has relied heavily on natural resources to support development in past decades, and since the transition to a democracy, the country has seen year on year economic growth. Primary sectors continue to contribute substantially, despite the increasing importance of industry and services sectors in recent years. Agriculture, forestry and fishing, made up 23% of GDP in 2017 compared with 57% in 2000 (Asian Development Bank, 2019). In addition, due to the informal and unregulated use of natural source, such as illegal logging and export of timber, the impact of forestry and fishing on the economy is underestimated in national statistics. Some studies estimate that the value of Myanmar's ecosystems could be 10 times higher than is reflected in formal statistics for forestry and fisheries (Fodor and Ling, 2019).

Myanmar's land, forests, rivers and coasts also support employment and livelihoods for most of the country's people and are especially critical for continued progress on reducing poverty (Mandle et al., 2016). Around a third of the population still lives in poverty, with the majority - 87% - located in rural areas (Fodor and Ling, 2019). The number of people living in poverty is seen to be more prevalent in hilly, mountainous and coastal zones of the country where peoples' livelihoods are reliant on rely on small-scale agriculture, fisheries and use of forest resources.

The heavy reliance on natural resources for development, coupled with unrestricted and unsustainable use of these resources means that the environment costs of Myanmar's growth has been high. Myanmar has been estimated to have lost over 10 million hectares of forest in the last 25 years (Fodor and Ling, 2019). Forest cover in the country has shrunk faster than other countries in the region, declining from 60% of land area in 1990 to 44% in 2017 (Figure 6.1). Urbanisation has brought its own environmental challenges, and Myanmar was ranked 138 out of 180 countries on a global Environmental Performance Index in 2018 (Wendling et al., 2018). Greater vehicle ownership, burning of agricultural and other waste and constriction activities has increased air pollution in urban areas, and mining activities accompanied by the discharge of untreated wastewater and solid waste into water bodies is impacting water quality in rivers and lakes. Myanmar will need to improve environmental management and the way natural resources are used in order to continue growing and improving human development.

Figure 6.1. Forest cover as % of total land area in selected Southeast Asian countries, 1990 to 2017



Source: FAOStat, Agri-environmental indicators – Land use, <http://www.fao.org/faostat/>, accessed 13.12.09

Significant gap in investment needed for sustainable infrastructure

Myanmar faces a major gap in infrastructure provision and investment. Access to electricity in Myanmar is much lower than other countries in the region (Staples and Qiu, 2017), with roughly 50% of the population lacking access to the national grid according to the authorities. The efficiency of the network in the country is also poor, with over a quarter of electricity generated lost in transmission and distribution in 2013 (Asian Development Bank, 2107b). As highlighted in Chapter 5, the quality of transport and logistics infrastructure in the country is poor, and poses a significant challenge to trade and competitiveness.

Infrastructure weaknesses are further hampered by a significant gap in investment. Cumulative infrastructure investment needs for the country are estimated at USD 224 billion between 2016 and 2014, and with current investment levels much less than what is needed, the total investment gap is estimated at USD 112 billion, in the same period (Oxford Economics, 2017). The scale of the investment required means that public finance will need to catalyse private flows. So far, the primary source of financing for development projects has been public budgets supported by public revenues, with FDI comprising the second largest source, which illustrates the potential to mobilise greater volumes of private investment within the country (UNDP, 2017). While bridging existing infrastructure gaps in Myanmar will be critical to ensure continued economic growth, they also present an opportunity to promote investment in greener infrastructure alternatives and avoid locking-in environmentally unsustainable infrastructure for the next decades. Off-grid renewable energy can support increased access to energy while grid expansion takes place, and utility scale, on-grid renewables can help reduce the carbon intensity of the electricity supply, as well as sometimes allow for power cost savings (IRENA, 2019).

High vulnerability to climate change

Myanmar is one of the most vulnerable countries globally to climate change. The Global Climate Risk Index ranks Myanmar as the second most affected country in the world to extreme weather-related events between 1999 and 2018, with resulting losses estimated at 0.83% of GDP over the same period (Eckstein et al., 2019). Against this background, future climate projections to the middle of the century paint a worrying picture. Temperatures are expected to rise between 1.3 to 2.7 degrees above historical levels (with higher increases associated with highest increases in global greenhouse gas emission) (Horton et al., 2017). By the middle of the century, Myanmar could observe between 4 and 17 days of extreme heat each month, compared with one day per month observed between 1981 and 2010. These changes will have impact almost every sector of the economy, with sea level rise affecting coastal cities and critical energy, transport, water and telecommunications infrastructure, and changing rainfall patterns affecting agricultural productivity and livelihoods. Preparing for and adapting to climate change, and integrating climate resilience into policy making, planning and investments will be critical for Myanmar to safeguard the progress it has made on growth and development so far.

Policy framework for green growth and climate change

A strong government commitment to support green growth, underpinned by a coherent policy framework and clear targets, provides investor with encouraging signals regarding the government's ambitions for green growth. Setting clear, long term, and legally binding policy and regulatory frameworks to mainstream and encourage green growth are key to attracting private investment. Such frameworks are critically important to mitigate the risks related in investment in green infrastructure and new technologies. Such a framework should include a comprehensive and coherent framework of policies related to the environment and green growth, integrating of environmental targets and ambitions into sector policies and plans, and engagement and commitments towards multilateral environmental agreements.

Myanmar's international commitments to green growth

Myanmar has ratified most major multilateral environmental agreements (Table 6.1), including the three Rio Conventions: the Convention on Biological Diversity (CBD) in 1994, UN Convention to Combat Desertification in 1997, and United Nations Framework Convention on Climate Change (UNFCCC) in 2003. Most recently Myanmar ratified the Nagoya Protocol to the CBD in 2014, and the Paris Agreement under the UNFCCC in 2017. In the run up to the Paris Agreement, Myanmar submitted its Nationally Determined Contribution to the UNFCCC in 2015.

Table 6.1. Multilateral environmental agreements (MEAs) ratified by Myanmar

MEA	Year of ratification / accession
ASEAN Agreement on the Conservation of Nature and Natural Resources	1997
ASEAN Agreement on Trans boundary Haze Pollution	2003
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal	2015
Cartagena Protocol for Bio-safety	2008
Convention on Biological Diversity	1994
Convention on International Trade of Endangered Species of Wild Fauna and Flora	1997
Copenhagen Amendment on to the Montreal Protocol on Substances that Depletes the Ozone Layer	2009
Kyoto Protocol to UNFCCC	2003
Montreal Protocol on Substances that Depletes Ozone Layer	1993
Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the CBD	2014
Paris Agreement under UNFCCC	2017
Ramsar Convention on Wetlands	2005
Stockholm Convention on Persistent Organic Pollutants	2004
UN Convention on the Law of the Sea	1996
UN Convention to Combat Desertification	1997
United Nations Framework Convention on Climate Change (UNFCCC)	2003
Vienna Convention for the Protection of the Ozone Layer	1993

Source: Adapted from <https://www.informea.org/en> and Raitzer, Nuella Samson, and Nam (2015).

Policy framework for green growth and climate change

Due to the relatively recent political, economic and social transition in the country, many of Myanmar's policies have been revamped and put in place in the last five years (Table 6.2). As a result, Myanmar's overall policy framework covering green growth objectives is coherent and well-aligned. The Myanmar Sustainable Development Plan (MSDP) 2018 is structured to a large extent around the Agenda 2030 framework and makes clear references to how strategies and actions align with different SDGs. The third pillar of the MSDP is 'People and Planet', and one of five policy goals of the plan is related to the environment. Despite having a comprehensive coverage of environmental issues, the plan stops short of adopting any specific targets related to environmental protection or climate change.

Against the backdrop of the MSDP, Myanmar has put in place several complementary policies and strategies on environment and climate change, including overarching the National Environmental Policy (2019), the Myanmar Climate Change Strategy and Action Plan (MCCSAP) 2018–2030, and the Environmental Conservation Law 2012 (and associated underlying policies and guidance). The NEP 2019 has a strong focus on mainstreaming environmental issues into development policies and planning, while the MCCSAP covers Myanmar's strategic response on climate change mitigation and adaptation. While both policies are well aligned with each other, like the MSDP, neither adopt any clear targets with relation to the environment. Myanmar's Nationally-Determined Contributions (NDC) to the Paris Agreement

outlines its contribution to combatting global climate change, and includes several sectoral climate change targets for the forestry and energy sectors. Despite this, Myanmar does not include an overarching emissions reduction estimate in its NDC and is one out of only two countries in ASEAN to not adopt an economy-wide target (IEA, 2019a).

Table 6.2. Policy framework related to green growth and the environment in Myanmar

Type	Policy / regulation	Description
Cross-cutting	Myanmar Sustainable Development Plan 2018	The MSDP provides a long-term vision for the country. The Plan recognizes 'Myanmar's natural endowments' as crucial for development and includes sustainability as a cross cutting theme. The MSDP is organized around three pillars and five goals. Pillar 3 'People and planet' includes Goal 5 'Natural Resources & the Environment for Posterity of the Nation'. Six strategies and action plans are included under the Goal 5, spanning environment and ecosystems (Strategy 5.1), climate resilience (Strategy 5.2), access to water and sanitation (Strategy 5.3), provision of energy (Strategy 5.4), natural resources and land management (Strategy 5.5), and sustainable cities (Strategy 5.6).
Core environment and climate policies and strategies	National Environmental Policy (NEP) 2019	NEP 2019 sets out a long-term strategy for environmental sustainability in the country, spanning environmental protection and management, as well as mainstreaming of environmental issues into social and economic development policy and planning. The plan includes 23 Principles under three areas (a) clean environment and healthy and functioning ecosystems, (b) sustainable economic and social development, and (c) the mainstreaming of environmental protection and management.
	Myanmar Climate Change Strategy and Action Plan (MCCSAP) 2018–2030	MCCSAP outlines a roadmap to guide Myanmar's 'strategic responses and actions to address climate related risks and opportunities', within a 15-year time period. The Strategy covers climate change adaptation and mitigation, and sets out sector level outcomes and indicators for the main sectors contributing to climate change: agriculture and natural resources, infrastructure sectors, cities, education and health etc.
	Myanmar's Nationally Determined Contribution to the Paris Agreement	The NDC adopts sector level targets for climate change mitigation and outlines priorities for climate change adaptation. Mitigation targets are as follows: <i>Forestry sector:</i> Reserved Forest (RF) and Protected Public Forest (PPF) = 30% of total national land area and Protected Area Systems (PAS) = 10% of total national land area <i>Energy sector:</i> (a) Increase hydropower to 9.4 GW by 2030 (b) Rural electrification through the use of at least 30% renewable sources (c) To realise a 20% electricity saving potential by 2030 of the total forecast electricity consumption. (d) To distribute approximately 260 000 cook stoves between 2016 and 2031. For adaptation, the NDC outlines four priorities in order of importance: resilience in the agriculture sector and development of early warning systems, public health protection and water resource management, protection of coastal areas, and infrastructure and biodiversity conservation.
	Environmental Conservation Law 2012	ECL (2012) sets out the legal framework for the implementation of the country's environmental plans and strategies. Its aims to systematically integrate environmental conservation into the development process. It includes specific articles regarding the institutional framework for environmental conservation in Myanmar, establishing environmental quality standards, restoration and protection of ecosystems, and management of natural resources.
	Environmental Conservation Rules (ECR) 2014	ECR 2014 supports the implementation of the ECL 2012 by providing more details on the various articles under the Law.
	Environmental Impact Assessment (EIA) Procedure (2015)	Details the EIA process and framework in Myanmar.
	National Environmental Quality (Emission) Guidelines (2015)	Regulates and controls noise and vibration, air emissions, and liquid discharges from various sources to prevent or reduce pollution and protect environmental and human health. The Guidelines apply to projects that generate noise or air emissions, and / or that have either direct or indirect discharge of process water, wastewater from utility operations or storm water to the environment.

In addition to the above, the government is also currently preparing a Green Economy Policy Framework, which, according to the authorities, will focus on the efficient utilization of natural resources, reduction of carbon emission, use of renewable energy and systematic waste management. Eleven priority areas for green economy investments have been identified, including (1) Sustainable and productive agriculture and livestock; (2) Clean air and clean and sufficient water; (3) Clean and accessible energy; (4) Healthy forests and biodiversity; (5) Sustainable urban and rural development and buildings; (6) Sustainable fisheries; (7) Sustainable consumption and production; (8) Sustainable waste management; (9) Sustainable transport infrastructure and services; (10) Lower impact from extractives, and (11) Sustainable tourism.

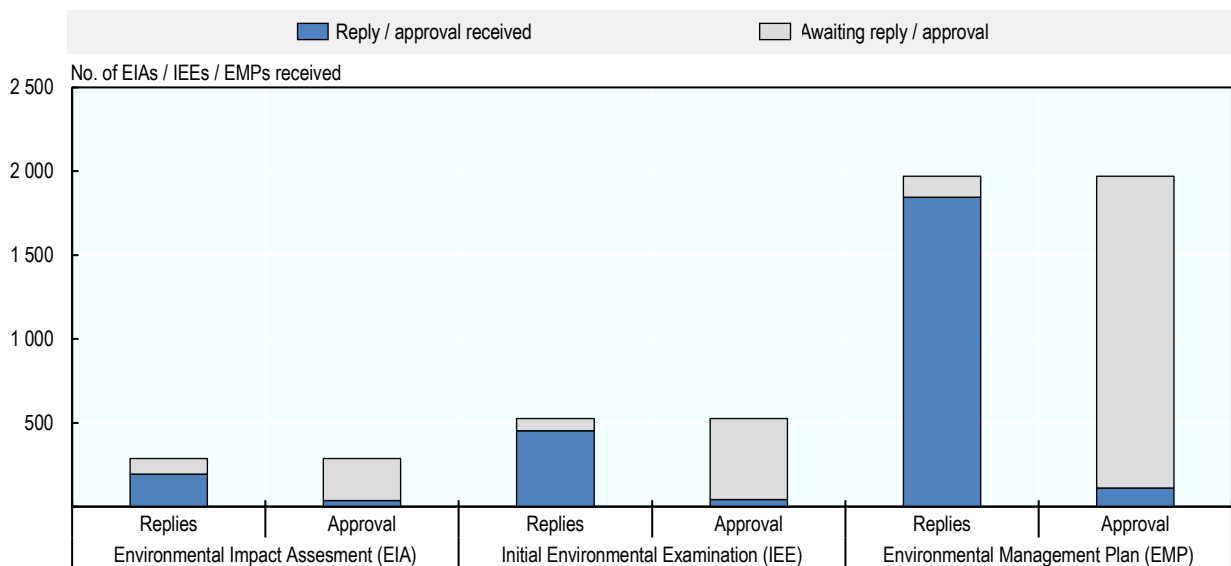
Policy framework for environmental protection

Since 2012, Myanmar has steadily built up a national environmental safeguards system to promote the greening of investment. The Environmental Conservation Law 2012 and the Environment Conservation Rules 2014 together outline clear actions to be taken to promote environmental management, including initiating the establishment of specific environmental quality standards for the country, and the use of environmental impact assessments (EIAs) to screen development activities. To support these policies, specific EIA Procedures and National Environment Quality (Emission) Guidelines were published in 2015. Guidelines to support the use of EIA have been developed for various sectors such as mining and hydropower.

As per the EIA Procedures (2015) investment activities either require an EIA or an initial environmental examination (IEE) depending on their scope, size and potential impact on the environment. Depending on the results of the EIA or IEE process, a comprehensive environmental management plan (EMP) may also be required. The Environmental Conservation Department (ECD) under the Ministry of Natural Resources and Environmental Conservation (MONREC) oversees the national environmental safeguards system, including reviewing and monitoring EIAs, and issues environmental compliance certificates (ECCs).

Myanmar's progress on establishing a comprehensive policy framework for environmental management in the span of only a few years is commendable, however, the implementation and scale up of the system requires significant resources and is likely to take time. A comprehensive diagnostic of Myanmar's safeguards system in 2019 by the World Bank highlights significant challenges in its operationalization (Fodor and Ling, 2019). Investment proponents face major delays in the review and approval of EIAs and IEEs, due to a significant lack of manpower and human resources in MONREC. The number of documents received by the Ministry for review have increased hugely every year, with over 2700 EIA, IEEs and EMPs received in 2017-18, against around 250 in 2014-15 (Fodor and Ling, 2019). According to ECD data presented in Fodor and Ling (2019), as of early 2019, only 13% of EIAs submitted had been approved (Figure 6.2).

Figure 6.2. Backlog of responses to and approvals for EIAs, IEEs and EMPs



Note: Data is as of 31 January 2019.

Source: Fodor and Ling (2019).

Another factor exacerbating delays is the lack of quality of EIA documents submitted to the ministry which illustrates the lack of capacity in the environmental assessment industry in Myanmar. Beyond the ex-ante EIA approval process, relevant authorities at national and subnational levels also lack the capacity to monitor and audit implementation of investments to ensure compliance with EIA results. While some of the above issues are expected due to the relatively recent establishment of Myanmar's safeguards system, urgent steps are needed to unblock critical areas. The government needs to prioritise the functioning of the country's EIA system by strengthening MONREC's staff resources, capacity and budget – at national and subnational levels.

According to the authorities, to keep pace with demand, ECD has increased its staff capacity in recent years and is continually working towards reducing the system backlog with the financial and technical assistance of development partners, such as UNDP, JICA, IFC and World Wildlife Fund (WWF). This has involved, for instance, the hiring of hiring outsource reviewers if cost of review is borne by project proponent, building the capacity of all staffs in EIA department, using specific checklists for ease and consistency of assessment and save the time, and refreshing the organizational structure among others.

Efforts are also underway to enhance the monitoring process. According to the authorities, although ECD has not yet been able to carry out systematic and regular monitoring – aside from checking monitoring reports submitted by project proponents every six months according the condition of approval letter or Environmental Compliance Certificate – some state and regional offices have started monitoring and inspection processes for approved projects. Authorities also reported that ECD is starting to prepare a monitoring guideline and is training staff for this purposes with the support of the Norwegian Environmental Agency and UNDP.

Beyond project-level environmental safeguards processes, it is also important for the county to pursue more proactive integration of environmental management across sectors at the strategy and planning level. Myanmar has implemented pilot Strategic Environmental Assessments (SEA), most notably in the hydropower sector in 2018, however there is no existing policy framework or guidance in place to drive this more systematically across sectors. Myanmar's new project bank (see Chapter 5) could be an important starting point for initiating a new phase of green investments in the country by integrating environmental considerations during the prioritization of investments, either through SEA or by integrating specific criteria to screen projects.

Promoting investment in priority areas for green growth: renewable energy

Growing need for power

Myanmar's energy sector, especially power generation, lies at the heart of its development ambitions, and will also be critical in determining whether the country can avoid locking-in environmental challenges for the next decades. Today, the country faces a major gap in proving access to electricity which is hindering poverty reduction and the growth of businesses and industry. Electricity consumption per capita in Myanmar is the lowest in the region, estimated at 0.3 MWh per capita in 2017, compared with 0.5 MWh per capita in Cambodia, 1.9 MWh per capita in Viet Nam and 2.9 MWh per capita in Thailand (IEA, 2019b). While the National Electrification Master Plan (2014) aims to provide universal access to electricity by 2030, about half of the population lack access to electricity, and even where there is access, the reliability of electricity provided to industries and businesses needs to be improved.

Looking forward, demand is expected to increase exponentially, with projections estimating electricity demand could be as high as 15 GWh by 2030 against 3.1 GWh in 2017 (Staples and Qiu, 2017). Improving electricity access and meeting increasing demand will require increased investment to expand and improve the transmission and distribution network of the country, as well as expanding power generation. On-grid renewable energy can could offer cost savings while also reducing the carbon intensity of the grid. For

example, the installation of rooftop solar in commercial buildings may allow for savings on electricity bought from the grid. Off-grid solutions for power could also provide a quick, and potentially environmentally sustainable, option to increase access and offer some cost saving opportunities.

Abundant renewable energy resources that are yet to be tapped

Myanmar has extensive renewable energy potential that could support the increasing need for electricity, but only a fraction of these have been exploited so far. Hydropower has historically been the main source of electricity in the country and is likely to remain important in coming years. The magnitude of hydropower resources in the country dwarfs the capacity of plants currently operating. In 2015, 29 large scale dams and 32 mini-hydro plants were operating, with a combined capacity of over 3330 MW, compared with the estimated 45GW of hydropower potential in Myanmar, though this potential takes into account potential harmful mainstream dams (IFC, 2018). Large-scale hydropower development across the region, including in Myanmar, has been associated with significant environmental and social costs which must be factored into future development of the sector. Projections for power development show that 53% of the energy generation mix of the country to 2030 is likely to be from hydropower, and a recent SEA of hydropower advocates for a ‘whole-of-basin’ approach when selecting sites for development to avoid cumulative impacts from multiple dams (IFC, 2018).

Beyond hydropower, other renewable sources of electricity generation have also not been exploited so far. The solar industry is at its infancy, and while two utility-scale solar plants with a combined capacity of 300MW are being developed, and a further 990 MW of plants are in discussions for development, these are still only a fraction of the estimated 26.9 GW of solar potential in Myanmar (Tun, 2018; Staples and Qiu, 2017). Myanmar also has untapped potential to generate electricity from wind along its coast, and has significant geothermal potential (Tun, 2018).

Challenges in mobilizing green investment for renewable power

Power development in Myanmar has historically dominated by public investment, however, this has changed in recent years, and in 2016, 50% of power generated was from private sector power generation plants (Staples and Qiu, 2017). Despite the potential for renewables in the country, and the prevalence of private actors, investment in renewables remains low due to several barriers. At the outset, there is a lack of clarity on the government’s ambitions towards renewable energy, beyond hydropower, going forward.

Myanmar has only recently publicly adopted a formal power development plan which outlines the planned power generation mix for the next decade. The National Electricity Master Plan (2014) was formally approved in May 2019 by the Congress, but there is some ambiguity as to whether this plan has been updated since its development. The plan, developed in 2014 with technical assistance from the Japanese International Cooperation Agency (JICA), estimates that 9% of electric power capacity would be from non-hydro renewable sources by 2030. An ADB-supported analysis published in 2015 and compiling technical inputs for a broader Energy Masterplan, however, estimates that non-hydro renewables will make up only 1.2% of Myanmar’s overall energy supply by 2030 (Emmerton et al., 2015). Both plans foresee an increase in coal-fired power in Myanmar which raises concerns about the environmental sustainability of electricity generation for the medium- to long-term. With major international investors divesting away from coal-fired power generation worldwide, any investments in coal power are likely to run the risk of being stranded or requiring significant public support to be financially viable.

For utility scale renewable projects, the lack of a standardized Power Purchase Agreement (PPA) that caters to foreign investors and project developers is another barrier to investment. Draft PPAs have been developed for some subsectors (e.g. hydropower, solar) with support from development partners, however, these have not been formally adopted yet. The solar projects currently being developed have been supported by PPAs in the local currency, which is not attractive for independent power producers (IPPs)

who may be backed by external sources of investment. There has been lack of a transparent tendering process so far, and most projects have been submitted to the government as unsolicited proposals, which risks impairing value-for money expectations.

Another issue preventing further investments in solar energy, for example, is the government unwillingness to provide risk sharing or facilitate access to land. This has attracted considerable attention during the government's tender for solar projects in June 2020. Disregarding the difficulties in obtaining land for such projects in a responsible manner, the government initially imposed a one-month deadline for potential investors to submit their bids for 30 solar power projects adding 1 060 MW in generating capacity to the grid. This combined with the government's initial reluctance to extend the tender period (later conceded) received strong criticism by investors who argued impossible to obtain all needed documentation within the given timeframe under the current pandemic COVID-19 context (Myanmar Times, 2020). Altogether these substantive and procedural issues end up adding significant challenges for private proponents of renewable power projects.

The Myanmar government is, nonetheless, keen in fostering clean energy and has established a National Renewable Energy Management Committee in 2019 under the President's mandate to spur the development of faster, cleaner and cheaper energy sources.

Opportunities for investment in off-grid electricity

The National Electricity Master Plan (2014) provides a road map for Myanmar to achieve universal access to electricity by 2030 by adopting a phased approach. Easier connections covering 50% of households will be prioritised, followed by two additional phases of investment supporting 25% of grid connections each. In the plan, off-grid technologies, including those supported by renewable energy sources, are included as an interim solution in areas where the grid is not expected to reach for another 5-10 years. However, as grid expansion is expected to be both time and resource intensive, an alternative approach would be to facilitate off-grid technologies through, for example, mini-grids, to play a more central role in the electricity system going forward. The Ministry of Agriculture, Livestock and Irrigation, supported by the World Bank, is deploying mini-grids and solar home systems for 500 000 households, in a complementary effort to grid expansion (Vivid Economics, 2017).

An assessment of the market potential for mini-grids highlights there is an immediate potential market for 2 300 mini-grids covering a total 2 million people, with an associated investment opportunity of around USD 537 million (Roland Berger, 2019). However, one the main challenges for off-grid systems is the continuation of their business model, particularly once transmission lines are connected, and a lack of clarity about how off-grid systems will be integrated into the grid. Despite the challenges, initial private investment is being seen in this area. For example, in March 2019, Engie invested in Mandalay Yoma Energy, a company working to deliver solar off-grid systems in areas which lack access to electricity¹. Another example is Yoma Micropower, which is working to connect off-grid telecommunications towers to solar plants. Greater support from the government through a dedicated strategy or plan on promoting off-grid electricity solutions could increase confidence in the market and help it to scale up.

Financing for green growth

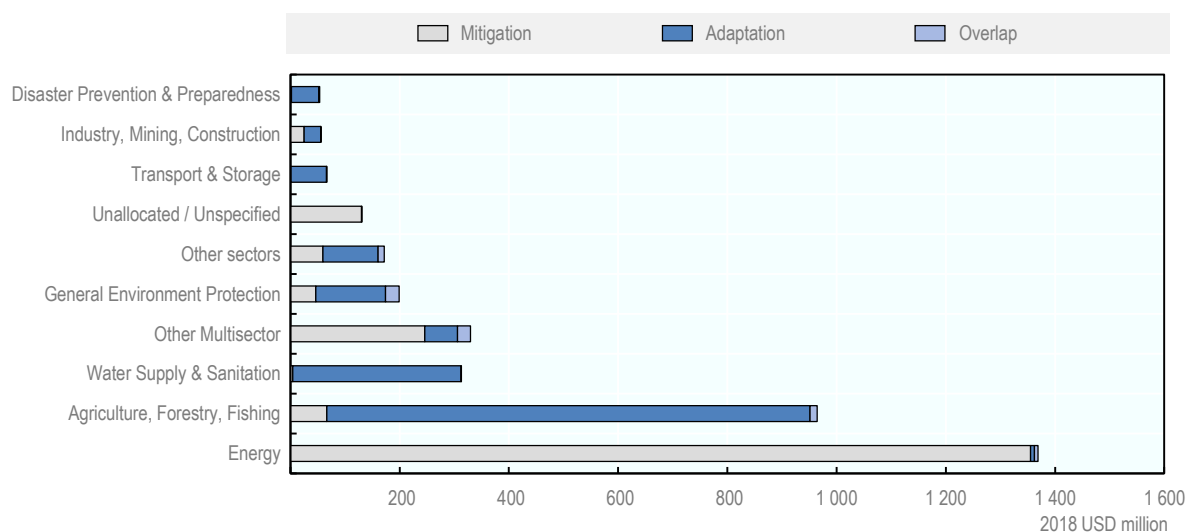
Financial policies and instruments are key to promoting green investment as they can help increase access to finance, mitigate the risks associated with new green technologies and demonstrate their viability, and reduce the cost of capital associated with green investments to increase their viability (Corfee-Morlot et al., 2012).

Development finance can support the green growth agenda in Myanmar

International public development finance and technical support provided by development partners has played an important role in supporting the development agenda of Myanmar. Despite being a relatively small share of financing for development in the country when compared with government budget and FDI, having a core focus on development issues has meant that Official Development Assistance (ODA) has supported progress in social and environmental sectors, and on institutional and economic reform (UNDP, 2017). In the case of environmental management and climate change, allocations of public budgets have grown in recent years but remain modest, with MONREC receiving 0.23% of the union budget in 2016/17 (Fodor and Ling, 2019). The MCCSAP 2018 and Myanmar's NDC both identify the need to identify and broaden sources of finance for these areas, and to develop financing mechanisms and modalities for green growth.

According to OECD Development Assistance Committee statistics, since 2013, climate-related development finance to Myanmar has increased year on year up to 2017, reaching just over USD 800 million in climate-related development finance committed to projects in the country in 2017. It then declined to nearly USD 600 million in 2018. Of the climate-related development finance to Myanmar in the last five years (2013-18), 53% support climate change mitigation, 45% support adaptation, and 2% support projects contributing to both mitigation and adaptation objectives. The top five development partners in terms of volume of support for climate change between 2013 and 2018 were Japan, World Bank, IFC, Germany and UK. Myanmar has managed to access climate finance from a diversified mix of funds, with projects support by seven out of the 11 bilateral and multilateral climate funds it is eligible for in 2014 (UNDP, 2017).

Figure 6.3. Climate-related development finance to Myanmar, 2013 to 2018, by sector



Source: OECD DAC Statistics.

The volume of climate-related development finance that Myanmar can access, however, will still only be a fraction of what is needed in the country, especially considering the pace at which the economy is growing. International public funds must be used strategically to build the systems need to spur domestic sources of financing, as well as financing from the private sector. One key area will be using climate-related development finance to build up Myanmar's response to the impacts of climate change, by supporting the development of early warning systems, strengthening data and information systems on climate impacts, supporting hazard mapping and community-level adaptation responses, and climate-proofing large scale and critical infrastructure.

References

- Asian Development Bank (2017a) *Country Partnership Strategy 2017-2021: Building the Foundations for Inclusive Growth*, Manila, Philippines.
- , (2017b), *Meeting Asia's Infrastructure Needs*, Manila, Philippines.
- Corfee-Morlot, Jan, Virginie Marchal, Céline Kauffmann, Christopher Kennedy, Fiona Stewart, Christopher Kaminker, and Geraldine Ang (2012), "Towards a Green Investment Policy Framework: The Case of Low-Carbon, Climate-Resilient Infrastructure", *OECD Environment Working Papers No. 48*, OECD Publishing, Paris, <https://doi.org/10.1787/5k8zth7s6s6d-en>.
- Eckestein, D., Hutfils, M-L and Maik Wings (2019), *Global Climate Risk 2019: Who Suffers Most From Extreme Weather Events? Weather-related Loss Events in 2017 and 1998 to 2017*, Briefing Paper, Germanwatch: Bonn.
- Fodor, Martin, and Stephen Ling (2019), *Myanmar - Country Environmental Analysis: A Road towards Sustainability, Peace, and Prosperity: Synthesis Report*, World Bank: Washington DC, May.
- Horton, R., M. De Mel, D. Peters, C. Lesk, R. Bartlett, H. Helsingen, P. Bader, D., Capizzi, S. Martin, and C. Rosenzweig (2017), *Assessing Climate Risk in Myanmar: Technical Report*, Centre for Climate Systems Research at Columbia University, WWF-US and WWF-Myanmar: New York, NY, USA, March.
- IEA (2019a), *Southeast Asia Energy Outlook 2019*, IEA: Paris.
- (2019b), *World Energy Balances*, IEA: Paris.
- IFC (2018), *Strategic Environmental Assessment of the Myanmar Hydropower Sector: Final Report*, World Bank Group: Washington D.C.
- IRENA (2019), *Renewable Power Generation Costs in 2018*, International Renewable Energy Agency: Abu Dhabi.
- Mandle, L., S. Wolny, P. Hamel, H. Helsingen, N. Bhagabati, and A. Dixon (2016), *Natural Connections: How Natural Capital Supports Myanmar's People and Economy*, WWF-Myanmar, May.
- Myanmar National Energy Management Committee (2015), *Myanmar Energy Masterplan*, Government of Myanmar, December.
- Myanmar Times (2020), "Energy ministry tells bidders no extension for solar tender", website article, May 30, <https://www.mmtimes.com/news/energy-ministry-tells-bidders-no-extension-solar-tender.html> (accessed on 5 June 2020).
- OECD (2017), "Mobilising financing for the transition", in *Investing in Climate, Investing in Growth*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264273528-9-en>
- OECD (2015), *Policy Framework for Investment, 2015 Edition*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264208667-en>
- OECD (2011), *Towards Green Growth*, OECD Green Growth Studies, OECD Publishing, Paris, <https://doi.org/10.1787/9789264111318-en>
- Oxford Economics (2017), "Global Infrastructure Outlook", Global Infrastructure Hub, website content, <https://outlook.gihub.org/> (accessed on 16 December 2019).
- Raitzer, David A, Jindra G Nuella Samson, and Kee-Yung Nam (2015), "Achieving Environmental Sustainability in Myanmar", *ADB Economics Working Paper No. 467*, Manila, Philippines.
- Roland Berger (2019), *Decentralised Energy Market Assessment in Myanmar*, Smart Power Myanmar Research Series, Yangon, May.
- Staples, A., and P. Qiu (2017), *Building Myanmar: Bridging the Infrastructure Gap*, The Economist, October.

Tun, Maw Maw (2018), “An Overview of Renewable Energy Sources and Their Energy Potential for Sustainable Development in Myanmar”, *European Journal of Sustainable Development Research* 3 (1), em0071, <https://doi.org/10.20897/ejosdr/3951>

UNDP (2017), *Development Finance Assessment Snapshot Myanmar: Financing the future with an integrated national financing framework*, UNDP Regional Bureau for Asia and the Pacific.

Vivid Economics (2017), *Green Growth Potential Assessment: Myanmar Country Report*, Global Green Growth Institute, Seoul, December.

Wendling, Z. A., J. W. Emerson, D. C. Esty, M. A. Levy, and A. de Sherbinin (2018), “2018 Environmental Performance Index”, website content, New Haven, CT, <https://epi.yale.edu/> (accessed on 16 December 2019).

Notes

¹ See <https://www.engie.com/en/news/mandalay-yoma-energy-mini-grid-rural-households-myanmar/>

7. Making the most of economic zones

This chapter provides an overview of the regulatory and institutional framework for special economic zones and industrial zones in Myanmar, and then examines the implementation and performance of the most advanced zones in the country, Thilawa SEZ and Mingaladon Industrial Park. It concludes with an assessment of the potential for linkages between zone investors and the local economy, and offers directions for the way forward in terms of addressing skills shortages, developing a supplier base, and actively promoting business linkages.

Following the experience of regional peers, Myanmar is advancing an ambitious programme of special economic zone (SEZs) and industrial zone development, with the aim of attracting investors, creating jobs, and developing industry. Currently there are three SEZs and 19 industrial zones across the country. These zones impose a cost on society through forgone revenues from tax incentives, duty exemptions and infrastructure investments specific to the zone. In order to justify their establishment, the associated societal gains must outweigh these costs. In principle, zones, particularly SEZs, have the potential to generate long-run spillovers that benefit workers and firms beyond their confines through knowledge transfers, in addition to being a potential source of foreign currency as they typically target more export-oriented industries. In practice, the experience of SEZs as a vehicle for development has been mixed, depending much on the quality of policies and business environment in which they operate. On the positive side, host countries can, to a certain extent, influence the spillover potential of SEZs with appropriate policies and institutions targeting skills and supplier development, and facilitating the exchange of information between SEZ investors and local companies.

Some important differences in the framework for SEZs and industrial zones exist in Myanmar. SEZ programmes are governed by a special regulatory and institutional framework, dealing with trade, investment, land, tax, labour and environmental policy. The main legislation covering the regime for the establishment and operation of SEZs and the rights and obligations of SEZ authorities, developers and users is the 2014 Special Economic Zone Law. Industrial zones, on the other hand, do not offer a special regulatory or customs regime, and have until recently not been subject to dedicated legislation. The government submitted a draft Industrial Zone Law to Parliament in late 2019, enacted in May 2020, with the objective of ensuring a more systematic approach to zone planning and development.

To attract investors, the Myanmar SEZ Law offers a generous incentive package, including a corporate tax holiday of up to seven years, and a subsequent extended period of reduced corporate tax rate, as well as deductions linked to R&D investments and local staff training activities. In addition, the law mandates the establishment of a one-stop shop to access all government services and clearances, and the provision of basic infrastructure and utilities. In return, investors are subject to a minimum investment requirement, restrictions on domestic sales and employment of foreign personnel, and staff training obligations.

Compared to the in-land regime, the 10-year 50% corporate tax rate reduction offers a substantial competitive advantage, which partly justifies the restrictions on domestic sales of free zone investors, as a means of protecting inland investors from unfair competition. However, a less distortionary approach would be to gradually phase out the reduced tax rate, as has been the case in many regional peers, while relaxing the export share requirement, which would allow inland companies to benefit from high-quality goods produced in the zones.

Thilawa SEZ is currently the most advanced SEZ in Myanmar, with high quality facilities, public utilities and transport links. Its Management Committee, the TSMC, established a One-Stop Services Centre that significantly reduces the number of public officials with which investors must engage and offers expedited one-stop clearances for all necessary approvals and registrations. The TSMC is in the process of developing a portal for investors to submit applications and obtain approvals online, and has committed to specific turnaround times for many procedures, on par with zones that are internationally recognised for their good practice in business facilitation. It has also issued a notice clearly stating RBC expectations that apply to all companies doing business in Thilawa. As such, Thilawa can serve as a model for other industrial zones in terms of infrastructure development and zone management, and as a laboratory for policymakers to test new policies, like simplified regulations or RBC policies, before rolling them out to the wider economy. While it is too early to assess Thilawa's wider economic impacts, currently, 74 businesses are operational in the SEZ and account for around 9 000 jobs; a quarter of these businesses have already started exporting. Moreover there is evidence that Thilawa is contributing to skills development, as reported by surveyed zone workers, while the extent of backward linkages with non-zone firms remains limited mainly because of the still limited capacity of domestic firms (IGC, 2018).

The planning and administration of industrial zones is generally less well developed compared to that of SEZs. Until now, management committees have not been subject to rules or standards for developing and managing the zones, and the respective roles of different government bodies in administering zone development were not clearly defined. The weak and outdated legal framework has resulted in the rapid proliferation of industrial zones with inadequate planning and little assurances on their performance and benefits. Many industrial zones have inadequate infrastructure, unused plots and irregular use of land. Infrastructure investment and maintenance have been insufficient over the years. Roads are in poor condition even in zones surrounding the main urban areas, and drainage and waste management continue to be a concern. The high prices of land in these zones have led many companies to sell their plots and take their operations outside the zones, defeating any strategy behind zone development. The newly enacted Industrial Zone Law of May 2020 sets out that existing zones shall comply with provisions of the new law, including on land use, environmental conservation, and infrastructure provision. If appropriately enforced, this new legal framework is likely to deliver significant improvements in industrial zone performance.

Mingaladon Industrial Park, developed by a public-private joint venture between the Myanmar government and a Japanese trading and investment company is a notable exception to the general shortcomings of industrial zones. It is widely considered to have the most advanced facilities of any industrial zone in Myanmar, which along with its proximity to Yangon are its main attraction to investors. Unlike other industrial zones in the country, Mingaladon is fully operational with some 41 running businesses occupying all available plots, and employing tens of thousands of workers in light manufacturing activities. But business facilitation in Mingaladon is little better than in other zones or in the wider economy. Building on the Mingaladon experience, the Myanmar government is looking to develop other two industrial parks in partnership with the foreign investors, namely with the Thai Amata Corporation and with the Korea Land and Housing Corporation. It is expected that these new zones will set new improved standards for future industrial zones in the country (Myanmar Times, 2019a and 2019b).

The MIPP proposes a set of actions to improve administration policies of industrial zones, including devising a zone allocation plan based on the investment and linkage potential of different regions; clarifying the roles and responsibilities of different institutions; setting the rules and requirements in terms of activities, infrastructure provision and environmental protection; and examining opportunities for streamlining business-related procedures through a one-window service. The government has since enacted a new Industrial Zone Law as mentioned above and is in the process of amending the Private Industrial Enterprise (1990) and the Small and Medium Enterprise Development (2015) Laws, for the purpose of increasing investment, strengthening links with SEZs, upgrading existing industrial zones and developing sustainable industries. If designed appropriately and in the line with the actions proposed by the MIPP, these laws have the potential to support framework conditions that are conducive to new investment attraction and industrial linkage development in Myanmar's industrial zones.

Myanmar is currently able to offer abundant labour to investors at a competitive cost but with an insufficient supply of workers with technical or managerial skills, who are vital for the adoption of new technologies and for effective business management. The combination of tax deductions for training expenses, investor obligations to provide training activities, and gradually increasing restrictions on foreign skilled labour may serve to effectively transfer knowledge to local employees and develop the technical skills base. But restricting foreign personnel without a parallel initiative to develop the local skills base will only serve to discourage potential investors from choosing to locate in Myanmar. In parallel, the education system is undergoing a major overhaul and the MIPP proposes concrete actions to develop human resources for industry, including monitoring private sector needs and facilitating dialogue between government bodies that oversee vocational education and skill development, education and training institutions and private sector representatives. These actions, if implemented, have the potential to foster the sorely needed technical and managerial skills.

Given the limited base of local suppliers, Myanmar is still at an early stage with respect to linkage programmes, and still relies heavily on donor support to develop the necessary framework for integrating local suppliers in the supply chains of foreign investors. Going forward, successful special economic zones and industrial zones, like Thilawa and Mingaladon, offer a good starting point for implementing pilot linkages programmes. The TSMC could also promote the matching of buyers and sellers by, for example, providing firms in the zone with a list of firms in the Yangon region, and in neighbouring IZs that are producing the relevant inputs or through networking events.

Main policy recommendations

- Align SEZ and industrial zone development and administration with the broader investment promotion strategy. Ensure careful co-ordination across the respective authorities overseeing SEZs and IZs, and DICA, to avoid policy misalignment, duplication and wasted resources.
- Consider gradually phasing out excessive fiscal advantages provided to SEZ investors through extended corporate tax reduction (in addition to the tax holiday available to non-zone investors), while simultaneously relaxing the export-share requirement of free-zones, to level the playing field across zone and non-zone investors, reduce government revenue losses, eliminate distortions in investor allocations to domestic and export markets, and grant domestic industry access to free zone goods. Along these lines, also consider extending tax deductions for training expenses available to SEZ investors to the inland regime.
- In line with the goal of attracting and enabling responsible investments into Myanmar, as alluded in the new Myanmar Investment Law, consider adopting the Thilawa SEZ Notice No. 4/2015 on Responsible Investment for the wider economy, and encourage management committees of all zones to adopt it too.
- Resolve the inconsistency between the SEZ Law and the EIA requirements in terms of approval processes and terminology as set out by the 2012 Environmental Conservation Law, by amending the implementing regulations of either law and creating a dedicated EIA regime for SEZs.
- Implement the action plan for improving planning and administration of industrial zones, and ensure that clear rules and requirements in terms of zone allocation, infrastructure provision, business facilitation and environmental protection are embedded in the new Industrial Zone Law.
- Implement the action plan to develop human resources for industry set out in the MIPP. In particular, establish an active dialogue with the private sector on skills needs, facilitate dialogue between relevant policy makers, education and training institutions, and industry, and support the design of curricula that meet the needs of business.
- Support relevant institutions in designing systematic and industry-specific training programmes for supporting industries, in collaboration with donors and the business community. Involve SEZ investors in the design of training curricula and programmes. Focus on key economic sectors, such as those targeted by the MIPP, including textiles and garments, agroindustry and machinery assembly. Food processing could serve as a pilot initiative given the currently higher potential for linkages in the sector.
- Promote the matching of investors and suppliers through networking events, or by providing Thilawa investors with a list of firms in the Yangon region, and in neighbouring industrial zones that are producing the relevant inputs.

The case for special economic zones

Economic zones have become the preferred instrument of many governments to achieve a number of policy objectives, ranging from FDI attraction to industrial development. Recent estimates suggest that there are nearly 5 400 SEZs globally, of which more than 1 000 established within the last five years (UNCTAD, 2019). Despite many variations in name and form, economic zones can broadly be defined as designated areas where business activity is subject to different rules from those prevailing in the national territory. These distinct (and often laxer) rules are intended to create a business environment that is relatively more liberal from a policy perspective and more efficient from an administrative perspective (Farole, 2011).

Common features of zones include a defined geographic perimeter, reduced tax burden, infrastructure support, simplified regulatory requirements (e.g. with respect to land access, permits and licences, or employment rules), and streamlined administrative procedures (e.g. for registration, customs, etc.) that are often governed by a single autonomous authority. In return for these concessions, governments expect investors in zones to create jobs, boost and diversify exports, and build productive capacity. Their attractiveness to policymakers stems also from their potential use as experimental laboratories where new policies can be tested before being rolled out to the rest of the economy, and more generally to catalyse structural transformation. In practice, evidence of the success of zones in meeting their development objectives is mixed (Box 7.1).

Economic zones generally fall under one of four categories: free zones, export processing zones (EPZs), special economic zones (SEZs), or industrial zones or parks (Table 7.1). Free zones and traditional EPZs are long-established models that are essentially separate customs territories designed to facilitate trade and increase export earnings, respectively. Modern SEZs and industrial zones have a broader development mandate and are designed to facilitate the formation of industrial clusters. SEZs, which are governed by special legislation, typically follow a multi-sector approach and sometimes include other zone models (e.g. large-scale SEZs may include EPZs and industrial zones within them), while industrial zones are usually sector-specific with adapted infrastructure (e.g. science and technology parks) but do not offer special regulatory treatment.

Table 7.1. Types of zones

Type of zone	Development objective	Typical size	Markets
Free zones	Support trade	<50 hectares	Domestic, re-export
Export processing zones	Export manufacturing	<100 hectares	Mostly export
Special economic zones	Integrated development	>1000 hectares	Internal, domestic, export
Industrial zones	Industrial clusters	No minimum	Mostly domestic

Source: Adapted from Farole and Akinci (2011)

Following the experience of some ASEAN peers and China, the government of Myanmar is advancing an ambitious programme of SEZ and industrial zone development, with the aim of supporting structural transformation of the economy (OECD, 2014). As of November 2019, the government designated three SEZs and 19 industrial zones. Of the three SEZs (briefly characterised in Table 7.2), only Thilawa is currently in operation and is home to 113 residents. Spread across the country, industrial zones were mostly established over 1996 to 2010 and host almost 7 500 residents as of November 2019 (Figure 7.1). The three industrial zones in the Yangon region occupy 65% of the country's industrial land and are divided into 35 separately managed industrial areas and parks. Data shared by the authorities indicates that, including all industrial sub-zones, there are a total of 53 active zones and at least another three planned zones. The overall framework governing zones in Myanmar, and the implementation and performance of Thilawa SEZ and Mingaladon Industrial Park are the focus of the remainder of this chapter.

Table 7.2. SEZs in Myanmar

	Thilawa SEZ	Dawei SEZ	Kyaukphyu SEZ
Location	23km south of Yangon	Southern part of Thanintharyi Region	Western Region of Rakhine State
Project size	2 400 hectares	20 000 hectares	1 700 hectares
Major developers	Japan and Myanmar	Thailand and Myanmar	China and Myanmar
Stage	Zone A completed and operational; completion of Zone B expected in 2022.	Started and then suspended in 2013; Conditions for development currently under negotiation.	Three phases started in 2016. Completion expected in 2038.
Target industries	Light industries, manufacturing of consumer goods	First phase: labour-intensive industries, such as garments and food processing; Second phase: heavy industries including automotive, chemicals, rubber, electronics	Regional logistics, oil and gas, processing, garments and footwear
Strengths	Proximity to major market and labour force in Yangon	Proximity to Thailand; deep sea port planned	Proximity to oil and gas resources; deep sea port planned
Weaknesses	River ports in Yangon have limited capacity to handle large shipments	Poor infrastructure in nearby areas	Far from existing industrial areas

Source: Adapted from HKTDC Research (2016)

Box 7.1. Evidence of SEZ impacts

Boosting investment, exports and jobs

There is little systematic research on the impact of SEZs, but evidence of their effectiveness has been mixed. Case studies, often focusing on success stories, provide some evidence of a positive contribution to FDI attraction, export performance and job creation. In China for instance, SEZs account for over 80% of cumulative FDI and are found to have a particularly strong effect on greenfield investments, while not crowding out domestic investment (World Bank, 2017). In Costa Rica, SEZs helped diversify production from garments to electronic components, and their share in manufacturing exports increased from 10% in 1990 to 55% in 2003 (Gereffi, 2019). In the US FTZ programme, job creation averaged 7% per year since 2013, compared to 2% for the wider economy. A few empirical studies that weigh zone impacts against their construction and running costs provide further evidence that many SEZs are effective in boosting FDI, jobs and exports, and that their net economic benefits are marginally positive (Mongé-Gonzalez et al., 2005; Jayanthakumaran, 2003).

At the same time, anecdotal evidence provides numerous instances of zones that did not attract the expected influx of investors, or resulted in investors profiting from generous fiscal incentives while delivering limited employment and exports gains (Farole and Akinci, 2011). In some countries, decentralised policymaking for developing zones has led to excessive competition between provinces, and a misuse of resources and land where zones are only partially occupied (OECD, 2018b). Moreover, SEZs have sometimes been criticised for negative social and environmental impacts, including exploitation of workers and low environmental, health and safety standards (Milberg et al., 2008). In Sub-Saharan Africa, where zone initiatives have been least successful (with a few notable exceptions), poor performance has been attributed to a weak regulatory and institutional framework, lack of effective strategic planning, insufficient governance and implementation capacity, and inadequate infrastructure (Zeng, 2015). Experience worldwide also suggests that successful SEZ programmes require years of nurturing with consistent support from government before they yield the desired impacts (OECD, 2018a).

Experimenting with policy reform

SEZs can play a catalytic role in the process of economic liberalisation and reform. Where governance is relatively weak, or economic reforms are politically sensitive to implement, the enclave nature of SEZs

can be an asset. China effectively used its numerous SEZs as a testing lab for the market economy. Since the 1980s, the government experimented with liberal economic reforms and new institutions in Shenzhen and other coastal SEZs, before gradually introducing them to the wider economy. Recently, the more liberal negative list approach for foreign investment (that restricts access only in explicitly listed industries) was first tested in the Shanghai pilot free trade zone in 2013, then further extended to other pilot zones in 2015, and ultimately adopted as national policy in 2018 (UNCTAD, 2019). Similarly, the true success of the Mauritius EPZ programme was not job creation, investment or exports, but the economic and political reform process that it catalysed, and the ensuing structural transformation of the economy (Farole and Akinci, 2011).

In a similar vein, SEZs can be used as effective pilot schemes for testing policies to boost the investment climate. These pilots can be applied, for instance, in the area of environmental impact assessment, one-stop services, supplier development initiatives, and business matchmaking programmes (OECD, 2014). However, the framework conditions that allowed SEZs to serve a catalytic role in the policy reform process should not be ignored. Shenzhen was only part of the country's overall economic reform landscape (Cheesman, 2012). What worked for China over this period will not necessarily work in other contexts. Successful pilot schemes in SEZs will not necessarily be effective when rolled out to the wider economy if accompanying measures to build local capabilities (both in the private and public sectors) are not in place.

Promoting structural change and upgrading

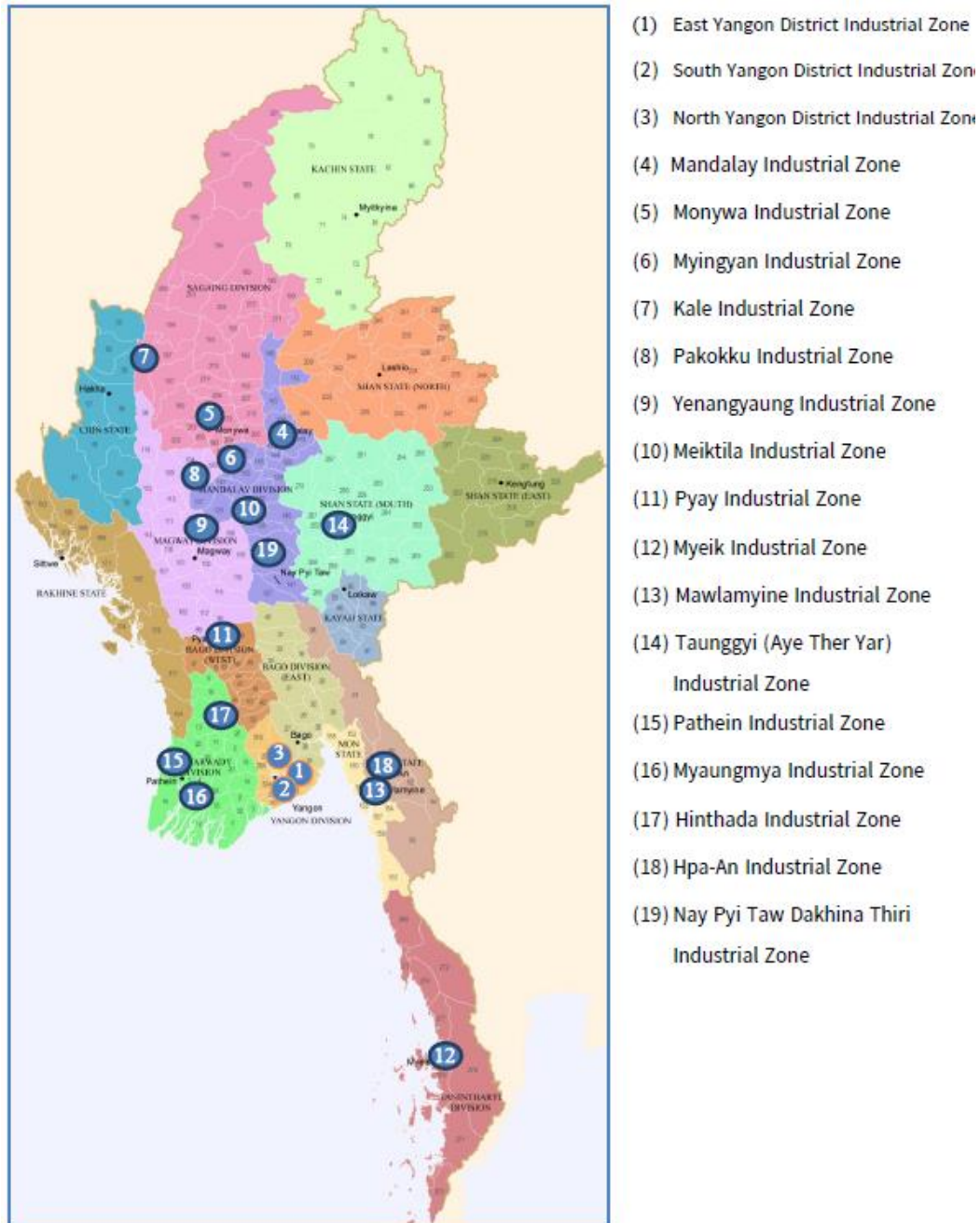
Through adequate infrastructure and good practice in business facilitation, zones can to some extent compensate for an adverse investment climate. However, SEZs are not a substitute for improving the general investment climate, and have often failed to sustain innovation and competitiveness over time, delivering little technological upgrading or new firm creation. Most of the jobs created in zones are low-skilled and concentrated in low-technology manufacturing operations. Even zones that are effective in boosting investment, exports and jobs risk missing the broader development objectives and creating enclaves and parallel economies. In the Dominican Republic, SEZs initially helped shift the economy away from agricultural commodities toward textile manufacturing. But the programme's reliance on trade preferences, incentives and low wages, combined with enclave nature of the zones, led to deteriorating competitiveness and stagnation when the preferences were eventually phased out and wages began to rise (Burgaud and Farole, 2011).

Zone programmes that contribute to upgrading, structural transformation and long-term competitiveness are embedded in a broader national development strategy. For SEZs to generate impact beyond their confines, accompanying measures need to be put in place as part of the SEZ and wider national development strategy, including appropriate connectivity to the rest of the country, reduced barriers to investment, and engagement of the private sector and education institutes. In practical terms, zone spillovers require establishing conditions that favour linkages between investors in the zones and economic actors outside the zones that enable the transfer of knowledge and technology. The extent of these linkages depends crucially on how wide the gap is between the capabilities of the local business elite and the sophistication of what is demanded by foreign investors, so that a more robust local private sector translates to a greater probability of knowledge transfer.

There are many examples of how development strategies that incorporate SEZs have contributed to structural transformation and upgrading. Early examples include Korea and Chinese Taipei, where investors in SEZs formed extensive backward supplier linkages with domestic firms. The Philippines and Malaysia were also able to use their SEZ programmes to support upgrading to higher value added and technology-intensive industries, including electronics, services and software development (ASEAN, 2017). Outside of Asia, zones have also contributed to structural transformation in a number of countries, including the Dominican Republic, Mauritius and Lesotho.

Research suggests that partnerships between economic zones and local universities and vocational training institutes constitute an important magnet in attracting anchor investors, and expanding backward linkages into the host economy (Moran, 2011). In the Dominican Republic, following the decline in SEZ activity and exports, human development was encouraged to support upgrading of the country's production profile. A growing number of SEZs entered into collaboration with local universities, and, since 2010, SEZ exports rebounded, and production grew more diversified. By 2017, the number of indirect jobs attributed to SEZs grew to an estimated 250 000, double the jobs within the SEZs.

Figure 7.1. Existing industrial zones in Myanmar



Source: reproduced from Directorate of Industrial Supervision and Inspection of Ministry of Planning, Finance and Industry (2019).

The regulatory framework for zones in Myanmar

SEZ programmes are usually governed by a special regulatory and institutional framework, dealing primarily with trade, investment, land, tax, labour and environmental policy (Table 7.3). Within this framework, SEZ legislation sets out the regime for the establishment and operation of SEZs and stipulates the rights and obligations of SEZ authorities, developers, operators, and users. The main legislation covering the definition, procedures and administration of SEZs in Myanmar is the 2014 Special Economic Zone Law (henceforth, SEZ Law), implemented by the 2015 Myanmar Special Economic Zone Rules (SEZ Rules). Multiple provisions in the SEZ Law reaffirm the applicability of national laws on land, environment and labour.

Industrial zones, on the other hand, have not been subject to any dedicated regulation to date, although this may change rather soon. The government has already submitted a draft Industrial Zone Law to the parliament and expects it to be enacted before end-2019 (Frontier Myanmar Research, 2019). The goal of the proposed law is to ensure a systematic approach to planning zones and that their development and management meets international standards.

Table 7.3. Main policy areas covered by regulatory framework of SEZs

General legal framework	Examples of special regime
Trade rules	Exemption from customs duties, expedited customs clearance
Investment law	Fewer restrictions on FDI, SEZ one-stop shop, additional protection clauses
Land and real estate laws	Relaxed rules on land ownership, exemption from real estate taxes
Tax code	Exemption from corporate income tax and VAT
Labour laws	Right to employ foreign personnel, requirement to train local staff
Environmental regulation	Obligations related to pollution, noise, water treatment, waste disposal

Source: Adapted from UNCTAD (2019)

Core elements of SEZ law

SEZ programmes that generate extra-zonal benefits through significant linkages with the domestic economy are developed with a clear vision and strategy for achieving specific goals, and are part of a broader development agenda. This strategy is ingrained in SEZ law, through provisions on SEZ definitions, objectives and targeted activities, establishment procedures, investment attraction tools, and operational requirements for investors.

According to a recent UNCTAD survey of SEZ laws in 115 countries, over 90% of SEZ laws contain a general definition of SEZ, but less than a third explicitly mention specific zone types and define them. Under two thirds of surveyed laws state the objectives of the zones. The most frequently cited objectives are static economic impacts such as attracting investment, boosting exports and creating jobs (59%). Around half of the laws articulate dynamic growth objectives, seeking innovation, industrial upgrading, skills development, economic diversification, structural change or integration into value chains. Only 20% specify sustainable development objectives, relating to job quality, environmental protection, or gender issues (UNCTAD, 2019).

The Myanmar SEZ Law provides a general definition of SEZ based on geographic demarcation and legal notification by the competent authority, and further specifies the types of zones (or activities) that can be established within the SEZ. Free Zones, deemed outside national territory and exempt from customs duties are to prioritise export-oriented manufacturing activities; while Promotion Zones, subject to national trade and taxation rules, serve primarily the domestic or internal SEZ markets. A third “other zone” type, can be stipulated by the SEZ managing committee according to market demand in addition to the free zone and

promotion zone. There need not be a physical demarcation of free zone activities and promotion or other zone activities within the SEZ.

The objectives of SEZs in Myanmar are clearly stated in Article 4 of the SEZ Law. They include static economic, dynamic growth and sustainable development objectives and are explicitly linked to a broader development strategy, in accordance with good practice. Notably, the SEZ programme aims to support the national economic development plan; create jobs and improve the standard of living of workers; promote economic cooperation with other countries and provide opportunities for vocational training; encourage both domestic and foreign investment; and support the creation of industrial linkages. These objectives, and particularly mention of domestic investment, linkages and vocational training opportunities provide a good basis for a zone programme that generates spillovers.

Investment attraction tools

Most SEZ laws contain a range of investment attraction instruments that confer special treatment to investors in zones, relative to the general legal framework (Table 7.4). The most common are fiscal incentives and special customs regimes, addressed by 85% and 82% of SEZ laws, respectively. Much fewer contain provisions on investment facilitation, investor protection, or land use (28–36%), followed by trade facilitation and infrastructure provision (18–19%); and only 3% provide for social amenities such as schools and hospitals (UNCTAD, 2019). The Myanmar SEZ Law is relatively comprehensive, applying all of these tools aside from social amenities (which can but need not be established in promotion zones) to make SEZs attractive to investors.

Table 7.4. Investment attraction tools in SEZ laws

Investment attraction tools	% of SEZ laws	Myanmar SEZ Law
Fiscal incentives	85%	✓
Special customs regime	82%	✓
Investment facilitation	36%	✓
Investment protection	29%	✓
Preferential land use	28%	✓
Trade facilitation	19%	✓
Infrastructure provision	18%	✓
Social amenities	3%	✗

Source: Authors' elaboration based on UNCTAD (2019) and the 2014 Myanmar SEZ Law

Commonly used fiscal incentives include exemptions or reduced tax rates on corporate income tax (CIT), tax deductions or credits on expenses (e.g. R&D), and accelerated depreciation of assets. Incentive schemes, particularly tax holidays can impose significant fiscal costs. In Cambodia, the incentive regime is among the least generous in the region, yet forgone revenue due to tax incentives was estimated to amount to 6% of GDP (OECD, 2018a). Incentives that lower the cost of investment (e.g. tax deductions and credits) are considered more efficient for attracting new investments than profit-based tax incentives (e.g. tax holidays and reduced CIT), which by design make already profitable projects even more profitable. Incentives that target specific activities (e.g. training or supplier development) involve greater transaction costs both in terms of understanding eligibility and of monitoring compliance, but, if effectively implemented, can support the achievement of socio-economic objectives.

The Myanmar SEZ Law specifies that businesses in the free zone and promotion zone receive corporate tax exemptions for the first seven or five years, respectively, followed by a 50% reduced CIT rate for the second five years, plus an additional five-year reduced rate on reinvested profits. Then the standard corporate tax rate of 25% applies. Dividends paid out to shareholders from taxed profits are exempt from

dividend tax. Additionally, free zone investors are exempt from customs duties and commercial taxes on all imports used for production (including imports from promotion zones), while promotion zone investors can apply for exemption on imported capital goods, only. Expenses related to staff training and research activities incurred by investors in free zones can be deducted from taxable income.

At first glance, a comparison of the Myanmar SEZ Law¹ and the Myanmar Investment Law² suggests that promotion zone investors and inland regime investors are essentially under the same tax and customs regime, and exporters in the inland regime have access to similar fiscal and customs advantages as free zone investors (Table 7.5). However, an important difference in the two regimes is the extended period of reduced CIT rate after the initial CIT holiday, available to both export-oriented (free zone) and domestic market-oriented (promotion zone) investors (Table 7.4). While this may compensate market-seeking investors for high costs related to market penetration and product adaptation, this fiscal advantage may be particularly detrimental for domestic non-zone companies that compete for the same market as promotion zone investors.

Table 7.5. Preferential tax treatment inside and outside Myanmar SEZs

		Inside SEZs		Outside SEZs
Law		SEZ Law		Investment Law
Approval		SEZ Management Committee		Myanmar Investment Commission
Tax exemptions and reductions	Commercial tax/ VAT	Free Zone	Exemption	No exemption
		Promotion Zone	Exemption for 5 years	
	Corporate income tax (CIT)	Free Zone	Exemption for 7 years 50% reduction for next 5 years 50% reduction for next 5 years for reinvested profits	Exemption for promoted sectors only, for 3, 5 or 7 years depending on development designation of location
		Promotion Zone	Exemption for 5 years 50% reduction for next 5 years 50% reduction for next 5 years for reinvested profits	
	Dividend tax	Free Zone	Exemption on dividends paid out from profits for which CIT was paid	No exemption
		Promotion Zone		
Deductions	Free Zone	Local staff training and R&D activities	R&D activities	
	Promotion Zone	Not specified		
Customs duties		Free Zone	Exemption on import of capital goods, intermediate goods and raw materials (including from Promotion Zone)	Exemption on import of capital goods during the construction period or during the preparatory period of the investment; Refund on import of raw materials and intermediate goods for the manufacture of export products
		Promotion Zone	Exemption on capital goods for 5 years 50% reduction for next 5 years Refund on import of raw materials and intermediate goods for the manufacture of export products	

Source: OECD based on SEZ Law and Investment Law

While the corporate tax holiday is similar to or shorter than the SEZ regimes of regional peers, this is one of the more generous incentive packages offered in the region (along with Indonesia, Lao PDR and Viet Nam), as a result of the long period of reduced CIT rate.³ Many regional peers have abolished reduced tax rates in zones altogether, in line with wide consensus among international experts to simplify tax regimes and reduce reliance on tax incentives. Cambodia took this approach, offering essentially no special fiscal treatment to companies in SEZs to date. This avoids creating a dual regime system that can be an added source of complexity and distortion (OECD, 2018a). More advanced countries in the region have moved away from zone-based incentives, to targeting priority sectors and activities. Prioritising

industries can also be problematic and may not be suitable for Myanmar at this stage, but there may be scope for further reducing fiscal privileges of investors in zones relative to the wider economy.

On the other hand, tax deductions granted under Article 52 of the SEZ Law for staff training expenses can make an important contribution to upgrading skills and building local capacity. The government may consider extending these deductions to investors in promotion zones and in the inland regime.

While financial incentives are influential, they are not the only considerations for investors. Non-pecuniary incentives strive to improve the business climate within the SEZ, and have been found to matter more for SEZ success than tax incentives, based on data from 77 countries (Farole, 2011). Among the main obstacles faced by domestic and foreign investors in Myanmar are access to electricity and access to land (World Bank, 2016). The Myanmar SEZ framework alleviates these constraints by requiring developers to provide basic infrastructure and utilities; by sidestepping the costs imposed by inadequate land registry and conversion of land use categories; and by protecting against land expropriation.

The SEZ Law further mandates the establishment of a one-stop services centre (OSSC) to access all government services and clearances, where on-site representatives from relevant government departments are granted authority to issue all necessary permits without seeking approval from line ministries. Customs officers are similarly required to provide simplified and expedited clearance procedures on-site. This is a huge benefit, as there is effectively still no one-stop clearance for an investor outside the SEZ, and the investor has to make several applications across various ministries to get approval for the project.

Investor requirements

Over a third of SEZ laws specify criteria that investors must meet to establish and operate in SEZs, including minimum investment and performance requirements related to exports, employment and skills transfer (UNCTAD, 2019). The Myanmar SEZ Laws and Rules similarly establish these requirements, which are somewhat more onerous compared to other regional peers in terms of capital and export requirements (Table 7.6). In particular, free zone investments in Myanmar are subject to a 75% export share requirement (ESR), and supporting industry activities of free zones must sell 80% of their output to free zone exporters. In contrast, zone investors in Cambodia, Lao PDR and Viet Nam are not restricted from selling to the domestic market provided these sales are treated as imports and subject to general tariffs and customs procedures.

The statutory ceiling on domestic sales, or export share requirement, is intended on the one hand, to protect firms in the inland regime from exposure to unfair competition from free zone firms under special investment regimes, and on the other to develop exports and avoid creating incentives for domestic market-seeking firms to relocate to free zones. However, it may distort investors' allocation of sales across domestic and export markets to comply with the ESR and enjoy the associated incentives, or prevent them from adjusting to macroeconomic fluctuations in demand. Moreover, it limits the extent to which the domestic industry and Myanmar citizens can, respectively, benefit from high-quality inputs and consumer goods produced in free zones. This may be particularly damaging to both SEZ investors and Myanmar consumers since the onset of the COVID-19 pandemic and the related impediments to trade. Lastly, monitoring the implementation of ESRs can be costly from an administrative point of view.

At the same time, the current preferential treatment available to both export-oriented and domestic market-oriented investors (*i.e.* the extended 50% CIT rate reduction) goes counter to the justification of protecting inland investors from unfair competition. Gradually lowering import tariffs and easing import procedures under the inland regime while phasing out profit-based corporate tax incentives in the zones may reduce the costly comparative advantage gap between free zone and inland investors (OECD, forthcoming 2020). This was the approach adopted in Cambodia, where zone investors enjoy virtually no fiscal advantage compared to the inland regime.

Among the countries considered only Cambodia and Myanmar require investors to train local staff. Specifically, Article 73 of the SEZ Law mandates the provision of training and course material on subjects relevant to the business “for the improvement of the skill of the citizen staff”. In Cambodia, all investors, within and outside zones are required to provide adequate and consistent training to Cambodian staff under the national investment law. Moreover, zone developers have a duty to cooperate with the Ministry of Labour and Vocational Training to facilitate the training of Cambodian workers and employees and to promote new knowledge and skills through specifically-designed programmes.

Similar to its regional peers, Myanmar allows the employment of foreign personnel in SEZs only for activities requiring technical or managerial skills. In particular, Article 75 of the SEZ Law requires plants to gradually shift their skilled labour force towards Myanmar citizens, from at least 25% in the first year of operation to 75% in the fifth year. In Cambodia the law is much more restrictive allowing for at most 10% of skilled workers to be foreigners; while, at the other end of the spectrum, Viet Nam does not impose any restriction on skilled foreign employees. Combined with Article 73 on training requirements, and Article 52, on tax deductible training expenses, Myanmar’s approach of gradually increasing the foreign employment restriction may be a way of fostering skills upgrading and anchoring investors to the country, although it entails the potentially high administrative costs of monitoring and enforcing the regulation. A less restrictive approach like that of Viet Nam, on the other hand, gives investors greater flexibility to bring in qualified manpower with the required qualification, increasing the zones attractiveness.

Table 7.6. Establishment and operational requirements for SEZ users

Investor requirements	Myanmar	Cambodia	Lao PDR	Viet Nam
Minimum investment	USD 750 000 (FZ) USD 300 (SI, PZ)	✗	✗	✗
Exports share (including indirect)	75% (FZ) 80% (SI)	✗	✗	✗
Foreign employment	0% low-skilled ≤25% high-skilled*	0% low-skilled ≤10% high-skilled	≤10% low-skilled ≤25% high-skilled	0% low-skilled No limit high-skilled
Skills transfer	✓	✓	✗	✗

Note: FZ = free zone; SI = supporting industry in free zone (required to sell 80% of output to exporter in FZ); PZ = promotion zone. High-skilled workers include managers, technicians and experts. *The SEZ Law allows for a higher share of skilled foreign personnel in the initial years of operation: 75% (2 years), and 50% (2 years).

Source: Authors’ elaboration

Environmental Impact Assessments

As discussed in Chapter 6, Myanmar’s regulatory framework for Environmental Impact Assessments (EIAs) is set out in the 2012 Environmental Conservation Law (ECL) and its implementing regulations. The framework precedes the 2014 SEZ Law, and explicitly references SEZs only with respect to environmental conservation (e.g. waste treatment). In turn, the SEZ Law embeds the ECL framework by requiring all zone developers and investors to abide not only by the environmental standards described in the ECL, but also by international standards. The SEZ Law does not attach any environmental permitting responsibility whatsoever to the SEZ Authority. The SEZ management committee is only mandated to supervise and ensure compliance of both zone developer and investors in the SEZ with the existing laws relating to the conservation and protection of natural environment.

As such, there are no provisions in either law or respective implementing regulations that establish dedicated arrangements for EIAs on SEZs and SEZ investments or which exempt them from the purview of EIA requirements established in the ECL (Baird and Cosier, 2016). Nonetheless, stakeholders have reported cases of SEZ developers and investors pursuing their investments without obtaining the required approvals from the Environmental Conservation Department (ECD) of the Ministry of Natural Resources

and Environmental Conservation as stipulated in the ECL. For the moment, under the current legal framework, these and any other future SEZ investment project relying simply on the investment permission issued by the SEZ authority, where it would have been subject to EIA approvals if located outside the zone, are likely to be in violation of Myanmar law. The Government needs to resolve this inconsistency by amending the implementing regulations of either law and creating a dedicated EIA regime for SEZs.

Institutional set-up

SEZs have a complex institutional set-up involving multiple public- and private-sector actors with different roles and responsibilities:

- The **government** sets the overall development objectives and implements the underlying economic policies, including SEZ programmes.
- Most governments establish an **SEZ authority**, responsible for the strategic and operational planning of the SEZ programme, and for overseeing development and administration of zones. The authority usually responds to the highest levels of government, in the form of an independent specialised agency or a state-owned enterprise.
- The **zone developer**, under the supervision of the SEZ authority, implements a zone project, providing infrastructure and making land arrangements. Given the requisite technical and financial capacities, many countries opt for private sector involvement in zone development, and over 40% of SEZ laws include incentive schemes to attract private developers (e.g. tax breaks and preferential land use).
- **Zone users**, or investors, are the intended beneficiaries of the special regime, and contribute their productive and technological capabilities to the zone.

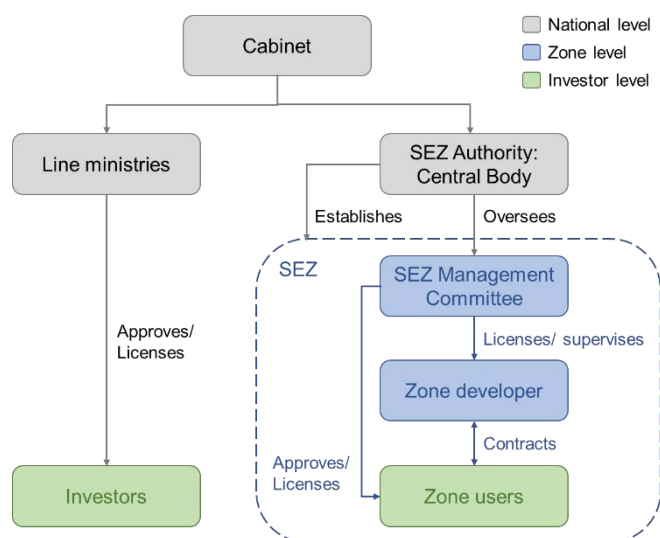
Like most countries, Myanmar established a separate SEZ authority, the Central Body, to co-ordinate zone policies and initiate related programmes. As it responds directly to the presidential cabinet and is chaired by the Vice President of Myanmar, the Central Body enjoys considerable autonomy in performing its duties, which include establishing SEZs; appointing and supervising each zone's management committee; selecting zone developers; and approving zone development plans submitted by the committees. The Central Body is also charged with forming a Central Working Body chaired by the Minister of Commerce to scrutinise proposed zone development plans and provide assistance in the implementation of SEZ activities.

The management committee of a zone, in turn, is charged with supervising the zone's development and day-to-day operations, providing all required permits within a prescribed time-frame (30 days), and establishing the one-stop window for issuing permits to investors. Within the SEZ, it can stipulate the demarcation between free zone, promotion zone, and other zone as it deems fit.

The developer, selected by the SEZ authority and licensed by the management committee, carries out the implementation and maintenance of the SEZ, and subleases land to investors. The SEZ Law specifies that the developer can be public, private, a public-private joint venture, fully domestic, fully foreign, a foreign-domestic joint venture, or an inter-governmental venture.

This institutional model (Figure 7.1) gives broad flexibility to policymakers to shape SEZ regimes according to zone activities and specific investment projects. It allows for developers to retain broad autonomy in their operations and to leverage the expertise of foreign public and private investors, while SEZ authorities retain some control over the admission process through the management committees.

Figure 7.2. Myanmar's institutional set-up for SEZs



Source: Authors' elaboration based on the Myanmar SEZ Law

Improving the framework for industrial zones

Contrary to SEZs, the legal framework, planning and administration of industrial zones in Myanmar are generally inferior to advanced ASEAN countries (MIC-JICA, 2018). Most zones were created between 1991 and 2010, and, up until now, have been governed by the directives of related ministries and the 1990 Private Industrial Enterprise Law (PIE). In this framework, the authority that oversaw industrial zones was the Directorate of Industrial Supervision and Inspection (DISI) under the Ministry of Industry. Management committees under DISI's oversight supervised industrial zone activities and provided the necessary services to business but were not subject to rules or standards for developing and managing the zones. The respective roles of different government bodies in planning and implementing zone development were not clearly defined. This weak legal framework resulted in the rapid proliferation of industrial zones with inadequate planning and little assurances on their performance and benefits to society at large.

There are limited investment climate incentives for establishing within existing zones, as business-related procedures are as costly and time-consuming as outside the zones. Corruption and regulatory red tape in particular make it difficult and time consuming to obtain the land ownership documentation required for loans or to import new technologies. Investors often have little understanding of the laws surrounding industrial processes, and find that many of these laws are unclear and applied unevenly. In practice, business owners must submit to the arbitrary request of officials. Whether or not these requests are supported by actual laws is often unknown by business owners (FNEFF, 2015).

Many industrial zones have inadequate infrastructure, unused plots and irregular use of land (a notable exception discussed in more detail in the next section is Mingaladon Industrial Park), being simply the result of the transformation of agricultural to industrial land (see Chapter 8 for a discussion on challenges related to land allocation and administration more generally). Infrastructure investment has fallen short of the needs of businesses, particularly for the more peripheral zones, and maintenance has been insufficient over the years. Roads are in poor condition even in zones surrounding the main urban areas, and drainage and waste management continue to be a concern, particularly as most zones were developed with inadequate waste management systems prior to the 2012 Environmental Conservation Law. The high prices of land in these zones have led many companies to sell their plots and take their operations outside the zones, defeating any strategy behind zone development. Also, the location of some industrial zones is questionable, as they are not connected to markets and trading routes (OECD, 2014).

In light of these shortcomings, the MIPP proposed a set of actions to improve administration policies of industrial zones, as part of the wider 2017-36 investment promotion strategy (Table 7.7). These actions include devising a zone allocation plan based on the investment and linkage potential of different regions and economic corridor considerations; clarifying the roles and responsibilities of different institutions; setting the rules and requirements in terms of zone activities, infrastructure provision and environmental protection; and examining opportunities for streamlining investment-related procedures through a one-window service.

Table 7.7. Action plan for improving industrial zone administration

Action	Items to be reviewed
Improve administration and management of industrial zones	<ul style="list-style-type: none"> • Regulatory organisation and supervision of zone management • Investment application criteria of MIC • Roles of state/ regional governments, Ministry of Industry (now merged into the new Ministry of Planning, Finance and Industry), Industrial Development Committee
Formulate a national industrial allocation plan	<ul style="list-style-type: none"> • Investment trends and investment potential of regions • Industrial linkage and agglomeration • Urban development • Economic corridor development
Formulate rules and standards for industrial zone development and management	<ul style="list-style-type: none"> • Zone requirements/ criteria • Standardised procedures for development • Management rules • Infrastructure development • Environmental protection
Consider establishing one-stop services centres in industrial zones	<ul style="list-style-type: none"> • Streamlining of investment-related procedures within OSSC mechanism

Source: MIC-JICA (2018).

The government has since submitted to Parliament a new Industrial Zone Law with the stated objectives of enhancing opportunities for investment, controlling and managing environmental impacts caused by industry, ensuring systematic planning of new zones, upgrading infrastructure of existing zones. Under the new law, enacted on 26 May 2020, industrial zones are governed by a three-tier system for policy design, oversight and management. A newly established Industrial Business and Industrial Zone Development Central Committee (Central Committee), chaired by the Minister of Planning, Finance and Industry, sets policies and reviews proposals to develop industrial zones. The Central Committee oversees regional supervisory committees, in turn chaired by regional ministers and charged with governing the zone programmes of their respective regions. Private sector representatives are included in the membership of regional committees. Individual zones and their day-to-day activities are then administered by management committees chaired by representatives elected by the zone investors under the supervision of their region's supervisory committee. Management committees will also at least be partly composed of investors.

The new law contains provisions on land use, environmental conservation, taxation and incentives, rights and obligations of developers and investors, and settlement of administrative disputes. For instance, under the IZ Law, regional supervisory committees are responsible for subjecting existing zones to environmental conservation plans, identifying any unused land plots, and reallocating them to SMEs. Prerequisites for new zones include strategic location with transport links to domestic and international markets; infrastructure development; sufficient land area; access to water and electrical power; and support for skills development through training opportunities. In addition, DISI is trying to draft a new and more comprehensive industrial law to replace the 1990 PIE law, and to amend the Small and Medium Enterprise Development Law (2015).

If these laws are enacted as proposed and in line with the actions proposed by the MIPP, together with the new IZ Law, they have the potential to support framework conditions that are conducive to new investment attraction and industrial linkage development. These laws should also aim to enhance the environmental performance of industrial activities, including by aligning and ensuring adequate monitoring of industries compliance with national standards, such as the Myanmar National Environmental Quality (Emissions) Guidelines (2015) which provides for controls on noise and vibration, air emissions, and liquid discharges from various sources (see Chapter 6 for more information on environmental standards).

In practice, existing management committees of selected zones have already started monitoring water use and examining opportunities for developing waste water treatment systems in their respective zones, under the guidance of the Environmental Conservation Department, and with the support of donors (JICA, 2018).

Aligning zone programmes with the investment promotion framework

SEZs and IZs are part of a broader national investment promotion and facilitation framework that comprises national and regional policies, legislation and institutions. As mentioned in previous chapters, the Myanmar government has taken significant strides toward strengthening the institutions and measures to promote and facilitate investment in the country, notably through the Investment Policy announced in 2016, and the new investment regime under the Myanmar Investment Law and Special Economic Zone Law.

Currently, DICA under the Ministry of Investment and Foreign Economic Relations is responsible for the overall investment promotion strategy and related activities, while SEZ programmes are under the direct supervision of the cabinet of ministers with the Ministry of Commerce providing an advisory role, and industrial zones are under the oversight of the Ministry of Planning, Finance and Industry. While it is not unusual for countries to have multiple institutions promoting investments at national and zone levels, what is important is for the activities and mandates of these institutions to be clearly outlined and co-ordinated to avoid wasteful duplication and overlap. Myanmar could look at the experience of other regional peers with different degrees of centralisation of FDI promotion efforts and zone programmes, and their respective successes and failures (Box 7.2).

Box 7.2. Experience of centralised and decentralised zone authorities

In **Cambodia**, the Council for Development Cambodia (CDC) established in 1994 was reorganised several times before becoming the highest decision-making body in defining the framework for investment strategies and accepting or rejecting investment proposals. The CDC now further serves as the first point of contact for foreign investors, the one-stop window for granting permits, the only institution granting tax incentives, the secretariat of the government-private sector forum, and the authority overseeing special economic zones. The strong degree of centralisation under the CDC ensures consistency and co-ordination of investment promotion and facilitation activities both within and outside zones.

In **Lao PDR**, until recently, the National Committee for SEZs (under the Prime Minister's Office) was responsible for investments in zones, but the amendments made in 2016 to the Law on Investment Promotion consolidated this investment promotion and facilitation responsibilities under the Ministry of Planning and Investment. This was a welcome reform as, previously, these distinct entry points had brought a certain degree of confusion to investors, especially when incoherent or conflicting messages were delivered. Bringing special economic zones management into the unit responsible for investment promotion under the Ministry of Planning and Investment should allow for a coherent and consistent investment promotion and facilitation strategy and better co-ordinated activities.

In contrast each province in **Viet Nam**, has a Department of Planning and Investment responsible for investment-related activities and reports to the province's People's Committee. While all provinces

constitute the entry point of investors to establish their business and start their investment, their level of activity and efficiency depend greatly on local capacities and resources. Decentralisation also comes with certain risks, such as duplication and overlap of activities, potentially harmful competition between provinces, possible lowering of environmental standards and growing regional inequalities as a result. Until recently, poor co-ordination on investment promotion has brought confusion to investors and has sometimes sent negative signals

In the **Philippines**, while the Board of Investment (BOI) under the Department of Trade and Industry is the official national IPA, there are 18 agencies involved in investment promotion, each one with different functions and incentive packages. The government created separate zone authorities (e.g. PEZA, CDC, SCAD) because the BOI was having difficulty moving from business licensing and regulation to an IPA and zone authority. The zone authorities have their individual mandates objectives anchored in a number of legal acts, which can create confusion for potential investors and the administration. The government is aware of these challenges and efforts have been underway since 2009 to synchronise the various IPAs and their activities, resulting in joint missions abroad, a common platform, “Invest Philippines”, and a joint website.

Source: OECD Investment Policy Reviews of Cambodia (2018), Viet Nam (2018), Lao PDR (2017) and Philippines (2016)

Implementation and impact: Thilawa and Mingaladon

There has been little systematic research on the impact of zones, as monitoring data on zone performance are rarely collected or comparable across countries. Zone assessments are largely based on case studies, which often focus on success stories and the characteristics that make them successful rather than providing a comprehensive cost-benefit appraisal.

The expected benefits of zones are both direct and indirect. Direct benefits include FDI attraction, job creation and income generation, export growth and diversification, and foreign exchange earnings. Indirect economic benefits are more difficult to define and measure, but are an essential component of the sustainable development impact of zones. They include supplier linkages beyond the confines of the zone and the indirect employment they create, as well as the induced income and jobs resulting from spending of zone wages in the wider economy.

Importantly, the benefits of SEZs should be weighed against their costs, which include the capital expenditure for zone development, the cost of operating the zone authority and other operating expenses, and the public revenues forgone through tax exemptions. Public expenditures on SEZs tend to be highest where governments develop and manage zones (UNCTAD, 2019). The combined economic impacts of a zone net of its investment and operating costs provide a measure of the zone’s financial viability, including the payback period on zone investment and the long-run fiscal burden it generates.

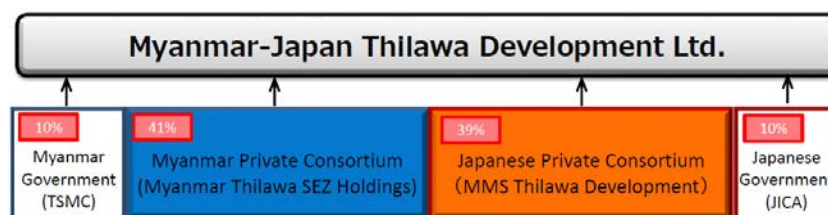
As mentioned earlier, zones can also generate dynamic economic effects through their impact on technology and skills development. These include promoting industrial upgrading and economic diversification, as well as enhanced regional co-operation and integration in regional and global value chains. Beyond economic impacts, zones can have positive or negative social and environmental impacts, by affecting for instance labour conditions, land use and pollution. Finally, zones that are used for policy experimentation can provide valuable policy lessons and catalyse reforms (or alternatively reduce pressure for governments to pursue difficult national reforms). The net economic, social, and environmental benefits of zones and their effects on policy reform capture their overall sustainable development impact, which is what ultimately affects structural transformation.

As argued earlier, successful SEZ programmes require years of nurturing before they fully bear fruit, and in the case of Thilawa and Mingaladon, it is still early to assess broad socio-economic impacts weighed against investment and operation costs. Nevertheless, it is useful to examine zone implementation and economic performance, both relative to the broader economy and in comparison to other countries so as to get a sense of their economic contributions and draw some lessons for the way forward.

Learning from Thilawa SEZ

Initiated in 2011, Thilawa commenced commercial operations in September 2015 and is currently the most advanced SEZ in Myanmar. The zone is located 25 km southeast of Yangon, adjacent to Thilawa Port, and stretches over 2500 hectares. The development of the zone is undertaken by MJTD, a public-private joint venture, including the Government of Myanmar and the Japan International Cooperation Agency, along with private consortia from Myanmar and Japan (Figure 7.3). As of September 2019, a quarter of the total available land is developed (629 ha) and hosts 113 contracted investors, of which 74 are in operation (MJTD, 2019). Around a quarter of tenants are export-oriented tenants of the Free Zone, while the remainder are domestic market-oriented tenants of the Promotion Zone.

Figure 7.3. Investment structure of the Thilawa SEZ developer



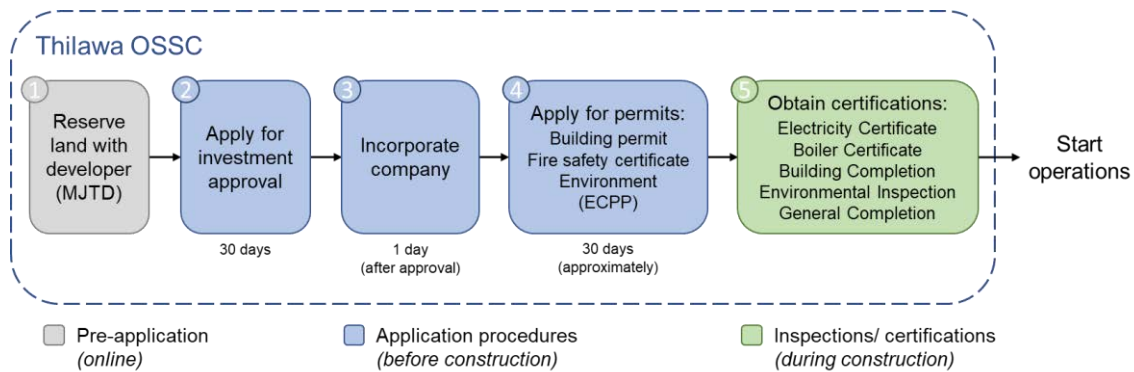
Note: TSMC = Thilawa SEZ Management Committee; JICA = Japan International Cooperation Agency.

Source: MJTD (2019)

Improving the investment climate

Countries often use SEZs to sidestep pre-existing regulatory procedures that impose high operating costs on firms, and to compensate for weak infrastructure. As mandated by the SEZ Law, the Thilawa SEZ Management Committee (TSMC), chaired by the Deputy Minister of Finance and Planning, established a One-Stop Services Centre (OSSC) that significantly reduces the number of public officials with which investors must engage and offers expedited one-stop clearances for all necessary approvals and registrations. Given the short lead time that international buyers require, delays and uncertainty around securing permits through multiple government agencies can be costly for producers, making one-stop clearances an effective way to reduce trade costs, which are estimated to be large in Myanmar (IGC, 2016).

The Thilawa OSSC is staffed by representatives of various ministries who are fully authorised to grant necessary licences and approvals required by investors. At the time of the project launch, the OSSC provides approval of company establishment, investment approval, company registration, environmental, construction and taxation application, and registration of foreign workers. During project construction and operation, the OSSC further offers visa issuance, customs clearance, labour management application, environmental management, tax filing, and power supply procedures (MJTD, 2018). The main steps for setting up a business in Thilawa are clearly explained on the Thilawa OSSC website, which provides links to all related forms and documentation (Figure 7.4). The TSMC is in the process of developing a portal for investors to submit applications, obtain approvals and interact with the TSMC online.

Figure 7.4. Setting up a business in Thilawa SEZ

Source: Adapted from <https://www.myanmarthilawa.gov.mm/>

The TSMC has committed to specific turnaround times for many procedures like investment approval (30 days), company incorporation (1 day), and construction design approval (5 days). In this respect, Thilawa is comparable to zones that are internationally recognised for their good practice in business facilitation, such as the Philippines Economic Zone Authority and the Clark Development Corporation in the Philippines (Box 7.3).

Box 7.3. Investor facilitation excellence in the Philippines

The Philippines has a number of good examples of one-stop-shops offering particularly effective services to investors.

The Philippines Economic Zone Authority (PEZA) is recognised internationally for its one-stop-non-stop shop, providing a 24 hours, 7 days a week service to investors. The services it offers under one roof include issuing building and occupancy permits, import and export permits, online application and e-payment systems, environmental clearance certificates, fast processing of food and medical devices, and special multiple-entry non-immigrant visas. PEZA's processing is recognised as fast and straightforward (CIE, 2008). Since 2009, PEZA zones' share in total inward FDI has increased from 50% to 70%, reflecting in part the quality of its one-stop-shop service.

Since 2013, Clark Development Corporation (CDC) has started streamlining administrative procedures on all frontline offices offering services such as permit processing. Based on official data for 2013, it has reduced processing time on average by 48%. In close co-ordination with the Bases Conversion and Development Authority (BCDA) and the Subic Clark Alliance for Development (SCAD), CDC developed and tested a programme called the harmonised Business Start Up and Registration System (EzBiz System), designed to achieve a unified, streamlined, cost-effective, automated and interlinked business registration, trade facilitation and information process. The system allows for an online interface and a real time business inquiry and registration system that would allow prospective investors seamless inquiries, and will eventually be rolled out to all national IPAs if successful.

Source: OECD (2016) and Pfister (2017)

In terms of infrastructure, the TSMC has taken access to basic public utilities seriously, as demonstrated by the recently developed electricity distribution network, gas pipeline, gas-fired power generation plant to supply firms inside the Thilawa SEZ, and water supply network. In addition, the bridges, highways and

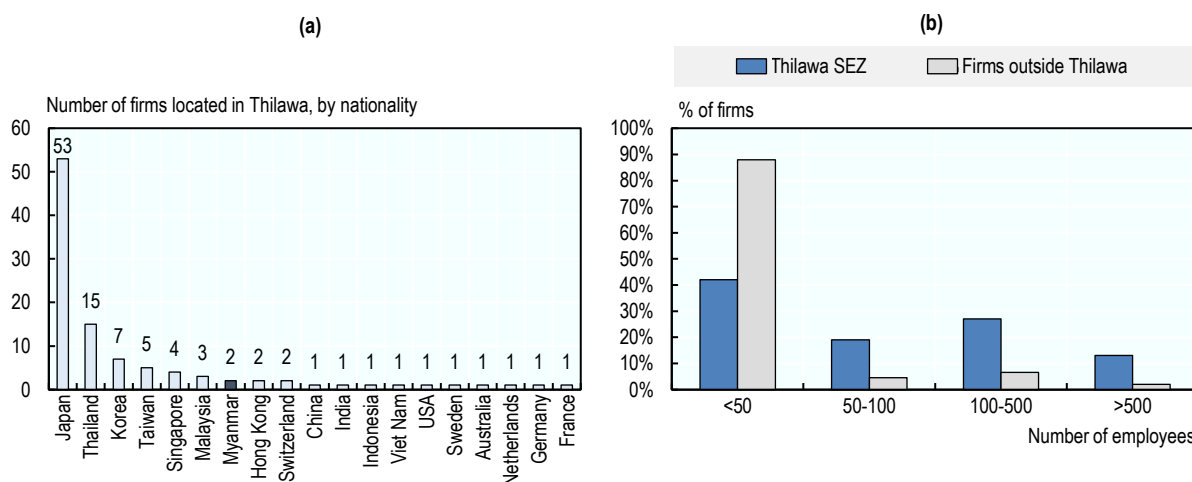
container terminals, both completed and under development, demonstrate the government's commitment to connect the SEZ to the wider economy.

Lastly, another key contribution of the TSMC to improving the investment climate in Thilawa has been its Notice No. 4/2015 to Ensure the Responsible Investment in the Thilawa SEZ. The guidance formally states what is expected of companies doing business in the SEZ in terms of responsible business conduct beyond simple compliance with Myanmar law. This includes respecting human rights; engaging with stakeholders affected by their activities; supporting the rights of workers; building human capital; ensuring effective grievance mechanisms; being open and transparent; creating shared value; and supporting the communities in which they operate. Given the reluctance of international brands to be associated with SEZs that violate human rights or other RBC principles, such a notice is an important step in branding Thilawa as a responsible business destination, and attracting more investment. As discussed in greater detail in Chapter 4, a similar notice, not only from other zone management committees, but from the government as a whole, would be a welcome improvement in the overall investment climate.

Thilawa's economic contributions

Just over 110 enterprises from 19 countries (including Myanmar) invested in Thilawa as of September 2019, with a combined total pledge of USD 1.89 billion. Currently, 74 businesses are operational and account for around 9000 jobs; a quarter of these have already started exporting. The vast majority of investors in Thilawa are Japanese, followed by Thai and Korean investors, while only two are local (Figure 7.5a).

Figure 7.5. Firms in Thilawa are predominantly foreign and larger



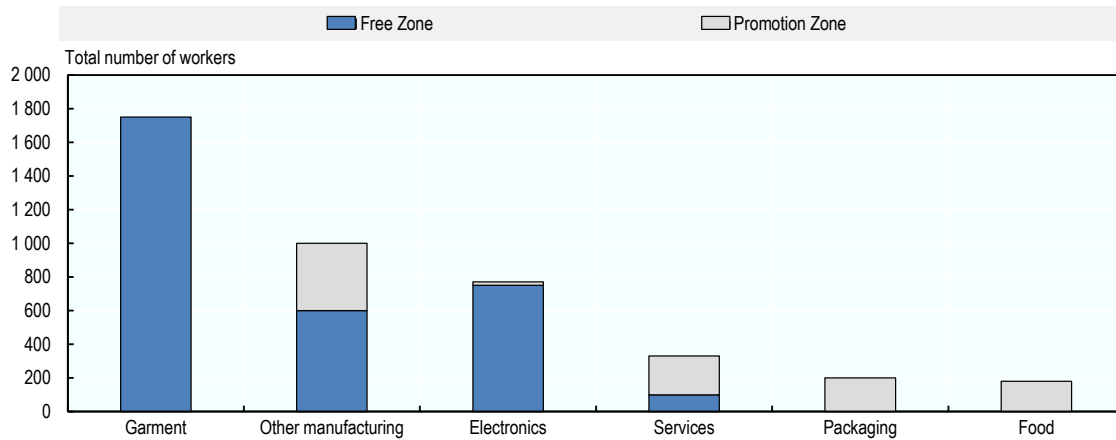
Note: Data are as September 2019 in Figure 7.5a, and as of February 2018 for IGC data on Thilawa firms and as of late 2016-early 2017 for World Bank's data on firms outside Thilawa in Figure 7.5b.

Source: author's calculation based on MJTD (2019), IGC (2018) and 2016 World Bank Enterprise Survey.

Comparing the distribution of firm size (in terms of employment) inside Thilawa as of February 2018 to a representative sample of Myanmar firms from the 2016 World Bank Enterprise Survey suggests that firms in Thilawa are typically larger than firms operating outside the zone (Figure 7.5b). A closer look indicates that the average number of employees of firms in the Free Zone is 250 compared to 50 in the Promotion Zone, and 80 outside Thilawa. This gap is largely due to the difference in industry specialisation between the Zones. Domestic market-oriented firms of the Promotion Zone, include more capital-intensive producers of construction materials, fertilisers, medicine and packaging, as well as logistics companies

and service providers. Large-scale export-oriented employers, such as garment, shoe, and toy manufacturers, are instead the main occupants of the Free Zone (Figure 7.6).

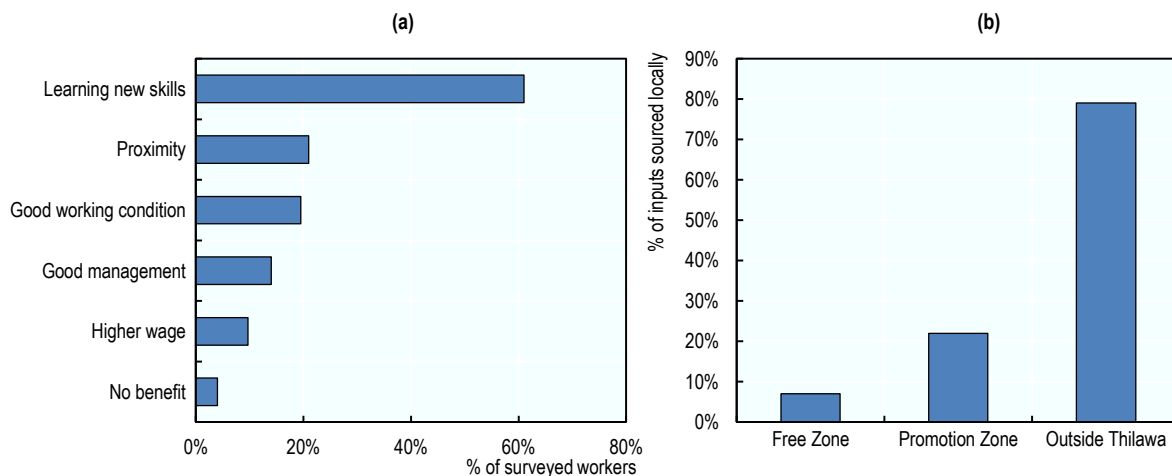
Figure 7.6. Large-scale employers prevail in the Free Zone



Note: The underlying data is from a survey of firms in Thilawa SEZ as of February 2018.
 Source: author’s calculation based on IGC (2018).

The potential long-run benefits of SEZs arise through knowledge transfers between foreign companies in the SEZ and local companies. An important channel of knowledge transfer is labour mobility. Foreign investors in SEZs typically use more advanced technology and processes and need to train their staff to acquire the relevant skills. If the trained staff subsequently move outside the zone to work for domestic companies or start a business they can share valuable knowledge acquired inside the zone to the wider economy. In Thilawa, the top perceived benefit of working in the zone is indeed learning new skills, and 62% of the managerial workforce report that human resource management is the most important skill acquired in the zone (Figure 7.7a).

Figure 7.7. Skills are the most important perceived benefit of working in Thilawa and local content is relatively low



Note: The underlying data is from a survey of workers in Thilawa SEZ as of February 2018.
 Source: author’s calculation based on IGC (2018).

Another important mechanism for zone spillovers is through business linkages between zone and non-zone firms, through selling or buying intermediate inputs. By engaging with firms with more advanced technology and knowhow, higher quality products and services and better management practices, domestic firms can internalise this knowledge and operate more efficiently. However, domestic input sourcing of Thilawa's investors is currently not very high. The percentage of intermediate inputs sourced locally is less than 20% in the Promotion Zone and under 10% in the Free Zone, compared to 80% in the rest of the country (Figure 7.7b). The sector in which local sourcing is greatest is food processing, where 50% of inputs were sourced domestically, on average (IGC, 2018).

Insights from Mingaladon Industrial Park

A total of 19 operational industrial zones exist across Myanmar with three more zones planned or currently under construction. The Yangon East Industrial Zone and Yangon North Industrial Zone are significantly larger than other zones in the country, and are consequently divided into 29 industrial areas that function as independent industrial zones, each with a management committee.

Stretching over 90 hectares, Mingaladon Industrial Park (henceforth, Mingaladon) is one of the independent industrial areas in the North Yangon Industrial Zone, located 7 km from Yangon International Airport, 25 km from central Yangon and 50 km from Thilawa SEZ. Originally established in 1996, Mingaladon was developed by a public-private joint venture involving Japanese Mits Co. Ltd. (60%) and the Myanmar Ministry of Construction (40%), with the objective of creating an industrial zone in Myanmar to meet international standards. In fact Mingaladon is the only zone in the country to have foreign participation in its development. Other zones are entirely domestically developed and many do not have a formal zone developer. Given the zone's relative success, clear rules and criteria for zone developers are a crucial factor introduced by the new 2020 Industrial Zone Law.

Similarly to all industrial zones, Mingaladon does not offer special treatment in terms of taxes, customs duties or administrative procedures. Investors benefit from customs duty exemption on import of capital goods for five years, and on the import of raw materials and intermediate goods used to manufacture export products, as stipulated by the Investment Law, provided the necessary materials are declared at the time of investment proposal. The same is true of employing skilled foreign staff (low-skilled foreign workers are not permitted). This can pose a considerable hurdle for investors, as any adjustments in imported resources require additional approvals. While similar procedures for importing materials and workers are necessary in Thilawa at the time of business proposal, they can be more easily and rapidly (1 day for registering foreign workers) amended thanks to the highly efficient Thilawa OSSC. Instead, in terms of business facilitation, there is limited improvement in Mingaladon with respect to other zones or the wider economy. Interviewed foreign investors in the garment sector, report that the zone management does little to help investors navigate through the required paperwork and procedures, and investors are forced to rely on personal acquaintances for help.

Mingaladon is widely considered to have the most advanced facilities of any zone in Myanmar, which are its main attraction to investors. Specifically, the zone provides access to electricity, communication, and water supply networks, a waste water treatment plant, a retention pond, roads and drainages. For large-scale producers, the supply of electricity remains insufficient, and many have their own generators. Unlike other zones, Mingaladon is fully operational with 28 running businesses occupying all available plots, each of 1 to 4 hectares in size. One interviewed embroidery manufacturer employing 5000 workers expressed that they would expand operations in Mingaladon if it were possible but are limited by availability of plots, and do not find other sites sufficiently attractive.

While other zones in the country fail to attract foreign investment, the vast majority of businesses in Mingaladon are Japanese, Korean and Chinese, and engaged in export-oriented, labour-intensive manufacturing of garments, shoes and cosmetics. As they export most if not all of their production, they benefit from duty and tax refunds on imported inputs. Interviewed businesses report that all machinery and

equipment are imported mainly from Japan, Germany and Italy, and raw materials from China and Chinese Taipei.

The 28 firms in Mingaladon, of which none are small and only one is medium-sized, employ a total of 14 872 workers as of 30 November 2019, according to official data shared by the authorities. In other words, investors in Mingaladon employ on average 531 workers, compared to 172 in the wider North Yangon Zone, and 53 countrywide, reflecting the zone's high concentration of low-skilled labour-intensive manufacturing activities (Table 7.8). A sport footwear manufacturer reported that they provide three months of training to new employees during their probationary period and keep them if they meet the skills requirements. Trainers are brought in from China, while supervisors within the plant are local. Other companies employ managers from Chinese Taipei and technicians and local staff for production. Competent, fast-learning and hard-working labour force were commonly reported as motives for locating in Myanmar during field visits.

Table 7.8. Industrial zone occupancy by region

Region (No. of IZs)	Number of enterprises				Labour force	Average firm size
	Small	Medium	Large	Total		
Mingaladon	27	1	0	28	14 872	531
Mandalay Division (3)	440	580	681	1 701	20 608	12
Yangon East (11)	947	930	129	2 006	65 710	33
Yangon South (1)	16	0	0	16	2 078	130
Yangon North (23)	1 495	106	9	1 610	276 854	172
Ayeyarwady Division (3)	16	17	44	77	10 526	137
Sagaing Division (4)	178	238	365	781	8 849	11
Bago Division (1)	34	74	79	187	956	5
Magway Division (2)	34	97	201	332	1 675	5
Mon State (1)	31	116	40	187	929	5
Shan State (1)	55	106	342	503	2 542	5
Tanintharyi Division (1)	25	2	2	29	1 168	40
Kayin State (1)	26	9	0	35	2 363	68
Naypyitaw (1)	9	0	0	9	182	20
Total (53)	3 306	2 275	1 892	7 473	394 440	53

Note: The reported number of IZs in parentheses includes sub-zones. Data as 30 November 2019.

Source: Ministry of Finance, Industry and Planning (2019).

Enhancing the impact of SEZs through business linkages

As discussed in the previous section, SEZs impose a cost on society through forgone revenues from tax incentives, duty exemptions and infrastructure investment specific to the zone. In order to justify the establishment of zones, the societal gains must outweigh these costs. The potential long-run benefits of SEZs are that they generate spillovers that benefit workers and firms located outside the zone through knowledge transfers.

Better understanding SEZ spillovers

SEZ spillovers encompass all sorts of long-lasting, structural benefits that investments in the SEZ can bring to the host country, whether on the quality of the workforce, on the competitive environment in the economy, or on the creation of supply chain linkages with domestic firms. Business linkages between zone

and non-zone companies are the channel through which SEZ spillovers can be maximised, owing to the productivity gains resulting from the transfer of knowledge and technology from zone investors to domestic companies and workers (Farole and Winkler, 2014).

While SEZ investors will generate spillovers depending on the spillover potential of the particular type of investment in the host economy, domestic firms will benefit from them if they have sufficient absorptive capacities. To a certain extent, host countries can influence investor spillover potential and domestic firm absorptive capacities with appropriate policies and institutions, such as labour market regulations, intellectual property (IP) rights, access to finance, education and training facilities, investment and trade policies and promotion as well as SME development policy.

Business linkages occur along the supply chain and can be either backward or forward. Backward linkages refer to upstream sectors and occur when domestic firms become suppliers to SEZ investors. Forward linkages arise in downstream sectors, when the investors' goods and services are used as inputs in local companies' operations. Low- and middle-income host countries tend to focus, in the first instance, on promoting the former as they can more easily serve to develop the potential of local SMEs. Creating linkages also serves the purpose of investment attraction and retention, as it induces foreign investors to be more firmly anchored to the local economy, to adopt a longer-term investment strategy in the country and be inclined to reinvest or expand activities.

Business linkages depend first and foremost on the capabilities of domestic companies, which in turn hinge crucially on the skills of local managers and workers. Addressing skills shortages and tailoring human resource development to meet industry needs are a critical first step. Improving the business climate outside SEZs, building a supplier base with the requisite capacities, and other more proactive measures to encourage linkages and develop clusters around SEZs are then essential to ensure SEZs become part of the wider business ecosystem rather than enclaves and benefit the rest of the economy.

Addressing skills shortages

A skilled workforce tailored to private sector needs is vital for the creation of productive business linkages, and for embedding economic zones in the wider business ecosystem. Higher education and vocational training are important means for acquiring the technical skills workers need in their professions. Policy action can help ensure educational and training programmes are high-quality, relevant, and regularly reviewed, and plays a fundamental role in linking education and training institutions with businesses and industry, to ensure programmes meet business needs. Human resource development is one of the priority policy areas to be addressed by the inter-ministerial Investment Promotion Committee (task force 5) established in 2019 (see Chapter 3).

Myanmar is currently able to offer abundant labour to investors at a competitive cost, but there remains insufficient supply of workers with technical or managerial skills, who are vital for the adoption of new technologies and for effective business management. Lack of trained staff was among the top reported business challenges in a 2017 Myanmar Business Survey of 500 domestic and international investors (Roland Berger, 2017). Quality of employees is similarly among the most commonly cited problems faced by Japanese investors in Myanmar (59%), second only to Bangladesh (63%) in a survey of 5073 firms in Asia and Oceania (JETRO, 2018).

Skills shortages derive from a combination of a weak education system and a lack of adequate training opportunities. Only 10% of young people from any year group currently obtain secondary school-leaving certificates, enabling them to meet the requirements for enrolment in university or in most vocational training programmes (GIZ, 2019). For those who qualify for higher education, there are 33 technical universities specialised in science and engineering and 28 computer studies universities, but their graduates do not satisfy the requirements of investors in terms of expertise (MIC-JICA, 2018). SME employees have limited access to formal on-the-job training opportunities. Training facilities are poorly

equipped and run-down and the programmes they offer are often ill-suited to the demands of a rapidly evolving labour market. Training institutes lack the ability to teach practical computer courses, for instance, due to a limited number of computers, lack of electricity and severely restricted funding (Oxford Business Group, 2018). To date, the private sector has not been systematically involved in developing and implementing vocational education initiatives (GIZ, 2019).

Recognising the need to improve the quality of the education system and develop adequate skills in Myanmar, the government laid out the groundwork for reform with the 2012 Comprehensive Education Sector Review, which resulted in the enactment of the 2014 National Education Law⁴ and establishment of a Technical Vocational Education and Training (TVET) Task Force. The education system is undergoing a major overhaul under the ambitious National Education Strategic Plan (2016-2021), which articulates strategies for human resource development, and for which the government is currently attempting to create the necessary legislation and institutional structures. The National Skills Standard Authority has reviewed TVET institutions from the perspective of skill standards, competency-based curriculum and competency-based assessment, and is creating a skills qualification framework in accordance with that of ASEAN (MIC-JICA, 2018).

In parallel the MIC acknowledges that investors sorely need skilled workers with practical knowledge and middle management staff, and sets out required actions to develop human resources for industry, as part of the wider 2017-36 investment promotion strategy. The proposed actions crucially include monitoring the needs of the private sector by facilitating dialogue between government bodies that oversee TVET and skill development, education and training institutions and private sector representatives, such as the UMFCCI. According to the strategy, DICA is to convey the needs of investors to relevant policymakers, while the Technical and Vocational Education Council is to formulate a plan for developing human resources for industry, with the purpose of designing curricula that meet the needs of business.

The MIPP further endorses the establishment of collaborations between universities and training institutions, foreign investors, local business and donor organisation, and several such collaborations are already in place. The Myanmar-Japan Centre for Human Resources Development, managed by UMFCCI with the assistance of JICA, provides training on practical production techniques. The Myanmar Garment Human Resource Development Centre trains garment workers in collaboration with JETRO. The Singapore-Myanmar Vocational Training Institute collaborates with foreign automobile producers and hotels on internship programmes. Thilawa SEZ has created its own Vocational Training Centre to train workers based on what skills are in demand by investors in the SEZ, although records of its activities are not yet available. Lastly, the action plan proposes revamping the employment placement network that matches job-seekers and investors, and putting together a reliable database on TVET institutions that allow investors to easily access information on where to find required skills.

If this co-ordinated effort continues to receive credible political backing and public resources, and the described actions are effectively implemented, monitored and reviewed, the ongoing overhaul of the education system is expected to help develop and maintain a skilled and adaptable workforce. Addressing existing skills shortages will in turn provide an important first step to building a vibrant supplier base that can engage in productive business linkages with SEZ investors. In advancing the activities of the Thilawa Vocational Training Centre and ensuring their effectiveness, Myanmar may draw some lessons from Malaysia's experience with the Penang Skills Development Centre (Box 7.4).

Box 7.4. Lessons from Malaysia's Penang Skills Development Centre

Amidst fierce national debates on the relative virtues of export-led versus import substitution growth strategies, the Penang SEZ became known in the 1980s as the site in Malaysia where multinational investors engaged in basic consumer electronic assembly and export. In combination with vigorous investment promotion policies, the Penang state government established the Penang Skills Development Centre (PSDC), which was later recognised as a world-class model for partnerships between government, academia, and industry. PSDC initially concentrated on vocational training in electrical engineering and electronics, as part of Malaysia's advance into standardised component production (such as printed circuit boards), and subsequently to higher value-added components and products in the semiconductor, information technology, audio visual, and digital camera sectors.

Beginning in 2000, Penang added life sciences, biotechnology, pharmaceuticals and medical devices to its repertoire for FDI-SEZ-export expansion. Penang's particular niche combines advanced electronics with life sciences, including, for example, precision and tooling-based medical devices, electrical and electronic-based medical devices, automation-based medical devices, and diagnostic tools. In an effort to ensure that its vocational training programmes kept pace with FDI promotion efforts, PSDC created a Micro-Electronics Centre of Excellence at Universiti Sains Malaysia, which relies on support from international corporations for specialization in mechanical engineering (e.g. robotics, micro- and nano-assembly), chemical engineering (e.g. gasses and chemical delivery techniques), materials sciences (e.g. packing R&D), and supply chain management. More recently, Universiti Sains Malaysia has begun to cultivate similar government-industry-academic partnerships in the pharmaceutical and nutraceutical sectors.

Penang's FDI-SEZ-export strategy has created a virtuous cycle for Malaysia by integrating attraction of foreign investors, skill-building initiatives, and infrastructure upgrades. In 2005, the Malaysian central government chose Penang to roll-out the Multimedia Super Corridor IT platform for industries and businesses. At the onset of the international financial crisis in 2008 there were more than 700 companies operating in Penang's eight SEZs (4 Free Trade Zones and 4 Industrial Estates) with a total of 775 factories employing more than 170 000 workers. At the same time Penang – and Malaysia overall – have generated one of the world's more successful records in generating backward linkages and supply chains within the host economy, from complex packaging to a broad array of contract engineering services.

Source: OECD-UNIDO (2019); OECD (2013)

Developing supporting industries

Industrial clusters, characterised by geographic concentrations of interconnected firms, have yet to begin developing in Myanmar (MIC-JICA, 2018). The export-oriented garment sector has developed in the Yangon region and its periphery, but lacks upstream linkages. Local competition is not yet well-prepared to face players operating on an international level, according to 78% of foreign investors that participated in a 2017 survey (Roland Berger, 2017). Resource-based industries, such as the agro-industry, are characterised by low value addition and offer limited spillover potential. In an effort to address the general lack of capacity, DISI has started offering technology-related training programmes in collaboration with relevant line ministries and organisations for SME development. The national and regional SME agencies also formulated an action plan for SME development.

Building absorptive capacities of Myanmar supporting industries and enhancing MNE-SME linkages not only requires a horizontal approach to SME development but also industry-specific capacity-building to

help SMEs achieve technological upgrading and meet quality standards. The potential for Myanmar companies to become suppliers of foreign affiliates remains limited in most industries. While it is important to help SMEs meet international quality standards (e.g. ISO), it might be more critical to help them meet industry-specific standards, as the latter are more inclined to help SMEs become sound supporting industries and integrate in global value chains (Farole and Winkler, 2014). Technical support and training also need to involve industry associations and MNEs themselves, which can play a key role in both the design and the delivery of such training, and ensure their relevance. These aspects also highlight the importance of adapting the country's human resource development strategy with national economic priorities, as discussed in the previous section.

The government could support the design of systematic and well-institutionalised industry-specific training programmes for supporting industries, in collaboration with donors, the business community and educational institutions. Agencies and training providers responsible for implementation should involve SEZ investors in the design of curricula and programmes. Initially the effort should focus on key economic sectors, such as those targeted by the MIPP, including textiles and garments, agroindustry and machinery assembly. As the bulk of existing linkages between Thilawa investors and domestic non-zone suppliers are in food processing, where 50% of inputs are sourced domestically, the agro-industry in particular could serve a good starting point for any pilot initiatives.

Thailand provides an interesting example of how a donor-supported industry initiative was scaled-up and institutionalised into an agency capable of providing technical and managerial support, and as supporting industries developed, gradually assumed a coaching role for fully privately-run industrial associations capable of delivering their own technical support (Box 7.5).

In parallel the government could target investments from strategic first-tier suppliers to advance the development of upstream activities in which Myanmar lacks capacity. The automotive industry is a good case in point, as global lead companies (e.g. Toyota) have shown interest in investing in assembly plants in Thilawa but are constrained by the absence of locally established suppliers. Myanmar companies are not yet at the stage of supplying automotive parts and components but have the potential to plug into the value chain as 3rd or 4th tier suppliers. Thus focusing Thilawa's investment promotion efforts to target international 1st and 2nd tier auto parts suppliers can be a way to promote the development of supporting industries, and ultimately linkages, in the automotive value chain.

Box 7.5. Thailand's approach to developing supporting industries

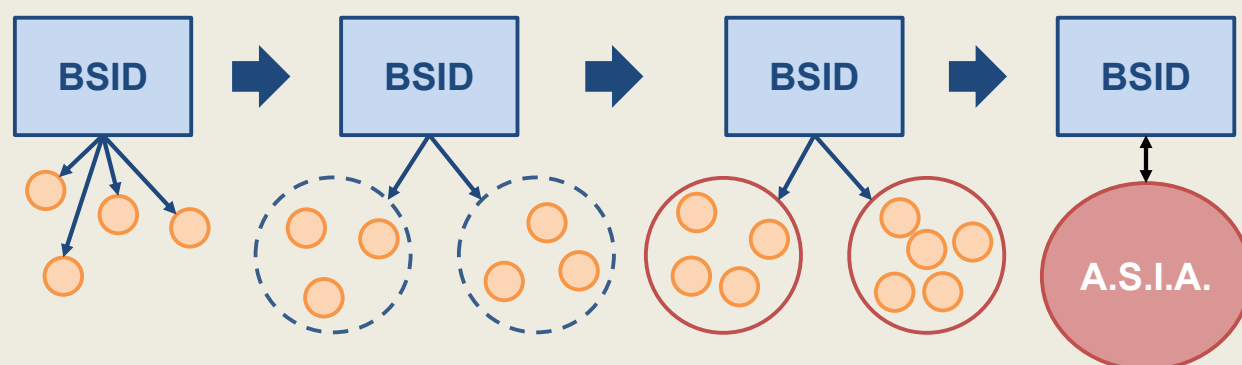
The Bureau of Supporting Industry (BSID) under Thailand's Ministry of Industry (MOI) is responsible for promoting Thai supporting industries. BSID originates from an agency established in 1987 with JICA technical cooperation to implement promotion measures for metal-related supporting industries in the wake of massive relocation of Japanese manufacturers to Thailand. The Machinery Industries Development Institute (MIDI) was scaled-up and upgraded to BSID with a higher organisational status and a broader scope of work (including plastic, packaging, and linkage), and focused on the three aspects: people, technology, and linkage.

BSID has taken a step-by-step approach to strengthening the capacity of Thai supporting industries. Initially, when the private sector was weak and the number of supporting industry firms was limited, BSID directly provided technical and managerial support to individual companies. When the number of companies grew to a thousand, BSID established and managed thematic forums of supporting industries (e.g. design, metal, machinery, foundry, etc.), serving as their coach and secretariat. Gradually, these forums gained experience and developed into truly privately-run industrial associations. Currently, there are twelve such industrial associations fostered by BSID, which are beginning to provide technical support and training to member companies independently.

In 2008, the Alliance for Supporting Industries Association (A.S.I.A.) was established, again with the support of BSID, to promote networking among existing supporting industry associations. A.S.I.A plans and conducts activities related to all industry associations, generating synergies for over 15,000 companies are involved in the alliance. While the organisation is young and its capacity limited, A.S.I.A has proven effective for promoting cooperation among different supporting industry firms toward a common goal of becoming competitive regionally and globally.

Currently, BSID, industrial institutes, A.S.I.A., and A.S.I.A.-affiliated industrial associations collectively work to strengthen supporting industries. BSID is responsible for overall policy for supporting industry promotion, and initiates and implements innovative pilot projects, which are then managed by the private sector (A.S.I.A. and its industrial associations). Industrial institutes play a key role in drafting and implementing industrial master plans in their respective sectors, acting as the hub for businesses, government (BSID), experts, and other organizations. A.S.I.A. and its industrial associations are the initial point of contact for member companies for information, training, and business matching. BSID, industrial institutes, and industrial associations all work very closely in Thailand, and are for the most part housed in the same complex in Klong Toey, Bangkok, allowing for frequent interaction and collaboration.

Figure 7.8. A step-by-step approach to develop Supporting Industries



Source: Based on GRIPS Development Forum (2016, 2015) and OECD-UNIDO (2019). Figure elaborated by GRIPS Development Forum (2016), based on interview with Mr. Panuwat Triyangkulsri, Director of BSID of the Ministry of Industry, Thailand, May 26, 2015.

Actively promoting business linkages

Even when local SMEs are competitive enough and technologically ready to engage with foreign investors, these linkages may not materialise. Many MNEs are bound by contracting arrangements that tie them to international suppliers. In some other cases, MNEs rely on their usual overseas business partners for convenience or because of lack of information, and do not make the effort to look for local firms that can act as suppliers. In such cases, the government can bridge information gaps with targeted measures to facilitate exchange of information. Such soft policy tools can both inform MNEs of local sourcing opportunities and their reliability, and inform SMEs of foreign investors' needs in terms of products and services, standards, and delivery. Whether or not foreign affiliates have an interest in creating and strengthening local linkages, their willingness to do so can be reinforced by government policies designed to:

- Provide information on local suppliers;
- Ensure that linkage programmes address SME capabilities

- Value the knowledge transfers from foreign investors to SMEs;
- Expand markets through MNE networks.

Southeast Asian peers have, to varying degrees and with varying levels of success, put in place a range of policies and programmes designed to raise the capabilities of domestic firms and deepen linkages between local SMEs and foreign MNEs. These initiatives can be grouped into seven broad categories (OECD-UNIDO, 2019):

- *SME centres* offer a wide array of services designed for SMEs including business matching activities.
- *Matching services* provide direct assistance in identifying business partners or buyers, and in setting up meetings or on-site factory tours.
- *Networking events* include SME showcase events and exhibitions and business matching sessions that bring together SME suppliers and prospective MNE buyers.
- *SME portals* provide SMEs with listings of commercial and government opportunities, networking events, or directly connect businesses through online channels
- *Supplier databases* provide lists of local suppliers by product or sector of activity.
- *Training and supplier development* initiatives offer funding to MNEs that support local SMEs in acquiring skills or technology, or in meeting specific vendor requirements.
- *SME solutions* initiatives offer funding for collaboration to develop solutions to help SMEs improve operational efficiency, adopt new technologies, upgrade capabilities, or develop new offerings.
- *MNE specialist secondments* provide financial and organisational support to MNEs whose specialists are seconded to SMEs to assist them in meeting vendor requirements.

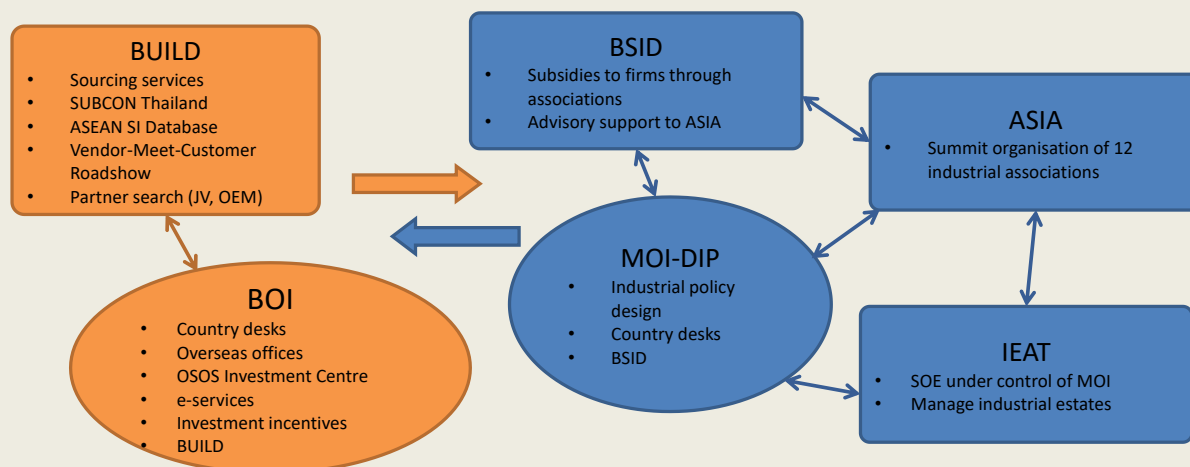
Given the still limited base of local suppliers, Myanmar is still at an early stage with respect to linkage programmes, and still relies heavily on donor support to develop the necessary framework for integrating SMEs in the supply chains of foreign investors. Going forward, successful special economic zones and industrial zones, like Thilawa and Mingaladon, offer a good starting point for implementing pilot linkages programmes. The TSMC could also promote the matching of buyers and sellers, for example, through networking events, or by providing zonal firms with a list of firms in the Yangon region, and in neighbouring IZs that are producing the relevant inputs and that meet the relevant international standards, both related to product quality and to responsible business practices. Regional initiatives like the ASEAN Supplying Industry Database will also benefit information provision and business match-making efforts.

Moreover, the example of Thailand's illustrates that successful linkage promotion needs to be part of a longer-term development plan that is coordinated across multiple government bodies (Box 7.6).

Box 7.6. Thailand's strategic network approach to linkage promotion

In Thailand, the Board of Investment (BOI) and the Ministry of Industry (MOI) are the key official actors responsible for the three core elements of linkage policies. They flexibly and informally coordinate activities of related agencies and units affiliated with BOI or MOI, as well as private sector bodies such as the Alliance for Supporting Industries Association (ASIA). In addition, there are academic institutions and non-profit organisations that provide technical support and business consulting, among which the Technology Promotion Association is the most prominent. The resulting network is neither dominated by a single organisation nor governed by explicit rules. Each member organisation performs its functions separately, and refers customers to other organisations wherever they can fill required functions better.

Figure 7.9. A strategic network approach to linkage promotion



As an investment promotion agency, the BOI is the first point of contact for foreign investors and is charged with attracting FDI strategically (based on the published list of priority activities and products) and linking it with local companies, through its BOI Unit for Industrial Linkage (BUILD). BUILD receives inquiries from foreign investors through various channels (including the One Start One Stop Investment Centre and BOI's overseas offices), announces the specification and volume requirements of foreign buyers in its website, and solicits expressions of interest from Thai suppliers. It also subsidises Thai firm participation in overseas trade shows (Vendor-Meet-Customer Roadshows).

Source: reproduced from OECD-UNIDO (2019). Figure elaborated by GRIPS Development Forum (2015) mission interview with the Board of Investment of Thailand, September 5, 2013.

References

- ASEAN (2017), *ASEAN Investment Report 2017: Foreign Direct Investment and Economic Zones in ASEAN*, Jakarta: ASEAN Secretariat, October 2017.
- Burgaud, J., and T. Farole (2011). "When Trade Preferences and Tax Breaks Are No Longer Enough: The Challenges of Adjustment in the Dominican Republic's Free Zones," in Farole, T., and G. Akinci (eds.), *Special Economic Zones: Progress, Emerging Challenges, and Future Directions*, Washington, DC: World Bank.
- Chen, J. (1993), "Social Cost-Benefit of China's Shenzhen Special Economic Zone", *Development Policy Review*, 11(3): 261–71.
- Farole, T. (2011). "Special Economic Zones: What Have We Learned?", *World Bank Economic Premise*, No. 1-5, Washington, D.C.: World Bank.
- Farole, T., and G. Akinci, eds. (2011), *Special Economic Zones: Progress, Emerging Challenges, and Future Directions*, Washington, D.C.: World Bank.
- Frontier Research Myanmar (2019), *Myanmar Industrial Zone Review — Contents and Sample Pack*, January.
- Gereffi, G., S. Frederick and P. Bamber (2019), "Diverse paths of upgrading in high-tech manufacturing: Costa Rica in the electronics and medical devices global value chains", *Transnational Corporations*, 26(1): 1–30, United Nations Conference on Trade and Development, Geneva.

- GIZ (2019), “Promotion of vocational education and training in Myanmar”, website content, <https://www.giz.de/en/worldwide/17777.html> (accessed on 15 December 2019).
- HKTDC Research (2016), “Myanmar Rising: Industrial and Special Economic Zones”, website section, August 16, <https://hkmb.hktdc.com/en/1X0A72FF/hktdc-research/Myanmar-Rising-Industrial-and-Special-Economic-Zones> (accessed on 24 August 2019).
- International Growth Centre (2018), “Learning from Thilawa Special Economic Zone”, IGC *Policy Brief No. 89404*, February.
- International Growth Centre (2016), “Special Economic Zones for Myanmar”, IGC *Policy Note*, February.
- Jayanthakumaran, K. (2003), “Benefit-Cost Appraisals of Export Processing Zones: A Survey of the Literature”, *Development Policy Review*, 21(1): 51–56.
- JETRO (2018), *2018 JETRO Survey on Business Conditions of Japanese Companies in Asia and Oceania*, December 2018.
- JICA (2018), “JICA and Environmental Conservation Department (ECD) together with local stakeholders completed Project for Capacity Development in Basic Water Environment Management”, press *release*, May 9, <https://www.jica.go.jp/myanmar/english/office/topics/press180509.html> (accessed on 15 December 2019).
- MIC-JICA (2018), *Myanmar Investment Promotion Plan 2016/17 – 2035/36*, Government of Myanmar.
- Myanmar Japan Thilawa Development Ltd. (2019), “Welcome to Thilawa Special Economic Zone”, Presentation by Mr. Tomoyasu Shimizu, CEO of MJTD, March 21 (unpublished).
- Mongé-Gonzalez, R., J. Rosales-Tijerino, and G. Arce-Alpizar (2005), “Cost-Benefit Analysis of the Free Trade Zone System: The impact of foreign Direct Investment in Costa Rica”, *OAS Trade, Growth and Competitive Studies*, Organization of American States, January.
- Myanmar Times (2019a), “Green light given for Thai-backed industrial estate near Yangon”, website article, October 29, <https://www.mmtimes.com/news/prospects-look-bright-south-korean-backed-industrial-complex-near-yangon.html> (accessed on 15 December 2019).
- Myanmar Times (2019b), “Prospects look bright for South Korean-backed industrial complex near Yangon”, website article, September 24, <https://www.mmtimes.com/news/prospects-look-bright-south-korean-backed-industrial-complex-near-yangon.html> (accessed on 15 December 2019).
- OECD (2020), *OECD Investment Policy Reviews: Egypt 2020*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9f9c589a-en>.
- OECD (2018a), *OECD Investment Policy Reviews: Cambodia 2018*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264309074-en>.
- OECD (2018b), *OECD Investment Policy Reviews: Viet Nam 2018*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264282957-en>.
- OECD (2018c), *OECD Investment Policy Reviews: Southeast Asia*, OECD, Paris, <http://www.oecd.org/investment/oecd-investment-policy-review-southeast-asia.htm>
- OECD (2017), *OECD Investment Policy Reviews: Lao PDR*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264276055-en>
- OECD (2016), *OECD Investment Policy Reviews: Philippines 2016*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264254510-en>.
- OECD (2014), *OECD Investment Policy Reviews: Myanmar 2014*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264206441-en>
- OECD-UNIDO (2019), *Integrating Southeast Asian SMEs in global value chains: Enabling linkages with foreign investors*, OECD, Paris, <https://www.oecd.org/industry/inv/investment-policy/integrating-southeast-asian-smes-in-global-value-chains.htm>
- GRIPS Development Forum (2016), “East Asian Experiences of FDI-Local Firm Linkage Development”,

- Presentation by Ohno, I. and Ohno, K., Addis Ababa, July 2016.
- GRIPS Development Forum (2015), "Report on the Thailand Mission", prepared by Ohno, I., Ohno, K. and Nagashima, A., 12 June 2015.
- Oxford Business Group (2019), *The Report: Myanmar 2019*, Oxford Business Group.
- Pfister, M. (2017), *What's Special about Special Economic Zones? A Case Study of the Philippines*, Executive Doctorate Thesis, Dauphine University, Paris
- Roland Berger (2017), *Myanmar Business Survey #2*, December 2017.
- UNCTAD (2019), *World Investment Report 2019: Special Economic Zones*, New York and Geneva: United Nations.
- World Bank (2017), *Special Economic Zones: An Operational Review of Their Impact*, Washington, D.C.: World Bank.
- Zheng, Z. D. (2011), "How do special economic zones and industrial clusters drive China's rapid development?", *Policy Research Working Paper 5583*, World Bank.

Notes

¹ Myanmar Special Economic Zone Law, 2014 (2014, The Pyidaungsu Hluttaw Law No. 1/2014), 8th Waning of Pyatho 1375 ME (2014, January 23).

² Myanmar Investment Law 2016 (The Pyidaungsu Hluttaw Law No. 40/2016), 2nd Waning of Thadingyut, 1378 M.E. (18th October, 2016).

³ The tax holiday lasts 6 years in Cambodia and the Philippines; 8 years in Thailand; 10 years in Indonesia and Lao PDR; and 4 years in Viet Nam, followed by a 5% CIT rate for 9 years.

⁴ Myanmar National Education Law 2014 (The Pyidaungsu Hluttaw Law No. 41/2014), 1376, New Moon of Thadingyut 7th day (September 30, 2014).

8. Fostering secure and well-defined land rights

This chapter provides an overview of Myanmar's regulatory framework on land rights and administration. It reviews recent policy developments and reforms, identifies key remaining obstacles contributing to land tenure insecurity and administration deficiencies and recommends a number of policy reforms for addressing these challenges.

Secure and well-defined land rights are a key building block of an enabling investment environment, notably one that supports a more inclusive and sustainable development path. Myanmar still needs to make considerable progress in this respect. The first OECD *Investment Policy Review* (OECD, 2014) already shed light on many land tenure and governance deficiencies affecting the investment climate and sustainable development more widely. The review also recommended a number of reforms that would contribute to strengthening land rights and administration.

Many of the land tenure challenges identified then still persist today, although it is to be hoped that the prospects are brighter for addressing these issues in the near future, given the adoption of the National Land Use Policy (NLUP) in 2016 (Government of Myanmar, 2016). The NLUP, which was finalised in the waning days of the previous Thein Sein government after extensive stakeholder consultations, represents a rather progressive land policy framework. Among other strategic orientations, it proposes the development of a National Land Law (NLL) to support the implementation of the various NLUP objectives. The current government, which took office in April 2016 subsequent to the NLUP publication, also restated the commitment to addressing land governance and increasing land tenure security in its election manifesto (NLD, 2015).

Subsequent events, however, have led some businesses and civil society organisations (CSOs) to take a more sceptical stance on the ability and willingness of the Myanmar government to pursue the vision established under the NLUP. The somewhat slow progress in advancing with the NLUP implementation – for example, the National Land Use Council (NLUC) charged with the implementation of the NLUP was only established two years later – and some rushed and parallel reforms to key land-related legislations in late 2018, which are inconsistent with the NLUP, have raised concerns of stakeholders. Many CSOs also voiced concerns about the lack of consultation so far around the development of the NLL. It is hoped that this will change after the formation in September 2019 of a dedicated working committee under the NLUC for this purpose and in involving representatives of a wide group of stakeholders.

Concerns have also been raised with respect to the ‘Land and Property Bank’ project announced in late 2019, under which it seems that government entities would list all the plots of land under their control and that could be potentially made available to investment projects. This way investors would have an upfront idea of possible land plots and locations for their projects. At this stage, the lack of official information about the initiative precludes a more thorough assessment of its potential impact, but considering the various deficiencies of the current land information system discussed below, there are likely to be significant risks and challenges in pursuing the initiative.

Until at least some of the core provisions of the NLUP are implemented, land tenure will remain confusing and often insecure for investors, smallholder farmers, communities and other landowners or users. The reasons include *inter alia*: *i*) the fragmented, complex and outdated legal and institutional framework, with dozens of laws in place and multiple agencies involved in land administration; *ii*) weak protection of land tenure rights, particularly of customary land use rights that are predominant in many of the ethnic states; *iii*) inaccurate or absence of land information systems (i.e. cadastre and property registry systems); *iv*) complex and burdensome land registration processes resulting in low land registration rates, notably in ethnic upland areas; *v*) absence of land use planning and complex land use change policies; *vi*) overly strict land use policies, including rigid land classifications that are used for land administration interventions including land registration that do not reflect the reality of existing land use on the ground; *vii*) unclear and costly land transfer procedures; *viii*) poor regime for compulsory land acquisitions by the state; *ix*) weak land disputes resolution system; *x*) challenges in addressing historical land grievances; *xi*) and, until recently, the promotion of large-scale land allocations without adequate safeguards.

The importance of secure access to land and natural resources cannot be overstated in Myanmar: it is the most important resource for rural households comprising two thirds of the population. A stark urban-rural poverty divide remains, with a still significant 23% of the rural population in poverty in 2015, compared to an urban poverty rate of 9% (Ministry of Planning and Finance, 2018). This means that millions of people

depend on access to farmland and rangelands, to fisheries and forests for their livelihoods. The way the government and society manage those resources has a direct impact on food security, poverty alleviation, investment and environmental sustainability (FAO and EU, 2018). Myanmar has been identified as one of the most vulnerable countries in the world to the effects of climate change, ranking 3rd out of 187 countries from 1998 to 2017 in the Global Climate Risk Index 2019 (Eckstein *et al.*, 2019). As such, effective use of land and the prevention of degradation of land and natural resources must also be factored into long-term land use planning.

With the agreement on the Sustainable Development Goals (SDGs) in 2015, global recognition of the critical importance of tenure, access to resources and their governance for achieving sustainable development has been secured within a broad, comprehensive framework. Within this context, Myanmar adopted its Myanmar Sustainable Development Plan (MSDP) 2018–2030 which consolidates the overarching national development vision and strategy, and serves thereby the purposes of facilitating the alignment of policies, co-ordination and co-operation across all ministries, states and regions (Ministry of Planning and Finance, 2018).

Despite explicitly noting that it results from the integration and distillation of existing plans and priorities, the MSDP fails to include a reference to the NLUP, which was dropped from its penultimate draft. The remaining section on land governance usefully focuses on sustainable land management to preserve the country's natural capital but is silent on other relevant land governance dimensions (Ministry of Planning and Finance, 2018). This omission adds to a number of confusing signals on the importance the government attaches to addressing the current complicated and conflicting land governance situation as mentioned above.

Anecdotal evidence suggests that the current situation is an important restraining factor on further investment as well as a source of continued frustration for smallholders, communities, and ethnic groups who must live with the vulnerability posed by insecure tenure. Land reform is often one of the most challenging areas of reform a government can face – it is tied up with long-held traditions of customs and use, more mundane but ever-present pushes and pulls of vested interests, both visible and hidden, and laden with economic and political implications. Those challenges are even more pressing in Myanmar given the deeply rooted interlinkages between land governance and the peace process.

Moving forward with this complex and highly contested process of land reform is essential for Myanmar to sustainably benefit from incoming investments that can contribute to improving the livelihood of its citizens.

Main policy recommendations

- Implement the NLUP through a structured and consultative process that involves a wide range of stakeholders and which is set out in a transparent and predictable manner, with a clear planning of activities and schedule for stakeholders' participation in the process. The establishment of the working committees under the NLUC for this purpose with participation of stakeholders goes in this direction. They should make sure that their work plans provide *inter alia* the opportunity for advanced considerations of draft documents, opportunities for oral and written input, and full and transparent access to relevant documentation by all stakeholders including beyond its active membership.
- Develop the National Land Law (NLL) and harmonise and rationalise existing land laws with the NLL:
 - Ensure that the NLL recognises and provides for the formalisation of all formal and informal land tenure rights and delineate a streamlined institutional framework and process for land

- rights registration, transfers and acquisitions; and set this as the framework for the harmonisation and rationalisation of the remaining land laws;
- Develop a comprehensive land law reform process and proposals that reflect the basic principles of the NLUP and harmonise existing land legislation with the NLL;
 - Take action on an interim basis to halt contentious amendments to the existing laws and regulations, for instance pause implementation of the 2019 Land Acquisition Resettlement and Rehabilitation Law, while adjusting implementing rules where feasible to address identified challenges and seek alignment with the NLUP;
 - Develop a single administration system to improve policy and procedural consistency and avoid situations of regulatory and institutional voids as is currently the case. Key considerations are to improve the efficiency and reliability of land-related services (e.g. issuance of land documents, cadastral survey and mapping and registry services) and enhance land tenure security for all, including by:
 - simplifying land categories and allowing all to be registered, including individual and communal claims to customary land;
 - promoting women's rights over land, including through the systematic registration of conjugal titles under both partner names;
 - establishing a streamlined process for registering and regularising land tenure rights and transfers;
 - establishing a transparent process for the management of public land;
 - establishing pilot land offices in selected townships with a focus on the delivery of good quality land administration services to experiment and roll-out successful practices to other offices in the medium-to-longer term;
 - reforming the current inefficient and costly property tax system;
 - establishing the framework for updating and then digitising existing land records and information with the vision of moving to an unified cadastre and registry system in the future;
 - addressing the necessary institutional arrangement to bring land administration services under a single land administration authority;
 - and designating a lead land committee in each chamber of the Parliament to deal with land issues;
 - Revise the 2019 Land Acquisition Resettlement and Rehabilitation Law to strengthen the framework and ensure compulsory land acquisitions by the state occur only in a non-discriminatory manner, for a well-delimited public purpose, under due process of law, and against prompt, adequate and fair compensation;
 - Develop a land dispute settlement system that is independent, timely, affordable and effective and is widely accessible to all;
 - Eliminate or at least restrict criminal sanctions concerning land-related offences to the most severe cases;
 - Establish a land use planning framework to support a more sustainable and efficient pattern of spatial development;
 - Set up monitoring and reporting mechanisms for large-scale agricultural land allocations to ensure their compliance with agreed performance requirements and allow for more informed policy-making, as well as to transparently respond to stakeholders' concerns about their social, environmental and economic impacts;

- Halt new large-scale land allocations in conflict-susceptible areas until land reforms are in place. Consider them only in areas where the risk of conflict is kept to a minimum, for instance in returned VFV land over which there are no existing claims (including of customary rights holders) or over which land legacy issues can realistically be addressed and there is no risk of infringing on customary rights of indigenous people and local communities;
- Address links to the peace processes/ceasefires, including restitution rights of refugees and internally displaced populations:
 - Land governance in conflict-affected areas, including land restitution, are wide-encompassing challenges, involving issues and policies well beyond the scope of this review. Other fora are more appropriate to discuss solutions to these specific complex matters. Nonetheless, it is important to recognise here that such challenges affect the climate for responsible investment and that an upgrading of the land regime and administration as suggested in this review would need to be carried out in a conflict-sensitive manner, recognising and incorporating land-related matters arising from the evolving peace processes and ceasefire agreements. Any institution and process established to address restitution rights of returning refugees and internally displaced persons (IDPs) should strive for the highest standard of transparency and accountability, and nurture the involvement of local communities at the policy and implementation level.

Key considerations for responsible investors

- *Detailed due diligence, including consultations and negotiations:* given all the challenges and gaps identified in existing Myanmar law, detailed due diligence is a necessary part of any investment involving land to ensure that investors are not involved in dispossession of existing users that does not comport with international standards. Companies should take a broad view in consulting and negotiating with occupiers and users of land, recognising that potential claimants or occupants may not have full documentation of their tenure rights, nor in some cases, tenure rights that are protected under current law. Ignoring claims based on long-standing occupancy and use, including customary use, or requiring current occupants or claimants to pursue them through the courts, is not a viable alternative for negotiating access to land in Myanmar. It is essential to recognise that even when claims cannot be upheld under existing legislation they are often legitimate for local communities and rural households. Nor is it practical, especially where claimants are already occupying the land. Efforts to involve smallholder farmers in the investor's business plan is strongly recommended, as communities traditionally involved in agriculture may have few other options to restore their livelihoods.

Overview of Myanmar's land regime and recent reform context

Few matters in Myanmar are as complex as land policy. Myanmar has dozens of laws governing land use with more than 20 different government departments responsible for some form of land administration, sometimes over the same type of land. Numerous laws date back to the colonial era but are still in force, like the Lower Burma Town and Villages Land Act 1899. In total there are about 22 categories of land, each governed by its own sets of laws and regulations (Table 8.1). A brief description of the main land use rights is available in the Annex 8.A.

Statistics on the prevalence of these classes are produced on an annual basis. A challenge is that the spatial representation of their prevalence (mapping these classes) is weak or inexistent. Hence rural people often do not know themselves on which land they establish their livelihoods. The lack of a consolidated and up-to-date land cadastre and registry system, among other issues discussed below,

makes it impossible to draw a more precise distribution of land by type in Myanmar. Nonetheless, official statistics can still give some sense of magnitude and predominance of the area occupied by each type of land.

Total land surface of Myanmar is 167 186 thousand acres (Table 8.2). About 30% is officially classified as forest reserved land under the administration of the Ministry of Natural Resources and Environmental Conservation (MONREC), of which a large portion is accessed and used by forest-dependent communities.

Table 8.1. Statutory authority assigned to different government departments/ministries in accordance with different land categories

Legal land categories		Governing law	Statutory authority
Farmland Paddy / lowland (<i>le</i>), 'dry' upland (<i>ya</i>), alluvial is- land land (<i>kaing kyun</i>), garden land (<i>u yin</i>), uphill land under permanent or shifting cultivation (<i>taungya</i>), nipa palm land (<i>nipa</i>), horticultural land and perennial crops land		Farmland Law (2012)	Farmland Administrative Body (FAB) Chaired by Ministry of Agriculture and Irrigation (MOALI)
Forest land	Permanent Forest Estate Reserve forest, public protected forest, protected areas, private commercial plantations	Forest Law (2018)	Forest Department, Ministry of Natural Resources and Environmental Conservation (MONREC)
Vacant, Fallow and Virgin Land	Virgin land; fallow and vacant land	Vacant, Fallow and Virgin Land Law (2012)	Central Committee for the Management of VFV Land, chaired by MOALI
Grazing land		Land and Revenue Act (1879)	General Administration Department (GAD), Ministry of Home Affairs (MoHA)
Leasable fisheries and aquaculture land		Freshwater Fishery Law Aquaculture Law	Department of Fisheries, MOALI
Mining land, gemstone land		Myanmar Mines Act	MONREC
Urban/ Town land		Town and Village Act / City Development Committee Law	City Development Committees (Naypyitaw, Yangon, Mandalay) MoHA
Village land; local public parkland; riverbanks; ponds; cantonment; village communal land		Town and Village Act	GAD
Dams, reservoirs and embankments		Channel Act	MOALI
Roads		Roads Act	Ministry of Transport and Communication (MoTC)
Religious land/cemeteries, religious building lands			Ministry of Religious and Cultural Affairs
Riverbanks and waterfront boundaries and land underneath the rivers and creeks		Conservation of Water Resources and Rivers Law	MoTC
Railways			MoTC
Airport fields		Myanmar National Airways Law	MoTC
Other government held land			Various ministries

Source: Adapted and updated from San Thein et al. (2018, p. 25).

VFV Land is not properly mapped and recorded by the government, but official estimates suggest that land falling within the VFV classification encompasses another 30% approximately (the sum of two land classes namely *i*) other wooded land and *ii*) cultivable waste other than fallow land, as per official MOALI/DALMS classification). But these estimates fail to adequately reflect the actual situation on the ground, typically including within the VFV land classification many areas of land that are under active cultivation by farmers or used by community groups as part of a rotational cultivation system (San Thein *et al.*, 2018). This is particularly the case in upland and hilly ethnic states. By comparing the officially recognised area of farmland of Chin state in 2017 with data on the area covered by agricultural activity using satellite imagery interpretation of 2010 by the International Centre for Integrated Mountain Development, FAO and EU

(2019) concludes that only 16% of agricultural land is being officially recognised as Farmland. Other estimates suggest that about 80% of the rural population is dependent on land under long fallow subsistence agriculture (FAO et al., 2017). Of the remaining land, about 20% is officially considered to be occupied for agriculture (net area sown and current fallow) and 24% is associated with other land uses, such as residential, commercial and industrial land.

Table 8.2. Area classified by type of land, 2017

Type of land		Thousand acres	Per cent
Reserved and protected forests		46 649	28%
Current fallow		1 149	1%
Net area sown		29 792	18%
	<i>Paddy</i>	15 673	
	<i>Ya</i>	10 331	
	<i>Kaing</i>	1 365	
	<i>Garden</i>	5 063	
	<i>Dhani</i>	117	
	<i>Taungya</i>	548	19%
Cultivable waste other than fallow		13 695	8%
Other wooded land		35 853	21%
Others		40 048	24%
	<i>Grazing Grounds & Cattle Paths</i>	738	
	<i>Cannals, Reservoirs Tanks and Embankment</i>	650	
	<i>Residential Area and Town</i>	501	
	<i>Village Land</i>	1 237	
	<i>Road</i>	675	
	<i>Railway Land</i>	67	
	<i>Others</i>	36 180	
Total area		167 186	100%

Note: total net area sown is exclusive of squatter, while the related breakdown is inclusive.

Source: Department of Agriculture Land Management and Statistics (DALMS), retrieved from the Myanmar Statistical Information System.

Recent reforms and current policy context

Since 2011, there have been a series of well-documented land reforms which have considerably changed the regulatory landscape. In 2012, the Farmland Law and the Vacant, Fallow and Virgin (VFV) Law were adopted, reinforcing the government's efforts to attract large-scale land investments into the newly opened country. The VFV Law allowed for the allocation of large tracts of land (up to 3 000 acres for a period of 30 years following its amendment in 2018) to be used for agriculture, livestock, mining or any other use permitted by the Central Committee for the Management of VFV Land. The land allocated can be expanded up to 30 000 acres at the rate of 3 000 acres at a time upon demonstration of adequate land use.¹

The Farmland Law intended to provide secure tenure over farmland by issuing land use certificates (LUC) to farmers, making these a tradeable commodity for the first time in Myanmar since 1953 and enabling farmers to sell, lease, mortgage and transfer farmland on a land market (Woods, 2012). Approximately ten million LUCs were issued with each covering on average a farm holding size of one hectare and households typically holding two LUCs according to DALMS 2018 statistics. These reforms did not address many of the legacy challenges related to land tenure and administration, however (see next section).

More recently, there has been a renewed impetus for reform. The adoption of the National Land Use Policy (NLUP) in 2016 after extensive stakeholder consultations sent a positive signal about the government's willingness to adopt a more modern land policy framework in line with international standards, such as

FAO's *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) (FAO, 2012). The renewed commitment, by the current administration when it took office in April 2016, to pursue the implementation of the NLUP further reassured investors and stakeholders, as did the adoption of the Agriculture Development Strategy (ADS) in 2018, which prominently addresses smallholder farmers and land tenure reform in its narrative. In principle, these two policies reflect the main policy orientation guiding land-related reforms (see Box 8.1 for a further discussion).

A few other reforms have also contributed to reinforce the government's commitment to improving its legal framework, such as the 2016 *Condominium Law* and the 2018 *Deed Registration Law*, although deficiencies of older style laws – vague terms and delays in developing required implementing measures – persisted even in these new laws.

Nonetheless, the slow but steady progress in advancing with the NLUP reform agenda and the sudden amendments, inconsistent with the NLUP, to the *VFV Law* in late 2018 and *Land Acquisition Act* in 2019 without proper consultation raised suspicions about the government's continued interests in pressing for reforms in a manner aligned with the policy stated in the NLUP.

Box 8.1. Key recent land policy developments

National Land Use Policy (NLUP) (2016)

The NLUP establishes Myanmar's long-term vision for land policy reforms, focusing on the sustainable management and use of land resources for the "livelihood improvement of Myanmar citizens and sustainable development of the country" (Government of Myanmar, 2016, p.1). Recognising the complexity and inadequacies of Myanmar's current land regime, the development of a National Land Law (NLL) is contemplated to support the implementation of the various NLUP objectives, namely: the government will promote responsible investment in land resources while strengthening land tenure security to improve the livelihoods and food security of people, including through the formal recognition of customary land tenure rights and related local customary land management practices of ethnic groups. The NLUP puts citizens at the heart of the policy, noting in its basic principles that it will prioritise the interest of public citizens over private companies in land use decision making.

The NLUP calls for a land use planning process that is participatory, transparent and accountable to provide the basis for systematic management and use of land resources, subsequent zoning and changes in land use. It calls for temporary suspension of land allocations on customary lands (though this does not seem to have happened). It also sets out the need for a revised and simplified land classification system, as well as the development of a land information system covering land maps, land records and other land information.

Given the significant difficulties and delays in resolving myriad land disputes to date, the NLUP calls for establishing impartial land dispute resolution mechanisms across the country, but sets out a complex system, starting with specialised land courts that currently do not exist as well as independent, tripartite arbitration processes comprised of the government, organisations (presumably CSOs), farmers and the private sector. The NLUP also calls for a right of appeal for land decisions, something absent from current legislation.

Lastly, it designated the National Land Use Council (NLUC) with the task of implementing the NLUP. The NLUC held its first National Land Use Forum together with civil society in October 2018 to set out short- and long-term work plans for the NLUC, including the development of the NLL. This appears to be the signal that the government is finally ready to move ahead on NLUP implementation. The NLUC held two subsequent meetings in 2019. While there has been a significant gap between the adoption of the NLUP and appointment of the NLUC, there have been various activities and strategic

interventions in the interim to implement the NLUP, including various projects on developing participatory land use planning processes, securing land resource tenure rights at the village or community level, developing local dispute resolution mechanisms and a government-managed open access spatial database (One Map Myanmar)(MOALI, 2018).

Agricultural Development Strategy (2018)

The Agriculture Development Strategy and Investment Plan 2018–2023 (ADS) is intended to operationalise Myanmar’s agricultural policy and guide the sector over the next 5 years (MOALI, 2018). The sector is a high priority for the government, contributing 30% of national GDP, with approximately 68% of rural population relying on crop husbandry and livestock for their livelihoods and incomes, and about 25% of total exports by value.

The ADS puts smallholder farmers squarely at the centre of the country’s agricultural strategy, signalling a sharp move away from MOALI’s Master Plan for the Agricultural Sector 2000-2030 that promised to convert 10 million acres of “wasteland” for agricultural production. The ADS explicitly states that it does not exclude agribusiness but envisages the agribusiness role as linking farmers into global supply chains, providing inputs like fertiliser, being involved in processing and sales, but apparently not at the core of production. It specifically notes that the ADS will align agribusiness investment with the safeguards for smallholders under the Myanmar Investment Law. It does not indicate a government priority of allocating large-scale land tracts to agribusiness investors, in contrast to the signals and actions of the earlier administration, a signal that is welcomed by farmers’ organisations and many civil society organisations concerned about land rights.

The ADS puts forward an initial framework to guide reforms, setting also important goals for improved service delivery of land administration to the public, including to women and the poorest: (i) accessible service delivery at the township village tract and possibly village level without excessive opportunity costs or out-of-pocket costs; (ii) user-friendly service that is responsive to specific demands of the public; (iii) transparent service that makes specific information on land acquisitions, land transfers and transactions, as well as broader information on outcomes of consultation processes, decision making on land restitution and land allocation publicly available; and (iv) formalisation of current unofficial practices for land leases, land rent, land tenancy, share cropping, depositing land as share into large scale block farming, land consolidation among farmers or farmer to farmer transaction (MOALI, 2018)

Critics have, nonetheless, expressed doubt that the strategy will be able to effectively combine the protection of smallholder farmers with the attraction of agribusiness, noting concerns about how smallholders and landless labourers will fare in global value chains (Bello, 2018). The ADS highlights a familiar pattern of land challenges that constrain productivity of the sector. It addresses long-standing issues of land rights, but it fails to establish clear accountability for pursuing such reforms. Critics have also voiced concerns against the lack of a clear prioritisation of land rights reform in the strategy, noting that “addressing the land ownership and tenure issue is the overriding task, the sine qua non of a successful agricultural development strategy” (Bello, 2018, p. 21).

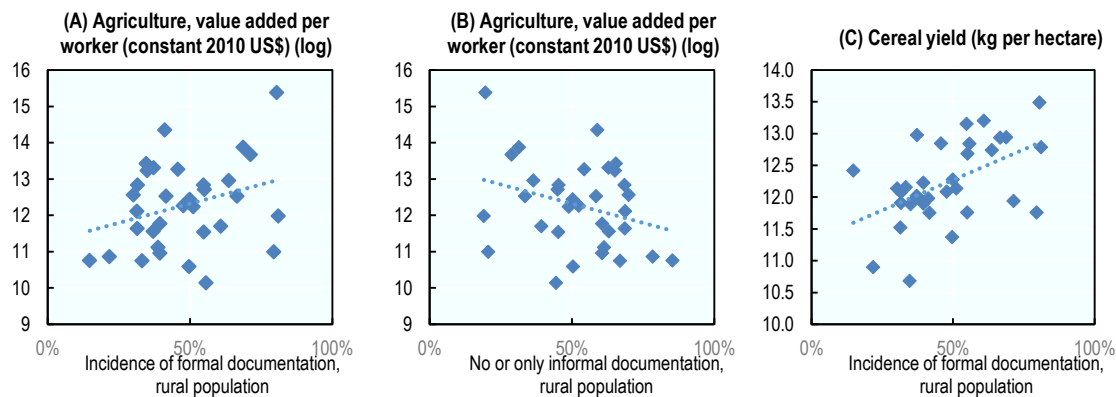
Key overarching challenges of Myanmar’s land regime

Myanmar’s land regime has two main overarching weaknesses entailing significant costs for Myanmar’s sustainable development: *i)* it fails to provide adequate land tenure security and *ii)* land administration services, including transfers, inheritance etc. are plagued with institutional and regulatory voids and inefficiencies that render any process for securing and transferring land tenure rights a burdensome and uncertain endeavour. Underlying these challenges, there are a number of policy, legal and institutional deficiencies which either alone or in accumulation or interaction with other issues contribute to aggravate

the sense of land tenure insecurity in the country. The discussion below compartmentalises the main issues for clarity purposes, but in reality they interplay and reinforce each other.

In addition to its importance for combatting various economic, social and environmental challenges (e.g. poverty, hunger and malnutrition, gender equity, environmental degradation, protection of indigenous people and their cultural heritage etc.), secure land rights are an important condition for many types of investments, including agricultural investments by large-scale and smallholder farmers. A number of studies have documented the role of tenure security in incentivising investments, albeit to varying degrees across regions.² They play an equally critical role in incentivising the use of more efficient and sustainable land management practices by, *inter alia*, helping to increase land value, limiting transaction costs associated with land transfers, facilitating access to credit by allowing land to be used as collateral and helping to protect the appropriation of returns by investors.

Figure 8.1. Land tenure security and agricultural productivity



Note: Land tenure data refers to the percentage of people who say they have formal, legally-binding documents that demonstrate their right to live in or use their properties. Documents are split into formal and informal subsets based on what would be expected to be issued by official agencies in each country. The data is sourced from a survey of a representative sample of people from 33 countries in 2018. On average, 50% of all respondents had formal documentation for one or more of their properties, 43% had no documentation and the remainder (7%) had informal documentation. The average reporting having formal documentation rises to 68% for owners and renters, excluding respondents who stay with or without permission. Beyond documentation of tenure rights, the survey measures respondents' tenure security by posing nearly 60 questions across five additional themes: information on tenure rights over their main dwelling, perception tenure security, benefits of tenure security, tenure security of other properties, experience of tenure insecurity and perceptions of protection afforded by authorities. A range of additional data are collected to capture robust information on individuals' tenure situation, as well as key individual and household characteristics. Prindex is a joint initiative of the Global Land Alliance and Overseas Development Institute.

Source: World Bank Development Indicators and Prindex (www.prindex.net).

Not surprisingly, land tenure security is to some extent associated with higher agriculture productivity, particularly when tenure rights are formalised (Figure 8.1), although the literature suggests some heterogeneity in effects due to contextual factors and other policy complementarities (Lawry *et al.*, 2014). Recognition of the various forms of tenure rights, including of customary rights, and their formalisation are important means for land benefits to accrue to landholders and society at large. Yet, only a few countries adequately recognise and provide the means for registering customary land held by indigenous people and local communities (WRI, 2017). Some estimates demonstrate that about 65% of the world's land is indigenous or community land, with 1 out of 7 people relying on customary forms of land ownership, but only a small fraction is formally recognised. An analysis of 64 countries covering 82% of world's land suggests that indigenous people and local communities have government-recognised rights to only 18% of the land in their countries, of which about 8% is due to official land demarcated for these groups' use (RRI, 2015).

Not least because of the large social and economic implications that land tenure systems have, the Food and Agriculture Organisation (FAO, 2012) has developed internationally agreed guidelines on the governance of land tenure – *the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) (Box 8.2). These guidelines advocate for the protection of legitimate tenure rights, whether those formally recognised in the national legislation or those which are socially legitimate – such as customary tenure rights – but not formally protected by law.

The consequences of land tenure insecurity are typically compounded by land administration weaknesses and voids that threaten the integrity and reliability of land-related institutions, procedures and documents, thereby raising transaction costs and further undermining confidence in the land tenure system. As such, besides adding to tenure insecurity, they may further contribute to an inefficient allocation of land, including by facilitating corruption and the capture of land by particular interested groups and inducing increased levels of informality.

Box 8.2. FAO guidelines on tenure rights – recognising customary tenure

The *Voluntary Guidelines on the Responsible Governance of Tenure* (VGGT) call for states to recognise and respect legitimate customary tenure rights that are not currently protected by law. To do this, national legislation should:

- Recognise and protect the full range of legitimate tenure rights within a country
- Make legitimate tenure rights equal in weight and stature to formal, certified rights
- Establish administrative processes that are simple, clear, streamlined, local and easy for rural communities to use to claim and defend their tenure rights
- Explicitly protect women’s tenure rights and establish women’s right to hold or own tenure rights
- Where tenure is shared or held in common, vest formal tenure rights in all community members as a coherent group
- Explicitly protect communal areas, customary rights of way and other shared resource use and access rights
- Balance protections for customary and indigenous tenure rights with provisions for gender equality and respect for human rights.

Source: FAO (2016e, p. 53).

Weak recognition of land tenure rights

Land tenure insecurity partly results from the limited recognition of land tenure rights in the national legislation. The Constitution of 2008 recognises and protects land use rights of legal and physical persons (with the state remaining the ultimate owner of all land), but many kinds of land tenure arrangements are not formally or only weakly recognised and protected in national laws, leaving particularly users of customary, ethnic or other traditional lands completely vulnerable.

Land tenure insecurity affects even those investors and farmers who have registered land use rights. This arises mainly in relation to the 2012 Farmland Law where non-compliance with its strict conditions imposed on land use, particularly on *paddy* land (a lingering characteristic from the military era where agricultural production was strictly controlled, with centralised policy-making imposing the choice of crops) and required administrative procedures can result in forfeiture. While the issuance of land use certificates (LUCs) to farmers in the lowland areas in 2012 was intended to improve farmers’ tenure security, it has

also rekindled old conflicts (such as land transfers forced by farmers' incapacity to deliver the compulsory quota of crop to the government) and created new ones (notably between parties involved in mortgage arrangements). Some point to the 2012 VFV and Farmland laws as a legal method of furthering farmer disenfranchisement (Woods, 2014).

The 2018 amendments to the VFV land, requiring the rapid registration of previously un-registered VFV land and criminalising those occupying and utilising VFV lands without registration, also contributed to impair land tenure security. In addition, the amendment forces those who live on and use the land to make a choice between registering for 30 year-VFV land use permit and giving up all further rights to the land (including passing it on through inheritance) or being considered a trespasser. In principle, if there are people living or otherwise using land classified as VFV, sometimes for generations, it should be indicative of a likely misclassification of the land from the start. As such, there is a considerable risk that, instead of improving tenure security, such amendments may end up sparking new conflicts over land, potentially on a large scale, and result in forced evictions of those who are on the land, but did not manage to register or their arrest for trespassing.³

These risks have been amplified, for instance, in the context of mineral prospection and exploration projects. Mining companies have been required to apply for VFV land permits in areas included in their prospecting and exploration tenements even at prospection and exploration stages (Chau and Daudier, 2019). By not clearly distinguishing between rights to occupy and use the surface of the land and rights to exploit deposits located underneath, the application of the amended law in such contexts risks affecting existing land users by depriving them of the right to use land unnecessarily, while possibly aggravating land conflicts and dissuading more responsible mining investors from considering Myanmar as an investment destination.

The major source of land tenure insecurity, however, comes from the lack of recognition of customary rights, including in recent legislation. Land tenure insecurity is particularly acute for the many ethnic groups in the states with longstanding customary land and cultivation practices. The 2012 Farmland Law, for instance, does not recognise customary use rights or tenure or shifting cultivation/rotational farming arrangements. It allows for collective tenure only if requested by a legal person, such as an association of community members. Communal lands or collective management of land use are widely common in upland areas. The new Forest Law, adopted in 2018, also does not recognise customary rights.

Likewise, the land classification system under the VFV Law, which builds on earlier British colonial laws on 'wastelands', fails to recognise shifting cultivation, which is particularly problematic given the vast amount of area classified as VFV land. Because of these omissions, it is not uncommon for land which is being cultivated on a rotational basis, to be misclassified as VFV land and then allocated for use by private sector investors or government entities (Andersen, 2016). In India, which inherited similar legislation from the British colonial period, this problem has been minimised by more narrowly classifying 'wastelands' as only those lands unfit for cultivation, therefore making clear that cultivable land cannot just be reclaimed by the government and reallocated.

For these reasons, the NLUP which explicitly recognised customary land use rights, although not ownership rights, represented such an important milestone. The recent, but controversial, VFV Law amendments in 2018 denoted another step in this direction by excluding lands for hillside cultivation, ethnic nationalities' customary land and land used for religious, social, education, health and transport purposes from the purview of the Law. But while customary lands are excluded, they are not currently protected by any other law, nor are local authorities informed about the change and instructed on how to deal with it.

The institutional and regulatory complexity and opacity discussed further below – arising from the lack of harmonised legislation, overlapping responsibilities of land-related institutions, burdensome registration procedures, weak and oftentimes inaccurate registration systems, deficient land use change policies (*i.e.* the cumbersome process to change land from one category to another) and undeveloped land transfer framework – only serves to aggravate the situation of land insecurity by rendering any process for

transferring and securing land tenure rights a burdensome and uncertain endeavour. Land tenure security is further enfeebled by the limited institutional mechanisms and capacity for solving land disputes and seeking redress, particularly in relation to the numerous cases of land confiscations by the military or on behalf of military-linked companies or personnel, and other arbitrary land confiscations by the state.

Another important weakness of the current regime is that it fails to adequately protect women's tenure rights. Currently, both the Farmland Law and the VFV Law are gender neutral, but in practice they preclude women from tenure protection. For example, the Farmland law (Instructions) allows land use certificates to be registered under more than one land rights holder name, but the practice is to register it under the name of the head of household. Because men are typically seen as heads of households and because there is no explicit requirement for registering joint ownership of LUCs, women's rights to land are left vulnerable. Again it is hoped that this will change following the implementation of the NLUP, which explicitly states that joint registration is to be pursued (Namati, 2016).

Lastly, the land tenure situation in areas of the country affected by armed conflict historically or presently are even more complicated. Numerous ethnic armed organisations (EAOs) across the seven ethnic states, in other regions, and in self-administered areas operate separate systems of administration at the subnational level including on land governance. The United Nations High Commissioner for Refugees (UNHCR) estimates that, as of December 2018, there were over 1.6 million people in situation of concern, among internally displaced people (IDPs) and refugees from current humanitarian crisis, of which many may potentially have land restitution claims (Displacement Solutions *et al.*, 2019). In this respect, the NLUP sets ambitious goals of systematically providing land use and housing rights to ethnic nationals who lost their land resources due to civil war, land confiscation, natural disasters or other causes, and that desire to resettle to their original lands, in accordance with international best practices and human rights standards. As such, the NLUP provides strong and appropriate signals for addressing one key challenge, which is likely to be one of the most challenging to implement.

A fragmented, complex and outdated framework...

Understanding the legal and institutional framework governing land in Myanmar is extremely difficult, making the secure and responsible acquisition of land for any project a particularly complicated and risky task. The legal system is constituted by a mosaic of laws, regulations, notices, directives and orders, of which some are quite dated. Not surprisingly, there are some important legal loopholes and numerous overlapping situations leading to legal confusion and limited or incorrect application of the laws (Mark, 2016). The resulting legal uncertainty significantly increases the risks associated with a land transaction.

To start with, there are 22 different types of land, with almost each being governed separately by its own set of laws and regulations (Table 8.1). In some cases, there may be various additional rules, guidelines, publications, directions and notifications – of which some are not published, but can be used by authorities to justify a decision or the inability to render a decision. While distinct rights and procedures may certainly be justified, there should be some consistency in treatment across land types.

In such a fragmented environment, simply understanding which laws apply to a particular piece of land and which of those take precedence is already complex. The lack of legal precision and clear responsibilities of some laws adds to the complexity of understanding which regime applies. The various classifications of land, for instance, are often poorly defined in the existing legal framework (Oberndorf, 2012) and some land categories overlap (for example overlaps between horticultural land, garden land, and *ya*land). In some cases, there is split administration of the same land – areas of virgin land (also known as public forest, uncategorised forest, woodland area) falls under the VFV Law but the trees and forest on the land remain subject to the Forest Law (San Thein *et al.*, 2018). There is also often a mismatch between how government maps categorise the land, how different township offices administer the land, and the actual on-the-ground use of the land by local communities (Woods, 2015). For example, forest

land that has been partly or completely converted to agricultural use can remain classified as forest land and administered by MONREC instead of the MOALI.

This situation is compounded by more general problematic legislative practices that (i) do not typically include exclusion clauses – *i.e.* clarifying the scope of application of provisions for particular activities; (ii) fail to clearly repeal old laws when adopting new ones; (iii) provide no clarity on the hierarchy of laws sometimes, *i.e.* beyond laws there are regulations, notifications, etc.; and (iv) overlap in subject matter among other laws by different ministries.

Lastly, the outdated framework leaves important policy gaps vis-à-vis internationally recognised principles and best practice, though the NLUP signals an intention to fill many of these gaps. In particular, as mentioned above, the NLUP specifically recognises FAO's VGGT, which sets out the accepted international framework on land tenure and that should underpin the government's next steps on recognising customary tenure. The NLUP also signals an intention to clarify an important gap on women's rights. Furthermore, the NLUP has also signalled the intention to address the absence of a resettlement framework until recently, as well as to update the outdated and fragmented approach to compulsory land acquisitions by the government (eminent domain). This is important given the government's ambitious infrastructure plans that will inevitably involve the exercise of eminent domain.

The government is willing and is advancing with reforms to improve the framework for acquisitions and resettlement. In August 2019, the parliament approved a new Law on Acquisition, Resettlement and Rehabilitation, repealing the previous law which dated from the colonial era (Land Acquisition Act of 1894). The law is not yet effective until it is assented by the President. It is not clear when this may occur. As further discussed below, the new law positively seeks to develop and tie together the frameworks for acquisitions and resettlement and rehabilitation, but it is not without weaknesses of its own. In many ways, the new law falls short of the principles and directions established in the NLUP and of international standards on the related matters.

The consolidation and simplification of Myanmar's land framework would significantly contribute to reducing existing policy and institutional voids and inconsistencies (discussed below). The policy goal set in the ADS and the NLUP of simplifying land classification along a few categories, as well as the NLUP's objective to bring the governance of various existing land laws under the umbrella of new a National Land Law (NLL) are welcoming steps for improving land tenure security and administration in Myanmar. At the moment, there is no consensus on the expected classifications: the two policies are not fully aligned, differing particularly with regards to retaining or not the VFV land classification. But their underlying goal of simplifying the current regime is important. The NLUP also foresees an easier and more transparent process for revising land classifications, which could be retained in the future NLL.

Numerous inconsistencies and governance failures

The fragmentation and complexity of the land framework in Myanmar facilitates the existence of inconsistencies and inefficiencies at all levels, from announced policies to the laws and their implementation.

Lack of clarity and coherence on strategic direction at the policy level

At the policy level, investors and civil society still feel that there is a lack of clarity on the broader policy direction the government will take as it moves ahead with land reforms. One emblematic example is the recent piecemeal amendments to existing land laws that have led to continued confusion and frustration of business and civil society organisations with the government's land policy reform process. Despite the NLUP explicitly recognising customary tenure and promoting inclusive public participation and consultation in decision making processes related to land use and management, the 2018 amendment of the VFV law

failed to secure ample consultation and did not adopt adequate language to avoid weakening the rights of those legitimately occupying and utilising VFV as explicitly proposed in the NLUP.

The recent reform to the regime on compulsory land acquisitions by the state, passed in August 2019, raises similar concerns. The law aims to provide a land acquisition framework that protects the interests of the people affected by land acquisition, notably by imposing conditions related to resettlement and rehabilitation. As such, it expects to promote a transparent and inclusive approach for land acquisition and prevent related adverse social and environment impacts. However, the revised law fails to adopt a clearer and narrowly defined language on some key provisions, including for instance in relation to the definition of public interest, which remains overly broad and ambiguous. It also incorporates some more problematic provisions, notably one allowing urgent acquisitions for public purposes in some poorly defined situations, which could potentially lead to cases of forced evictions. This would be inconsistent with Myanmar's commitments under the International Covenant on Economic, Social and Cultural Rights (see related section below for more details).

The resulting lack of policy and regulatory predictability has a dissuasive effect on investors – from the smallest local investor who cannot obtain sufficient assurances of tenure security in the future to justify making even modest investments, to larger-scale investors who are put off by the significant risks associated with land investments in all but limited urban areas.

Lack of clarity on the applicable regime and legal loopholes

Inconsistencies and inefficiencies also occur at the level of the law, with the lack of clarity about which legal regime and which authority has the final say on a certain matter being a prominent issue. At best, this leads to burdensome procedures where it is necessary to go back and forth among different ministries. In the worst case, it leads to conflicting procedures that no ministry has the authority or initiative to resolve.

Where there are overlapping tenure arrangements on existing land, for instance, none of the laws have clear processes to resolve the overlapping issue. Likewise, while there are generally procedures to change the designated use of certain types of land, these are not harmonised across the various types of land, each with different procedures requiring specific government permission with complex and lengthy procedures to complete the process (VDB-Loi, 2017).

A complex land administration: institutional voids, overlaps and burdensome procedures

Another important root cause of inconsistencies and inefficiencies is the multi-layered land administration that has emerged in combination with the current legal complexity. Currently, land sector services are formally spread across a number of ministries, departments and three City Development Committees (Box 8.3). Their activities are usually not well co-ordinated and their land records are not shared, exchanged or harmonised (see below).

The lack of standard operating procedures for land-related public services, and occasional disagreements among authorities about which procedures should apply, generate considerable uncertainty for land transactions. It also renders reforms more difficult as there is no clear procedural baseline to start with.⁴ For example, the Myanmar Investment Law (MIL) states that it prevails over other laws and as such, long-term leases foreigners are possible for MIC-endorsed projects. But stakeholders have reported the unwillingness of Office of Registration of Deeds to register long-term leases due to policy disagreements about whether foreigners should be able to lease land or lack of clarity for administrators who are supposed to register the leases (or both). This is currently a major hurdle for foreign investors.

Box 8.3. Current land administration bodies

Inter-Ministerial Bodies

National Land Use Council (NLUC) is responsible for overseeing implementation of the NLUP. It was established in January of 2018 to provide much-needed cross-ministerial coordination on land issues, and has met three times up to July 2019. Its membership includes representatives from relevant ministries and public-sector entities only. Civil society and other stakeholders are represented at the technical advisory group and working committees responsible for advancing with the various NLUP's priorities. Three of six expected working committees were established in July 2019 including civil society participation.

Farmland Administration Bodies (FABs) were created under the 2012 Farmland Law and are responsible for: approving farmland use rights registration and transactions and submitting those to the DALMS for registration; revoking farmland use rights if conditions are not fulfilled; resolving disputes over the allocation and use of farmland; valuing farmland for tax, acquisition and compensation purposes and ensuring fair compensation for those expropriated; and approving farmland transfers for other purposes. The FAB, also called land management committees are composed of various representatives from MOALI (DALMS) and GAD and exist from the national level down to village tract level. At central, state/region level, the FABs are chaired by MOALI whereas at the district and township level the FABs are chaired by GAD (San Thein et al., May 2018). Farmers are not represented at some of the higher levels of the FABs such as the Central Management Body, which is responsible for resolving disputes and is authorised to approve, issue, and revoke land use rights.

The *Central Committee for the Management of Vacant, Fallow and Virgin Lands* (CCVFV) manages VFV lands, and is responsible for approving requests for land use rights regarding VFV land for agriculture, mining and mineral production and 'allowable other purposes' under the law. It also co-ordinates with MONREC to prevent the damage or destruction of forests and natural ecosystems, fixing the rate of security fees to be deposited and the annual land revenue rate and suitable period for tax exemption; resolving disputes in co-ordination with other government agencies (Oberndorf, 2012). It is also a multi-ministerial committee chaired at the national level by MOALI and including GAD, MONREC, MoPF, Ministries of Hotels and Tourism, Defence and Religion and Culture. The CCVFV also has region or state committees and lower levels as needed. The 2018 VFV Law amendments required that they include "representatives of local ethnic groups, farmer representatives, CSO representatives and appropriate experts" which could create much needed balance in land administration in addressing VFV land issues.

Central Reinvestigation Committee for Reinspection of Farmlands and Other Land Acquisition, headed by Vice-President U Henry Van Thio, was created by a presidential instruction to resolve historic land confiscation claims. It has a mandate to accelerate the resolution of land expropriations by (i) investigating cases, (ii) deciding whether land should be returned or compensation paid, and (iii) monitoring the release and return of land to rightful owners. The Committee is replicated at each administrative level (state/region, district, township, village tract). It is an inter-ministerial committee including MOALI, MONREC and GAD. Except for the Union (Central) level, each Committee comprises government officials and farmer representatives who serve as advocates and conduits for local information. The government has attempted to streamline the committees' case review process, but a reported lack of transparency, duplication of efforts, resource constraints, and lack of written documentation from the complainants have slowed down resolution of cases (LIOH, 2017). It was meant to settle all land disputes within the first six months of the NLD-led government but is still operating with a significant caseload still to resolve. This is one objective indicator of the challenges of land reform in the country.

Ministries

Ministry of Agriculture, Livestock, and Irrigation (MOALI) is the main government body responsible for land administration and agricultural policy and is responsible for many land resource-related issues, including agricultural policy, land use planning, water resources, livestock, fisheries (especially land-based aquaculture), and land administration.

Department for Agricultural Land Management and Statistics (DALMS) is responsible for the majority of land administration services but its mandate does not cover all land tenures. It has branches down to township level. It is responsible for: (i) updating of Kwin maps to show farm holdings; (ii) surveying and registering farmland through the farmland register (though it does not survey VFV land); (iii) deed registration; (iv) creation of village block maps of land plots; (v) update of block maps in towns and cities; (vi) maintain the urban register of grant leases; (vi) recording other land tenures for agricultural land; (vi) maintaining the third order survey control network. It has branches at the state/region, district, and township levels and is supported by FABs at various government levels. It is considered to have inadequate resources to cover its wide mandate.

Ministry of the Office of the Union Government's General Administration Department (GAD) is responsible for various categories of land, including village land, town land, grazing ground, etc. It provides land leases (and other less common urban titles) to town and village lands. Significantly, GAD administers (i) public forest or virgin land (unclassified or public forest land) that gives GAD a significant role in agro-industrial developments, (ii) land classified as vacant and fallow lands, where it exercises control over agro-industrial developments, as well as over community land use, including grazing land and other transitional uses; and (iii) with respect to farmland, GAD controls existing applications for and records of LUCs, and the ability to rescind LUCs or acquire land for other public and non-public purposes. GAD, which has branches at the village tract, township, district, and state/region levels, acts as the representative of the central government at those levels. The most senior GAD Official in each district, the District Administrator, is responsible for all compulsory acquisition of land. Payments for VFV Land leases are made to GAD township offices. The GAD was transferred in December 2018 to the Ministry of the Office of the Union Government under civilian control. Previously it was under the Ministry of Home Affairs, under military control as per Myanmar's constitution. In May 2019, the government unveiled the new ministry's reform plan for the GAD, including revisions of staff manuals and code of conduct, but GAD remains staffed by the same officials.

Ministry of Natural Resources and Environmental Conservation (MONREC) is responsible for environmental protection, natural resources, and forests (permanent forest estate (reserve forest and protected public forest)).

- The *Survey Department* produces all official topographic maps in a range of map scales; though under MONREC, it reports directly to the Chief Commander of the Tatmadaw within the Ministry of Defence.
- The *Forestry Department* issues rights to forest land in the form of Community Forest Certificates and Concessions and has the power to degazetting forestlands from the permanent forest estate.
- The *Environmental Conservation Department* has an important role in the environmental (and social) impact assessment (EIA) process, including project proposal screening and approvals of EIA and management plans.

Ministry of Investment and Foreign Economic Relations' Directorate of Investment and Company Administration (DICA) is the secretariat of the Myanmar Investment Commission (MIC) and is the primary interface between businesses and the government. Land leases of more than one year for foreign-owned companies (other than in SEZs) require Permits or Endorsements from MIC, as do

investments from Myanmar companies using more than 1 000 acres of land, involving displacement of 100 people, or with significant environmental and social impacts.

City Development Committees of Yangon, Mandalay and Nay Pyi Taw manage all land use and ownership-related activities within their cities and serve as a separate and distinct delegated land administration authorities instead of GAD and DALMS. These committees enjoy a broad range of authority in the reclassification of use, acquisition of land and buildings, and transfer of titles of ownership.

Lack of unified and updated land information and registry systems

No harmonised and unified land information and registry system covering the full range of land types and tenure currently exists. Without a centralised land registry (who legally owns?) and cadaster (what is legally owned and where?) it is a daunting task to undertake appropriate due diligence for land transactions. At present, different registries exist and are held by different ministries for different purposes. Most land records are old, dating back to the colonial period, and do not reflect the reality on the ground as land boundaries have not been updated for years. Very little is computerised and available to public access. As a result, inconsistencies in the land maps and records are widespread (LIFT, 2015).

Even the recent cadastral maps (*Kwin* maps), issued in lower and central Myanmar following the adoption of the 2012 Farmland Law, are likely to be inaccurate and need to be revised (Boutry *et al.*, 2017; World Bank, 2018). Official estimates suggest that 9.3 million LUCs were issued to farmers in 2013-14, out of a total of 16 million potential farmland parcels (FAO and EU, 2016). The World Bank (2018) reports about 8 million LUCs being issued to farmers in the same period, noting that these were based on fairly outdated maps. The Bank estimates that at least 80% of farmland must be re-surveyed and approximately 45 000 block maps in rural villages covered by grant land will need to be created. An important challenge for this is the lack of established procedures for renewal or updating the cadastre.

Beyond the possible cadastre inaccuracies, there are also important weaknesses in the registry system. In the case of farmland for instance, while the Farmland Law requires that any change to a land use right (e.g. when transferred, inherited or encumbered with debt) be properly registered, and new procedural directives were issued in May 2019 for this purpose, land transactions before 2012 were not formalised. These still need to be recorded. VFV land registry is less problematic as it cannot be transferred, only returned to the government, although the legislation provides for a VFV land (certificate) to be converted into farmland (LUC).

The lack of accurate cadastral and registry information is not unique to rural land. The expansion of towns and villages over the past 50 years has also created informal settlements outside the legal town limits, resulting in sometimes poor formalisation of grant leases (i.e. the urban land use rights). Even for town land, the surveys, block maps and deed registers are often inaccurate (World Bank, 2018). For example, it is unclear whether adverse possession land use rights⁵, recognised under the Lower Burma Town and Village Land Act (1899), are routinely registered and acknowledged. As noted by the World Bank (2018), “deed registration is barely operational in towns [...] Grant leases and their registration to the deed registry in town land have been out-of-date for many years” (World Bank, 2018). A similar situation exists in rural settlements. An FAO-EU (2016) report points to some 5-6 million residential properties in rural villages which were converted from farmland into residential plots over time without any formal registration. These situations reinforce the need to rationalise the functions of land-related agencies, such as DALMS and GAD on town land matters and, simultaneously, on village land as they maintain a duplicate of the Register of Grant Leases and other urban titles.

This current situation highlights the complexity of formalising land tenure with top-down policies that do not match local realities of land use (Boutry *et al.*, 2017). The push to provide farmers with documentation of

use rights following the 2012 Farmland law was in principle admirable – the law requires LUCs to be issued to all farmland with cadastral maps (*Kwin* maps) – but the resulting situation has created uncertainty for those left with inaccurate documentation (LUCs were mostly issued based on outdated maps and sometimes assigned to wrong landholders) and greater tenure insecurity for those who did not receive LUCs (and which may have seen their land entitled to someone else by errors in the registered information). This problematic situation is now possibly repeating itself with the 2018 amendments to the VFV law, which pushed for the registration of VFV land (further discussed below).

By favouring registration rates over reliability, these policies risk undermining whatever progress has already been made in building trust in a land registration system through important pilot programmes, such as the (i) OneMap (an initiative started in 2015 to develop an open, online spatial data platform bringing together land data from various sources)⁶; (ii) Land Administration and Management Project (LAMP) including to develop digital cadastral system, and iii) the upcoming project on Reallocation and Development of Unused Concession Land Programme (REAL DEV) supported by the Livelihoods and Food Security Fund (LIFT).

Giving adequate consideration to accuracy of information in mapping and registration exercises and their proper maintenance thereafter is key for the success of future land reforms. It is important for the recently created *National Mapping System Establishment and Implementation Working Committee*, which is tasked with guiding the further development of OneMap as part of the implementation of the NLUP, to reflect on interim measures to help secure the reliability of registered information carried out before the full completion of the OneMap initiative.

The World Bank (2018) estimates that with proper planning, one land register could be established at the township level to record all rights in all tenures and that the rollout across townships for the rejuvenation of records and services can be realised on a priority area basis over a 10-year period. In the interim, steps can be taken before adopting new laws, such as testing model land administrative offices. For example, while many land records are held at the township level, the distance and process involved in accessing these records still proves to be an obstacle to the average farmer. Myanmar may consider other options, such as the village or village-tract level for better accessibility (World Bank, 2018).

A complex and long registration process

While over 96% of the households owning parcels of land officially classified as farmland in the Delta Zone, and about 80% of the landowners in the Central Dry Zone, had been issued a farmland LUC by November 2014 (Alleverdian, 2016), many parts of the upland areas are not titled at all. Reasons vary, from the complexity of the registration process and the lack of perceived benefits of registering land use rights (if not drawbacks) to more structural issues, such as (i) a significant part of land used for agriculture failing to meet the official classification requirements to be eligible for titling under the Farmland law; (ii) absence of cadastral information (*kwin maps*) as many upland areas have never been surveyed; and (iii) lack of information and interest of informal occupants of VFV land in upland areas.

Rights to use farmland under the Farmland Law, for instance, are recognised through the issuance of LUCs, which can only be obtained upon completion of a multi-step approval process. If a farmer's LUC is approved, the farmer must pay a registration fee and register with a District Agricultural Land Management and Statistics Department before a district-level Farmland Management Body issues the LUC. This approval and registration process must be completed every time the LUC is transferred, sold, inherited, leased, or mortgaged. Similarly, the application to obtain the use of and register VFV land is also a multi-layered, time-consuming process with files going up and down through the various layers of VFV Committees. Although both processes involve rather low official costs, these are typically burdensome and imply large opportunity costs.

The process for registering urban land is equally burdensome and complex. As reported by the World Bank (2018), the current process to register grant land leases, for instance, requires several visits to GAD and DALMS offices, as well as the Department of Finance. For foreign investors, this has proven even more complicated if not impossible. The Office of Registration of Deeds (ORD) is reported to be refusing to register leases involving foreign investors without any written explanation that can be appealed, even though this is expressly provided for in the Investment Law. Investors report this practice to be a major challenge for all large infrastructure and real estate projects requiring significant debt financing. For this and other reasons, the World Bank Ease of Doing Business Index 2020 ranks Myanmar's performance in registering urban property in the 125th position among 190 economies.

Numerous other types of land are not even eligible for registration because they are not legally recognised. These would need to be first defined and recognised in the law before they can be registered. This is the case of customary land for instance. Data on the extent of land under customary tenure are unavailable although such land is widespread throughout the country and the norm in upland areas (FAO and MRLG, 2019). Other types of land – communal grazing land, water rights, forest rights, national government land and local government land and informal urban settlements – each with their own unique set of rights, restrictions and conditions also need to have their rights regularised/registered and secured in the land register.

In addition, the registration of land use rights in some case may not necessarily lead to higher land tenure security, particularly with regards to VFV and farmland, whose land use rights may be withdrawn if the numerous conditions and administrative procedures are not respected. Altogether the framework provides limited incentives for landholders to seek registration, with the exception of better access to credit by Farmland holders (LUCs can be given as collateral against seasonal credit from the Myanmar Agriculture Development Bank and other commercial banks).

Absence of land use planning and complex land use change processes

At present no law governs land use planning in Myanmar and hence no process exists to co-ordinate land planning at the regional level or with sectoral plans such as mining or infrastructure. The NLUP anticipates that the future National Land Law will cover a “participatory, transparent and accountable land use planning process.” It anticipates developing land use plans starting with participatory land use planning at township, town, ward, village-tract and village levels, with those plans being amalgamated at each higher level – district, region/state, then union level.

Until a clear land use plan and management framework is in place, procedures to change the designated land use remain specific to each type of land (e.g. under the Farmland or VFV law). Currently, these are typically long, complicated and expensive. One emblematic example is the case of the Farmland Law by which farmland cannot be used for any other purpose than agricultural crops. As such, even if only a small plot of land is to be used for a different purpose (e.g. a telecommunications tower or livestock or fish production (fishponds) for instance), a land use change process must be followed before the lease can be granted and registered. This is a typically lengthy and expensive process requiring ministerial level approval in some cases (e.g. conversion of paddy land) and regional approval in others. Even if the land use change is approved and the lease becomes registrable, it may likely be subject to late registration penalties or even time-barred from registration. While investors may have deeper pockets to endure the higher costs associated with such inefficiencies, local community members with limited understanding and resources often find their resources depleted by repeated trips to far off government offices (Kapoor *et al.*, 2018).

The conversion of VFV land is equally burdensome. The VFV law permits application by local farmers to secure a Permission Order for use of VFV land not already used, which can then be re-classified as farmland, for instance, if it is determined that the land is being used for stable crop production (Farmland Law, rule 34). This is, however, a long and complicated process that is not clearly set out in the VFV Rules.

A more detailed procedure is established in Farmland Law Instructions, but the hierarchy of the legal regime is not clarified in any of the laws. In addition, in many cases, efforts to follow the necessary steps for reclassification are not followed due *inter alia* to the complexity and perceived lack of legal authority to complete a reclassification process. As such, practitioners report that vacant land reclassification processes typically result from negotiation and discussion with the authorities involved, rather than as a result of following a clear pre-established process (Landesa and Namati, 2015).

Overly strict land use policies

As noted earlier, Myanmar's land regime imposes very strict conditions on land use, notably for paddy land, which in some cases contributes to weakening land tenure security. If land use rights holders fail to respect such conditions, their land use rights may be withdrawn and, in some cases, they may be charged with criminal penalties for non-compliance. Additional restrictions on land use rights apply to foreign investors (discussed further below).

- *Restrictions on use.* Farmland use, in particular, remains heavily regulated. The relevant Farmland Administration Body (FAB) needs to grant permission for farmland to be cultivated, used to grow other crops than initially permitted or to be used for non-agriculture purposes, as well as if the land sold, mortgaged, leased, exchanged or given to foreigners. It also cannot be left fallow without a sound reason. If the permitted land use conditions are breached, the land use right holder may be required to pay a fine or remove the buildings built without permission or even face eviction. In the case of failure to comply with such requirement, the land holder may be imprisoned for a period ranging from six months to two years.
 - In the case of VFV land, the land needs to be cultivated within four years – 15% of the allocated land within the first year, 30% in the second year, 30% the third year and 25% the fourth year – and within only two years for smallholders. Otherwise, land use rights may be confiscated. This renders it impossible to practice shifting cultivation on the land. In this respect, the ADS has sent a positive signal by calling for the abolition of these measures restricting farmer's crop choices and techniques.
- *Restrictions on the size of landholdings* applies for certain types of activities on VFV land. The 2018 amendments to the VFV Land Law significantly reduced the land that can be allocated to companies. Instead of allocating 5 000 acres at a time for perennial plants and industrial crops up to a maximum of 50 000 acres (with the possibility to grant more than 5 000 acres at a time with cabinet permission), the new limits for perennial plants, orchard and industrial crops are 300–3000 acres at a time, up to a total of 30 000 acres. 75% of the existing land must be cultivated as a condition for access to additional acreage. As before, the limit (now 3 000 acres at a time) can be exceeded with cabinet permission. The acreage limit for other types of agricultural activities remained unchanged. Rural farmers can be allotted land not exceeding 50 acres for family-sized farms.
 - The size of holdings of farmland is not limited in the Farmland Law. Holders of LUCs, however, typically have smaller plots of land so leasing land from farmers to make up a large-scale plantation would require a series of negotiations with individual farmers in the same area to lease their land. While possibly too burdensome for large-scale investors, this approach may mean that plantations that would otherwise trigger the requirement for an ESIA under the EIA Procedures would not be properly scrutinised for their environmental impacts. Related concerns have, for instance, arisen in relation to banana and watermelon plantations and merit further policy action by the government to fill this loophole (Frontier Myanmar, 2019; Boutry *et al.*, 2017).
- *Restrictions on transfers, mortgages:* While farmland use rights can now be sold, mortgaged, leased or used as collateral, VFV land cannot be mortgaged, sold, sub-leased, divided or otherwise

transferred without the approval of the Union Government. In reality, however, much VFV land has reportedly been sold by grantees (San Thein et al., 2018).

- *Time limits.* While farmland use rights are granted as long as required conditions are not breached, land use rights on VFV land are limited to 30 years for perennial and orchard crops, livestock and aquaculture but can be extended for another 30 years. They are unlimited for seasonal crops, unless conditions are breached, and for government-approved projects (OECD, 2014^[2]).

Lack of clarity and costly land transfer procedures

National and foreign investors can acquire land use rights in Myanmar in numerous ways. The process varies across the different types of land, but typically consists of long and complex procedures with various administrative bodies from multiple ministries and layers of administration. Numerous conditions are also imposed on land transfer, including additional ones when such transactions involve foreign persons.

Unclear relationship between the Myanmar Investment Law and other land laws

The Myanmar Investment Law (MIL) of 2016, which unified the investment regime for foreign and domestic investors, includes specific provisions with respect to land. A Permit or Endorsement from the Myanmar Investment Commission (MIC) may be required for an investment in the following two circumstances:

1. The investment is on the list of land transactions that trigger the requirement to apply for an MIC permit, whether or not foreign investors are involved (Box 8.4). Projects with a significant land footprint need to apply for a MIC Permit;
2. The investor would like to obtain a long-term lease of land or building. This is particularly relevant for foreign investors who are constrained to short-term (1 year) leases under the relevant legislation (The Transfer of Immovable Property (Restriction) Act – TIPRA). In this case, the investor must apply for a MIC permit or endorsement as a condition for obtaining a Land Rights Authorisation (LRA) under the MIL. The LRA entitles the investor to an extended period for a lease for land or buildings – up to an initial period of 50 years, either from the government or private entities, with an extension of two consecutive periods of 10 years (up to 70 years total) with the approval of the MIC. Investments in least developed and remote regions can get even longer-term leases with the permission of the parliament. The MIL imposes requirements as part of the LRA process to ensure that land authorised for investment for extended time periods will be used responsibly (Box 8.4).

Box 8.4. Land-related requirements under the Myanmar Investment Law

The following investments require a MIC Permit:

- (a) Businesses / investment activities that are strategic for the Union (many of these may include a substantial land footprint):
- investment exceeding USD 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;
 - a concession or contract with a government authority with an expected investment value exceeding USD 20 million
 - investment by foreign investors or investment exceeding USD 1 million by a Myanmar citizen investor along the border or in conflict affected area

- cross-border investment by the foreign investor or investment exceeding USD 1 million by Myanmar citizen investor
 - investment across the Regions or States within the Union
 - investment in agriculture involving more than 1 000 acres of land
 - investment to carry out other business except agriculture on more than 100 acres of land
- (b) Large capital-intensive investment projects over USD 100 million
- (c) Projects which have large potential impact on the environment and the local community, including projects that:
- Require an EIA (see EIA Procedure Notification 616 / 2015, Annex I) for the list of types of projects that require an EIA
 - Are located on a designated protected or reserved area or major biodiversity area or areas selected and specified to support the ecosystem and cultural and natural heritage, cultural commemoration and unspoilt natural areas
 - Includes the rights to occupy or use land that:
 - has been or is likely to be acquired through expropriation, compulsory acquisition procedure or by agreement in advance of such expropriation or compulsory acquisition procedure and will either: (i) cause the relocation of at least 100 individuals permanently residing on such land or (ii) comprise an area of more than 100 acres
 - comprises an area of more than 100 acres and would be likely to cause involuntary restrictions on land use and access to natural resources to any person having a legal right to such land use or access
 - comprises an area of more than 100 acres and which is the subject of a pre-existing bona fide claim or dispute by a person regarding rights to occupy or use such land in a way which would conflict with the proposed Investment
 - would otherwise adversely affect the legal right of at least 100 individuals occupying such land to continue to occupy such land
- (d) Uses state-owned lands and buildings

MIL land rights authorisation process

A land rights authorisation (LRA) application can be submitted concurrently with the application for a MIC permit or endorsement. The MIL does not specify the type of land that an investor can lease. The State and Regional Investment Committees can assess and accept LRA applications up to USD 5 million, following the procedures below (MIC Notification 25/2017).

An investor must complete a number of steps concerning land to apply for a MIC Permit:

- Investors will need to identify the land that is of interest, its current classification, its ownership, and whether a change in land use is required.
- The investor will have to enter into a draft lease for the land as this must be submitted as part of the MIC process.
- If the land use classification must be changed, the investor must obtain a recommendation letter or approval of the proposed land use change from the relevant land authorities.
- If the investor intends to enter into a lease or joint venture agreement with a state entity, such as MOALI, the draft must have been presented to the Attorney-General's office and the recommendations from the Attorney-General's office must be attached to the MIC application.

- The project should be screened by ECD for whether it requires an EIA or Initial Environmental Examination (Chapter III of the EIA Procedure), and if so, a proposal/plan for an EIA (but not the EIA itself) will need to be submitted to the MIC.
- A number of documents an investor must be submitted with respect to land as part of an application to the MIC, including:
 - information on the land and buildings, the landlord and the requested period for the LRA
 - If there must be any proposed change in land use of the land necessary to carry out the investment, the investor must submit a recommendation letter or similar document or approval from a state or regional government or other governmental department and governmental organisation endorsing any proposed change in use of the land to carry out the investment
- A draft of the lease from the private owner or, if it is government land, from the respective line ministry or department.
- If the land title for the land is not owned by the investor or the current owner, the investor can submit 'sound ownership documents' that MIC can accept 'if it reasonably believes these to be true.' Given that Myanmar does not have a unified cadastral system and that proof of land ownership can be demonstrated with a variety of types of documentation (tax receipts, different forms, etc.) this provision provides the flexibility to take into account different types of documentation.
- The MIC or a state/regional MIC screens the application according to a set of criteria and with respect to land those include whether:
 - The land over which the investor has applied for a LRA is able to be used for the purposes contemplated in the investment under applicable laws, whether presently or following the completion of a change of use procedure
 - If the investor's proposed use of the land will or may be likely to require any significant alteration of topography or elevation.
 - Whether it is necessary to impose conditions in the LRA, although it is not stated what kinds of conditions may be imposed i.e. whether these could cover specific environmental conditions for example.

Once the investor has been issued with an LRA, it must submit details to the MIC of: (i) the land or building lease agreement; (ii) extending the term of the lease; (iii) the approval of change of land use, providing copies of the relevant documents. Furthermore, the lease agreement must be registered at the Registrar Office of Deeds and Assurances in accordance with the Registration Act.).

Source: Myanmar Investment Law and Myanmar Investment Rules.

Despite the level of detail specified in the MIL and the MIR, the MIL is missing some important points of clarification. Neither the MIL nor the MIR specifically address the relationship between the MIL and other land processes – a gap that has caused confusion to investors. DICA has explanations on its website about how labour law and environmental law requirements can apply to an investment, but it does not have explanations in relation to land law. Several dimensions could be clarified:

- *The relationship and sequencing between the MIL's LRA process and requirements for obtaining land use rights under Myanmar land laws:* DICA has clarified informally that the LRA process does not permit investors to bypass the complicated requirements of acquiring land use rights under land-specific laws. The LRA process solely allows the extension of the applicable lease period, thus permitting foreign investors to bypass the lease term restrictions under the TIPRA. A lessor will still need to obtain the specific approvals and follow the specific procedures for the specific type

of land in question before a lease can be legally concluded and registered, including complying with any possible restriction on foreign investors (discussed further below).

- *The relationship between MIL and obtaining land via a government agency process, such as a concession – i.e.* clarifying whether it is still necessary to go through the LRA process or the land use would be covered in the concession agreement. The experience of investors in power projects seems to suggest that land for use in concessions is typically not covered through by concession procedures and that investors must be prepared to source land on their own (VDB-Loi, 2018). In principle, the government can acquire land for public purposes under the new Land Acquisition, Resettlement and Rehabilitation Law (2019), which can include projects with private investors. Presumably land can also be leased from a government agency through a straightforward land lease without having a separate operating contract (such as a concession), but this could also be clarified. In addition, DICA could also clarify if a land lease with a government agency requires the Attorney General's approval and the sequencing for this (Box 8.4).
- *The relationship and sequencing between the MIL's LRA process and any land expropriation process – i.e.* clarifying whether it is still necessary to go through the LRA process or the relevant land use rights are automatically conceded to investors as part of a project's land expropriation process under the Land Acquisition Act (or other expropriation process).
- *The relationship between the MIL and other authorities in the case of mortgages on land use rights by foreigners.* Under the TIPRA, foreigners are not allowed to acquire immovable property by way of mortgage without special government permission. However, the MIC has the authority to make a case-by-case evaluation on the ability of foreign investors to provide security over land and buildings pursuant to the MIL, but requires the prior approval of the Central Bank of Myanmar. The right and procedures to mortgage a property will also depend on the specific provisions of the land laws. The entire process of mortgaging land use rights could be further clarified.

Inefficient property tax system

Myanmar's current property tax system fails to stimulate property transactions and efficiently collect revenues for the government. The World Bank (2018) notes that in rural areas, the administrative costs exceed the revenue collected. This is because taxes are levied on agriculture land based on historically low rates established in a schedule that is more 70 years old now. In cities, there is no proper value-based property tax. Instead, there is a building tax fixed at 10% of the 'standard rental rate' in the Yangon region. The proper application of this system is onerous as it requires the systematic collection of rent value transactions of properties being rented. Most countries rely on value-based property taxes, particularly in urban areas.

Myanmar has one of the highest property transfer taxes in the world according to the World Bank (2018), which creates an additional disincentive for registering transactions and induces the under-declaration of property prices. Taxes on property transfers apply as follows: (i) the buyer of the property is taxed progressively between 3% to 30% depending on the property value; (ii) in addition, a 2% stamp duty is levied on property located within the three City Development Committees or 5% if located outside; and (iii) the seller is taxed at a 10% flat rate. These rates are in stark contrast to those levied in neighbouring economies and elsewhere (e.g. up to 2% and 3% in Thailand and Malaysia, respectively). The World Bank (2018) suggests eliminating or reducing the tax to no more than 2% (in line with ASEAN neighbours), and granting amnesty to past informal transactions to encourage their registration.

Weak regime on compulsory land acquisitions by the state

A new Land Acquisition, Resettlement and Rehabilitation Law was approved by the Parliament in August 2019. Once effective (it still needs to receive presidential assent to become effective), the new law will repeal the current regime which dates from the colonial era (Land Acquisition Act of 1894).

Early commentators have praised the law's integration of land acquisition with resettlement and rehabilitation and the fact that it requires future land acquisition to include environmental and social impact assessments. It also provides for the rights of the local people to their historical and cultural heritage to be protected and imposes more transparency in the implementation of land acquisition, resettlement and rehabilitation processes by requiring the participation of the local communities and technical experts, in addition to Government officials and the landowners, throughout the process (VDB-Loi, 2019). However, without discrediting the merits of the law for pursuing these goals, the new law falls short of addressing many weaknesses of the previous regime.

Compulsory land acquisition by a state is an accepted state function. Most countries have constitutional or other legal provisions allowing for public expropriations for public purposes, public uses, or in the public interest, and these takings may occur for many reasons: transport infrastructure, public buildings and utilities, and defence purposes (military bases).

Myanmar's legislation to date, including the new law, fails to establish the necessary safeguards for compulsory land acquisitions by the state (land expropriations) to be carried out in a lawful manner consistent with internationally accepted standards, notably those stipulating that expropriations should occur only for a well-defined public purpose, under due process of law and against prompt, adequate and effective compensation. It also falls short of other domestic practices in this respect, such as the NLUP and MIL (see Chapter 2 for a discussion of the MIL).

Until the issuance of the new law, there was no comprehensive law on land acquisition by the public sector, compensation or resettlement; instead there was a patchwork of laws. Several rules applied in different circumstances. No standard methodologies were in place to ensure consistency in procedures, including for compensation. There was also no independent appeal body to which affected persons could have recourse, and there were no specific rules about resettlement.⁷ Some specific relocation actions had been carried out at the Thilawa Special Economic Zone and Letpaduang copper mine, but these were much criticised.

The new law remains equally problematic in many aspects. Among other issues, it maintains a wide scope of application, allowing for compulsory land acquisitions by the state for loosely delimited "public purposes", including for instance for the "development of the country in accordance with the national economic policy". One can imagine the amplitude of projects that may fall within this consideration, notably because there is no accepted jurisprudence on what would qualify as 'public purpose'. The new law also establishes a specific regime for 'urgent acquisitions', essentially allowing the government to bypass the normal procedures without any clear delimitations. In some instances, such 'urgent acquisitions' may possibly constitute forced evictions, in contravention of the International Covenant on Economic, Social and Cultural Rights, to which Myanmar is a state party (MCRB, 2018; PILPG, 2017a).

The risk of abuses is aggravated by the lack of an independent review process. The law provides the government with wide discretionary powers to determine when 'public purpose' or 'urgency' situations hold and ultimately and solely to decide on the legality of its own expropriation actions. This is a clear impairment of due process. Complaints regarding an acquisition made under the law can only be brought to and decided by government bodies. The courts only have a role with respect to determining compensation and damages; the acquisition itself cannot be challenged in court.

The lack of clear definitions further adds considerable uncertainty with regards to who is entitled to rights provided for in the law. It adopts vague terminology with respect to who is entitled to compensation and damages under the law, notably 'landowners' being "a person and his household who owns the land with

strong evidence". While it provides for a non-exhaustive list of possible landowners which, to a certain extent, contributes to delimit what constitutes 'strong evidence' – recognising inclusively customary tenure holders in addition to those officially registered in the land record or that acquired the land in accordance with any existing law – it remains unclear how such a provision will be applied. As stated earlier, in many instances documentation is lacking or flawed and customary tenure is not fully recognised in other laws. It is unclear if there would be fair processes for determining 'strong evidence' by local governments as stipulated in the law.

Similarly, the definition of "persons related to the acquired land" is strangely narrow, raising questions as to the extent to which other persons would be entitled to damages arising from land acquisitions under the law. The inconsistent lexicon used throughout the law further thwarts legal clarity (e.g. 'landowner', 'person whose land is legally acquired', 'the relevant responsible person').

The new law also provides for the Land Acquisition Implementation Body, which is tasked under the law with undertaking all matters related to a land acquisition, to negotiate with landowners after a notification declaring the need and intent of land acquisition has been issued by the Central Committee. But there is no provision determining minimum standards for such negotiations (e.g. identifying and determining the relevant landowner-counterpart for the negotiations; defining what constitutes a 'negotiation' process, including *inter alia* with respect to minimum length of time, format and content of negotiations and other minimum standards needed to ensure an adequate and fair process is respected etc.).

The law also provides little incentive for the government to reach balanced negotiation outcomes, since it allows the acquisition to move ahead anyway even if landowners are not satisfied with the result. In addition, the law establishes strict penalties, including prison sentences, for offences which are not well delimited in the law, such as "obstructing, hindering or deterring the body or person performing the functions assigned under this Law", and which can potentially be used to pressure affected persons in negotiations. The lack of minimum negotiation attempt standards may render an already difficult process even more complicated, and may unintentionally lead to an excessive number of cases being appealed to the courts.

Provisions concerning compensation and damages are equally unclear and have little resemblance with international standards of prompt, adequate and effective compensation. The measure of compensation is the "local market value of the acquired land and building" plus relocation and resettlement expenses. The law does not explain what "local market value" means or when and how it should be assessed, nor does it provide for this to be disciplined by rules yet to be established. Some provisions take into account the value of seasonal crops grown on the land, but other possible income-generating assets, e.g. natural resources, forestry, lakes and rivers, are not contemplated. The law is also silent on the modalities of payment, notably in relation to the form and time that compensation and damages are to be paid.

Generally, compensation should be paid without delay prior to the actual taking of the property by the state, and paid in easily convertible or freely useable currency. It should also reflect the 'fair market value' of the property concerned immediately before or at the time when the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable, as property normally loses value after the expropriation. Such an assessment typically takes account of all the possible income-generating aspects of the land, if any. It sometimes considers the present value of potential future profits lost by the investor due to the acquisition, which may at times be higher than the land value computed through backward-looking valuation methods (e.g. sunk costs or replacement value methods). Such a standard formulation of the measure of compensation for lawful expropriation ('fair market value') is, for instance, the language adopted in the ASEAN Comprehensive Investment Agreement to which Myanmar is a party (see Chapter 2 for more details on investment protection in Myanmar).

For investors, this means that additional steps are necessary to supplement expropriation carried out by the government to ensure projects better align with international standards (e.g. IFC Performance

Standard No 5 on Land Acquisition and Involuntary Resettlement and No 1 on Environmental and Social Management Systems).

Until the NLL is adopted, several laws will continue to lay out rules for land acquisition by the government and compensation:

- The *Land Acquisition, Resettlement and Rehabilitation Law* commented above. Under the previous law (Land Acquisition Act of 1894) there was no clarity about which laws prevailed with respect to expropriation when there was overlap with specialised land laws. The new law addresses this to some extent by exempting Farmland or VFV Land from its disciplines on payment of compensation and damages, but its relationship with other laws remains unclear. Concerns also persist in relation to possible implementation inconsistencies. The new law repeals the previous law from 1894 but the rules and orders issued pursuant to the old act will remain applicable if they do not conflict with the provisions of the new law, which may add to more confusion and fragmentation.
- The 2011 *Special Economic Zone Law* places the burden on developers and investors to transfer and pay for compensation costs associated with land-based investments in SEZs.
- The 2012 *Vacant, Fallow and Virgin Lands Law* permits the state to reclaim VFV land: (i) for public purposes such as the discovery of cultural heritage or minerals or other natural resources, and for infrastructure. In these circumstances, compensation is calculated by current value to cover the actual investment cost of the legitimate owner, but this must be agreed with the cabinet; and (ii) permission to use VFV land can be revoked for failure to meet the strict conditions of use, with compensation but also with forfeiture of security deposit. The VFV Law and Rules set out only limited provisions on compensation and do not provide guidance on how to calculate or pay compensation.
- The 2012 *Farmland Act* (2012) permits FABs to revoke the LUCs if any of the strict conditions of use or administrative procedures are not complied with in full. No specific safeguards are provided and no access to independent judicial review of decisions. The government has the right to retake possession of land for state or public interests if citizens are adequately compensated, including compensation for improvements and construction on the land. The law does not define state or public interests, nor does it provide any principles and methods for determining land valuation or compensation, nor does it provide for judicial review of decisions (PILPG, 2017).
- The 2015 *Environmental Impact Assessment Procedures* apply to any project that has the potential to cause any adverse environmental, social, socio-economic, health, cultural, occupational safety or health, and community health and safety effects. They specifically note that projects that involve involuntary resettlement must adhere to international good practice (as accepted by international financial institutions including the World Bank Group and Asian Development Bank) on involuntary resettlement, until specific procedures are issued by responsible ministries. As no such procedures have yet been adopted, these international standards are compulsory for any project covered by the EIA projects and involving involuntary resettlement.
- The MIL sets out specific requirements for the expropriation of investments: according to law, in a non-discriminatory manner, for a public purpose and providing fair and adequate compensation, based on the market value at the time of expropriation. At the same time, the MIL provides a broader balancing test, weighing up a number of other factors in deciding the final compensation (fair consideration of public interest and the private investor's interests, taking into account the investment's present and past conditions, the reason for expropriation, the profits acquired by the investor during the term of investment, and also the duration of the investment).

Lack of adequate dispute resolution mechanism for land-related disputes

Myanmar's fragmented land regime provides for three different bodies with some mandate to resolve land disputes (Central FAB, Central VFV Committee, the Central Committee for Re-inspection of Confiscated Farmlands and Other Lands), but as for other issues it lacks specific guidance on roles, responsibilities and authorities of government officials serving at different levels of these mechanisms or the procedures they are authorised or allowed to use – for the officials or those participating in the procedures. Lack of clarification of the authority often results in disputes or grievances being elevated to higher levels when they might be settled at lower ones (MyJustice, 2019^[3]). There are some cases of land owners bringing cases to court, but the judicial system is slow, complicated and corrupt according to some (Kapoor *et al.*, 2018). In such a context, many conflicts remain unresolved (San Thein *et al.*, 2018).

The *Farmland Law* establishes a dispute resolution structure, but it is plagued with conflicts of interest and, hence, is said to lack impartiality. Farmers must bring their complaints to the FAB, which may be the same administrative body responsible for the contested decision. No mechanism exists for alternative dispute resolution or judicial review of FAB decisions, nor any provisions to hold decision-makers accountable (PILPG, 2017).

The *VFV Law* suffers from the same lack of impartiality as the *Farmland Law*, as decisions of the VFV Central Committee are final, and it is only with the 2018 amendments that representatives of local ethnic groups, farmers and CSO representatives, and experts are to be appointed to region or state committees. In principle, land governance has been highly concentrated in the hands of village tract headmen, who act as political brokers between the government and villagers. But in the absence of adequate checks and balances, corrupt practices have prevailed at the expense of the weakest and dispute arbitration decisions were often rendered in favour of the 'highest bidder' (Boutry *et al.*, 2017).

The *MIL*, on the other hand, has established a quite sophisticated dispute resolution mechanism, including a grievance mechanism that allows affected persons to complain to the Investment Assistance Committee established to prevent and resolve disputes before they escalate to a legal dispute. Such a measure, however, is not yet operational (see Chapter 2). It is also not clear how the *MIL* provisions interact with other provisions established in specific land laws. In principle, the *MIL* prevails over other laws on matters provided in the *MIL*, but it is not clear how this process takes place.

Concerns with land restitution processes and land in conflict-affected areas

Land restitution and land in conflict-affected areas are broad challenges, involving issues and policies well beyond the scope of this *Investment Policy Review*. Other fora are more appropriate to discuss solutions to these specific complex matters. It is important to recognise here, however, that such challenges affect the investment climate too. In particular, the current situation increases the perceived risks and transaction costs for potential responsible investors who are committed to avoiding and addressing adverse impacts arising from or associated with their operations, supply chains and other business relationships (see section below).

Land restitution and reinvestigation

Myanmar has had a long history of land conflicts, and a principle source of land insecurity has been the lack of rule of law as evidenced by the various instances of land confiscation. Many were irregular, occurring without explanation or compensation during decades of military rule for military settlements, military linked businesses and private businesses of military personnel. In February 2019, the Re-investigation Committee stated that they have received 7 119 complaints cases, of which 3 168 have been resolved, but other sources estimate the number of complaints to be as high as 15 000 (LIOH, 2017). The process has demonstrated the multifaceted challenges of dealing with land return issues – such as powerful political and military forces, complicated procedures, a civil service tradition of avoiding making decisions and administrative bottlenecks.

Solutions to such ingrained challenges typically require a range of policies developed in close consultation and collaboration with affected parties and civil society. The experiences of other countries may be useful to inform the design of such policies in Myanmar. A review by Landesa and Namati (2015) brings forward some successful policies implemented elsewhere that could be considered in Myanmar given some of the challenges of the policy currently in place: “Addressing past grievances in land should not begin as a zero-sum approach in which the aggrieved party receives the land, and the present user-claimant must vacate. Other more effective approaches to restitution programmes include: a mix of ownership (or long-term rights) in which the disputed land is divided, and one party provides support to the other; or states may add to the pot through compensation either in cash, new land, or shares in development. In mainland China, [Chinese Taipei] and South Korea, [...] providing equity shares in non-agricultural development was an effective approach in compensating for land acquisition, and in South Africa cash compensation was successfully used for those who had suffered from past evictions [though in Myanmar in-kind land compensation may be needed to restore livelihoods]” (Landesa and Namati (2015, p. 24).

Land in conflict affected areas

Numerous ethnic armed groups across the seven ethnic states, in other regions, and in self-administered areas operate separate systems of administration at the subnational level, including on land governance. This can include: formulation and public presentation of land policies for their ethnic national areas; land registration and administration efforts; support for community documentation efforts; research and demarcation of boundaries; and, training and public education on land documentation (USAID, 2017). The presence of two land administration approaches poses a real challenge to responsible investors in determining whom to consult and which authority should be dealt with – ideally both. In these areas, investors need to consider carefully their ability to conduct business in a conflict-sensitive manner that is in line with expectations of responsible business conduct. This requires enhanced due diligence and careful consideration of the investor’s capacity to manage such a complex operating environment.

In general, in areas affected by conflict, historically or presently, investors need to be aware of potential restitution claims by refugees and internally displaced populations (IDPs) who may have been forced off the land but retain legitimate claims. In such areas, investments may have to be reconsidered not only because of the legal risks involved in land transactions, but also to act responsibly by avoiding aggravating situations of conflict. The recent displacements in Northern Rakhine State and takings of lands of displaced populations, for instance, makes it very difficult to address the situation in ways that can be considered to recognise the rights of displaced populations.

In Myanmar, the scale of land dispossession resulting from the long-running conflicts is enormous, involving millions of acres of land and millions of people forced to flee from conflict over the past several decades. Many will seek to exercise their restitution rights in the context of their eventual return. Such processes are complicated but not unprecedented. Many other countries have addressed land rights in their peace processes and engaged in restitution programmes (Displacement Solutions and Norwegian Refugee Council, 2018).

Control over land and resources is intimately intertwined with the on-going conflicts and negotiations to end them. The Panglong 2 peace talks held in mid-2017 resulted in agreement of ten basic principles developing a people-centred, progressive land policy based on justice and fairness (Box 8.5). In addition, the 2016 Nationwide Ceasefire Agreement between the government and the Ethnic Armed Organisations addresses a range of housing and land property rights issues. Nonetheless, commentators have warned that “there is a significant risk in Myanmar that because of the deep vested interests [...] housing and land property issues may be perceived as too sensitive or complex to be properly addressed in any eventual agreement” so continued attention and effort are needed (Displacement Solutions and Norwegian Refugee Council, 2018, p. 5). Others have raised concerns that the 2018 VFV Law amendments will further exacerbate risks of increasing land conflicts and challenges in formal peace negotiations (Gelbort, 2018^[4]).

Box 8.5. Land and the Panglong process

Panglong 2 - Ten principles on land and the natural environment:

1. A countrywide land policy that is balanced, gender inclusive, and supports people-centred long-term durable development.
2. Based on justice and appropriateness
3. A policy that reduces central control
4. Include human rights, international, democracy and federal system norms in drawing up land policy.
5. Policy on land matters should be transparent and clear.
6. In setting up policy for land development, the desire of the local people is a priority and the main requirements of the farmers must be facilitated.
7. All nationals have a right to own and manage land in accordance with the land law. Women and men have equal rights.
8. Both women and men have equal rights to manage the land ownership matters in accordance with the land law.
9. If the land right granted for an original reason is not worked on in a specified period, the nation can withdraw the granted right and concede it to a person who will actually do the work.
10. To aim toward protecting and maintaining the natural environment and preventing damage and destruction of lands that were social, cultural, historical heritages and treasured by ethnic nationals.

A recent review of what would be needed to ensure that housing and land property restitution rights are incorporated into the ongoing peace process and within broader national legal reform efforts, including work towards a national land law, noted that the Central Committee for Re-inspection of Confiscated Farmlands and Other Lands alone is not sufficient. It recognised that there have been positive measures to address questions of housing, land and property restitution for refugees and IDPs within the context of the peace process and within broader governmental initiatives and legislative measures concerning land, but that more needs to be done. The review provides a detailed overview of steps to be taken to address the issue within the peace process and beyond, building on the “growing awareness that the resolution of housing, land and property restitution claims and disputes can be a vital contributor to economic and social stability, as well as broader reconciliation efforts within post-conflict peace building efforts within the country” (Displacement Solutions *et al.*, 2019, p.37).

The NLUP article 38 usefully recognises the issue and states that “when managing [...] rehabilitation and restitution related activities that result from [...] displacement due to the civil war, clear international best practices and human rights standards shall be applied, and participation by township, ward or village tract level stakeholders, civil society, representatives of ethnic nationalities and experts shall be ensured.”

Weak monitoring of large-scale land allocations

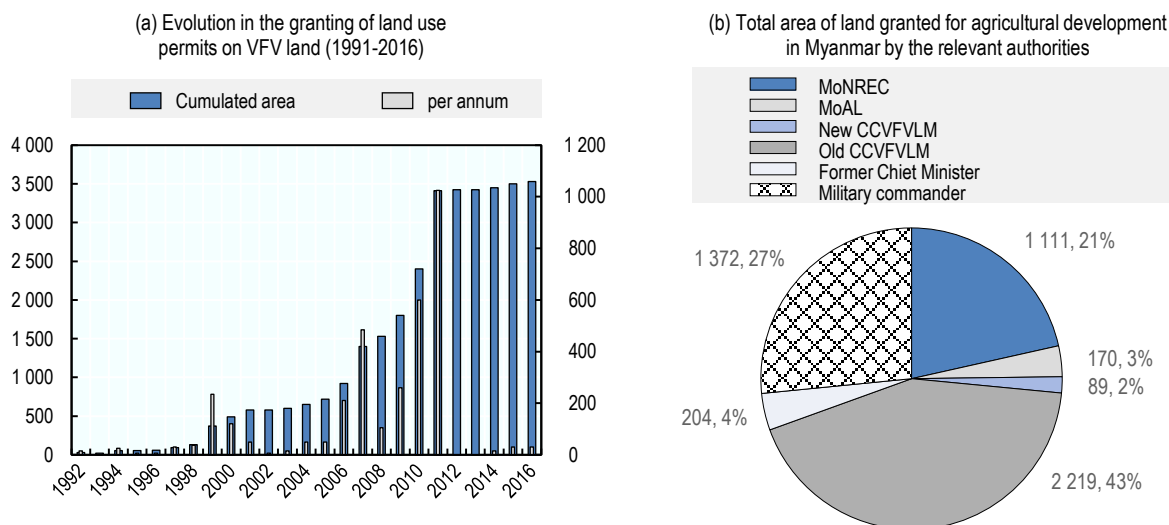
As mentioned earlier, following the political transition and economic opening in 2011, the Myanmar government established a policy oriented towards attracting large-scale private investments in agriculture, arguing that it would bring the necessary expertise, financing capacities and marketing networks to enhance the competitiveness of agricultural production and value chains. The recent policy approach under the ADS signals a departure from this previous large-scale agriculture orientation, placing smallholder farmers squarely at the centre of the new agriculture strategy.

There remains, nonetheless, a legacy of problematic large-scale land allocations carried out over recent decades. Many of the allocations of large land areas for agribusiness, extractives, energy, forestry, infrastructure, SEZs, etc. were carried out without respecting the existing land use rights of local communities. Under weak governance frameworks, large-scale investments may lead to adverse social impacts, particularly displacement, the loss of livelihoods, and a more limited access to land for the local population, resulting in social polarisation and political instability. Besides being a productive asset, land plays a multifaceted economic, social, cultural and religious role (LIOH, 2015; Oberndorf, 2012).

In addition, there have been numerous allocations of large plots of VFV land, which have not always been properly put to use by the new holders. The ADS notes that large-scale land allocations for private investment in the agricultural sector have often failed to result in tangible development of these areas. As little as 20-25% of land allocated under the VFV Law is actually being used according to contractual lease contract agreements (MOALI, 2018; Woods, 2015; San Thein *et al.*, 2017). An assessment of palm oil and rubber plantations in southern Myanmar, using geographic spatial information including data generated by the OneMap project, revealed that only 15% of the total land allocated for palm oil plantations in the studied area had been used for such purposes or remained planted with palm oil as of early 2019, while 35% of the concession area was reported to have been used for palm oil as planned in 2015 (Nomura *et al.*, 2019). While there are a number explanations for such large differences, the degree of compliance with concessional terms remains limited.

Most VFV land allocations took place between 2006 and 2011 during the last years of the military government but also at the peak of the food crisis. More recently, allocations have resumed, but the majority of the large-scale agricultural schemes visible today are a legacy of that particular period (Figure 8.2). VFV land allocations were spread throughout the country but were particularly concentrated in Kachin State – the third largest state – principally to military commanders (1.4 million acres, 34% of the total). Allocations in Kachin State were typically large, more than 50 000 acres, followed by Sagaing Region, Tanintharyi and Shan Regions. In general, large VFV allocations were located in peripheral regions and smaller ones in more central areas (in the dry zone and delta). Regions such as Sagaing and Magwe have VFV land grants that are mainly under 5 000 acres (San Thein *et al.*, 2018).

Figure 8.2. Large-scale land allocations for agriculture (thousand acres)



Note: Underlying data from Department of Agriculture and Land Management Statistics (2017), "List of land transactions on VFV land in the Union of Myanmar from 1991 to December 2016 (database)", Ministry of Agriculture, Livestock and Irrigation; and Forest Department (2013), "Large scale concessions in reserved forests and protected public forests", Ministry of Natural Resources and Environmental Conservation. Source: Reproduced from San Thein *et al.* (2018).

With low levels of utilisation, there have been cases where local farmers have opportunistically occupied or re-occupied the land, leading to localised conflicts. Land conflicts also occur when the government resettles communities displaced by infrastructure, mining or other large-footprint projects on land already occupied, thus creating conflicts between the newcomers and those already on the land (San Thein *et al.*, 2018).

The major challenge to ensure the social sustainability of private investments, particularly large-scale investments lies in developing land legislation that benefits both large investors and local communities. The responsible governance of land tenure would minimise the risks of social conflicts, thereby increasing the long-term profitability of investments. Where possible, new models of business partnerships between large investors and smallholders (such as contract farming) could be considered.

Contract farming

Given the importance of agriculture to the Myanmar economy and the significant role played by land policy, the government is looking at alternatives to large-scale land acquisition, and the NLUP and ADS signal that the policy will shift towards more clearly supporting smallholder farmers. MOALI is currently preparing standard operation procedures for contract farming with the idea that these may evolve into a contract farming law in the future. The NLUP specifically acknowledges contract farming and joint venture farming, but requires specific reviews of the work records of companies, mandatory pilots to determine if the contractual approach is appropriate for the local situation and defining and agreeing on mutually beneficial arrangements from the contractual situation (Government of Myanmar, 2016).

This recognises that no single model emerges as the best solution and investments may involve a combination of various models; the success of a specific model is context-specific, and contingent on tenure, culture, history, and biophysical and demographic considerations. The advantage of contract farming as compared to plantation models is that farmers normally cultivate their own fields, while the contractor is released from having to direct control the land or acquire land. In any case, one important condition for success is to adequately share the risks between companies and smallholders depending on the capacity of each party to shoulder them. The FAO *Guiding Principles for Responsible Contract Farming Operations* can help frame the buyer-seller relationship to ensure mutual benefits of arrangements (FAO, 2012a; OECD, 2014).

There has been increased attention to two increasingly prevalent examples of contract farming recently, in watermelon and banana plantations, which may explain the NLUP's caution in noting that models need to be tested (Frontier Myanmar, 2019; Boutry *et al.*, 2017). In the two emblematic cases, land acquisition was not carried out through regular, formal channels. Instead, investors used local brokers to acquire land and establish contact with farmers and village tract administrators (VTAs). While not explicitly prohibited, such arrangements may have sometimes by-passed prudential social and environmental requirements provided in the MIL. The farmers rented their land for a period of time, paid in advance. The investors were responsible for cultivating the land, which was generally done by contracted labour, often foreign. Farmers were typically prohibited from visiting their fields. These arrangements have attracted much attention due to the heavy doses of chemical fertilisers and pesticides used during the rental period, which caused significant environmental pollution (San Thein *et al.*, 2018; Boutry *et al.*, 2017).

A National Land Law to update and consolidate the current framework

The 2016 NLUP clearly signalled the development of an umbrella National Land Law (NLL) to implement the policy and harmonise all existing laws related to land, which provides an opportunity for the government to address many of the weaknesses in the current system. Despite some delay in moving ahead with this reform, the government finally announced in July 2019 the establishment of the National Land Law Formulation and Law Harmonisation Working Committee. According to the authorities, the Office of the

Union Attorney General, the Ministry of Natural Resources and Environmental Conservation, the Ministry of Agriculture, Livestock and Irrigation and other relevant agencies, including the General Administration Department (GAD), are all involved and currently co-operating in the drafting of the new law.

At present, indications are that the NLL will be aligned to the NLUP although the Parliament is currently considering whether to review and revise the NLUP. If this revision process goes ahead, the Attorney General's office has stated that this will not delay the drafting the NLL which will be based on the current NLUP. The government has indicated that the NLL will be an umbrella framework law that sits on top of other land laws, rather than being a comprehensive law that incorporates and supersedes existing land laws. The Attorney General has also confirmed that the NLL will not harmonise existing laws – i.e. address the existing overlaps and contradictions in existing laws. That will be taken care of as part of the subsequent amendment of existing laws to conform to the NLL.

The initiation of the process to develop an NLL is a positive step towards addressing many of the challenges alluded to above. It provides the opportunity to set out a clear framework of principles and rights concerning tenure security, use and transfer of land. The next section proposes a range of policy recommendations addressing many of issues and challenges discussed here. They reflect measures to be considered either in the process of developing such an umbrella NLL or in the substantive provisions of the law and its subsequent bylaws.

Key policy recommendations to improve land tenure security and administration

Implement the NLUP through a structured and consultative process

The NLUP, which has gained widespread (though not universal) acceptance among stakeholders, provides a clear framework and direction for land reforms. It addresses many of the key challenges set out in this review. In particular, it provides strong and positive signalling with respect to customary land, one of the most pressing challenges of tenure security in Myanmar and one that affects a large part of the population dependent on land resources for their livelihoods.

Because the NLUP is so comprehensive, it makes sense to break it down into key building blocks to structure implementation efforts. The EU/FAO FIRST Partnership Programme has proposed the following five distinct but interconnected land reform clusters for the NLUP's implementation, complemented by four crosscutting themes (Figure 8.3).

Figure 8.3. FAO Proposed Structure of NLUP Implementation



Source: reproduced from FAO and EU (2018).

The NLUC has established five work streams and related committees tasked with the NLUP implementation, which generally align with the above components. Four working committees have been formed so far with the following responsibilities: (i) NLL Formulation and Law Harmonisation (a drafting supporting team has been formed to support the committee work); (ii) National Mapping System (OneMap Myanmar) Establishment and Implementation; (iii) Land Use Planning and Co-ordination; (iv) and Agriculture Development Committee, responsible mainly for co-ordinating and implementing outcome 1.6 of the ADS, “Strengthening farmers’ land rights and enhanced capacity of institutions involve in agricultural land”.

In addition, the NLUC has also decided to establish land use committees in regions and states (and Nay Pyi Taw council) and a National Technical Advisory under MONREC’s responsibility. Dispute resolution seems to be an important component missing from the current NLUC committee structure. It may possibly be addressed in the committee responsible for the NLL, but it is important that the topic receives sufficient attention in the reform process, notably considering that the NLL Formulation and Law Harmonization committee already has a very significant workload and given the significant backlog of land disputes. The creation of a dedicated committee or sub-committee that would co-ordinate with the committee on the NLL may be an alternative. There are a number of substantive improvements needed with regards to dispute solution (see related recommendations below).

Once the NLUC has its final committee framework in place, committees will be tasked with coming up with medium and long-term plans. This would provide the much-needed clarity on the process that has been missing to date.

Establish an open, multi-stakeholder process for involvement in the NLUP implementation process and in particular the NLL

It is important that the work of the committees be developed in a similar fashion to the development of the NLUP itself. The NLUP established a solid precedent for multi-stakeholder consultation across the country and could usefully serve as a starting point for the implementation process, including developing the NLL. Given the magnitude of the proposed changes that are likely to affect many livelihoods, potentially for generations, the deeply cultural attachments to land, the potential for political capture, it is important to engage with a wide range of stakeholders: farmers’ unions, civil society organisations, communities, ethnic nationalities, women and other vulnerable groups.

On a positive note, the government has sought the participation of various stakeholders in the working committees and Technical Advisory Group established to implement the NLUP, although some argue this resulted from strong stakeholder pressure. The current membership of the four working committees and the TAG involve civil society, private sector, farmers’ representatives, parliamentary members including several ethnic state members of the ethnic affairs committee.

The government is to a certain extent starting from a trust deficit, given the significant gap between the adoption of the NLUP and the first Land Forum, the lack of transparency about the process to date and an approach to consultations with stakeholders that is often based on last minute invitations and that leaves little time for participants to plan or prepare. Setting out a commitment and a specific plan for multi-stakeholder consultation helps to start building trust. The government should consider adopting a White Paper that would set out a structured consultation process, including commitments to providing drafts in Burmese and English well in advance of meetings, through a website that is accessible to all, that identifies questions the government seeks feedback on as part of the consultation, and provides a mechanism for providing oral and written feedback. Such a process is necessary for policies to be legitimate and sensitive to stakeholders’ perspectives and realities.

Develop the National Land Law and harmonise and rationalise existing land laws

The NLL Committee has three important, inter-linked tasks in taking forward the revision of the legal framework.

The NLL should clearly recognise all formal and informal land tenure rights and delineate a streamlined institutional framework and process for land rights transfers and acquisitions

It is now clear that the NLL will not be an all-encompassing law, but instead an umbrella law that sits on top of other laws. As such, it must set out a clear framework of rights and principles that provide the basis for simplifying and harmonising all other land laws. Building on FAO and EU (2018), the NLL should set out a clear and simple framework of rights as follows:

- *Nature of rights* recognised in Myanmar: this would establish a small number of land classifications and identify, recognise and define a definite set of categories of land rights for: public, private, customary, ethnic nationalities; secondary rights (lease); others. This is the place to recognise *inter alia* customary land tenure rights and any land tenure rights of ethnic nationalities that have been missing for so long from the Myanmar legal framework. It also the place to affirm equal rights of men and women to land to avoid current practices that are biased against women's rights.
- *How these rights are acquired*: identify a clear and defined set of pathways for acquiring land rights: *i.e.* requests to the government, purchase of land use rights, customary occupation, good faith occupation that matures into a legally recognisable claim (adverse possession).
- *Conditions attached to holding the rights*
- *Modalities for transfers of land rights*
- *Extinction of rights*, including through expropriation (see below)
- *Institutional responsibilities in administering land rights*
- *Dispute settlement* (see below)

Develop a comprehensive land law reform process and proposals to update, harmonise and rationalise existing land laws

In parallel, the NLL Committee needs to take on the complex job of developing a plan to harmonise the country's confusing existing suite of land laws. This would entail at a minimum: (i) cataloguing and reviewing all existing land laws; (ii) proposing replacement laws that simplify the existing framework and harmonise them with the NLL; (iii) proposing amendments to any laws that will remain in place to conform with the NLL; (iv) developing a clear hierarchy of laws, in particular in the transition period to deal with conflicts among laws until the law revision process is complete; and (v) developing a realistic work-plan and timeframe that includes structured consultations at appropriate points in the process (see above a related discussion in the section on the NLUP). Many stakeholders have highlighted that this process should also build on fieldwork to compare with the actual practices on the ground – particularly in light of the considerable mismatch between existing laws and realities on the ground.

Take action on an interim basis

The proposed land reform, especially when replacing a fragmented legal framework as in Myanmar, will take time. In the interim, making changes to the existing implementing rules and guidelines, or changing emphasis of implementation of the existing land laws can help to address some of the challenges highlighted above. The government has already done so, using the 2016 community forest instructions to allow for greater protections by customary users of forestland through a changed policy rather than an amendment to the law itself (World Bank, 2018). Examples of interim changes that

could be accomplished include: (i) using the VFV Law to improve land access to poor and marginal groups, farmers with small land holdings, and landless households; (ii) issuance by MOALI of instructions to clarify the rights of farmers under the Farmland Law and to address unnecessary restrictions on crop production as set out in the ADS (MOALI, 2018).

In the interim, a moratorium on amendments to existing laws would stabilise the system and prohibit development and implementation of contradictory provisions. Likewise, consistent with provisions in the NLUP that call for the temporary suspension of land allocation to any land user other than for public purposes on customary lands, a moratorium of large-scale land allocations in areas potentially used by local communities under customary practices would help to build trust in the government reform process and limit the potential emergence of new conflicts. An exception could be considered for returned VFV land over which there are no existing claims (including of customary rights holders) or over which land legacy issues can realistically be addressed and there is no risk of infringing on customary rights of local communities.

Strengthen the framework for compulsory land acquisitions by the state

A continuing concern involves land acquisition and expropriations involving large-scale investment developments, particularly where property rights are not well-established and where those living or working on the land have complained about inadequate consultation and compensation. Where such processes were inadequate and unfair in the past, they have accentuated civil discontent and mistrust in the government.

As discussed above, the new Land Acquisition, Resettlement and Rehabilitation Law (2019) sends some positive signals by tying rules on acquisitions and resettlement and rehabilitation, but it fails to establish the adequate safeguards for compulsory land acquisitions by the state to be carried out in a lawful manner consistent with internationally accepted standards. It also falls short of other domestic practices in this respect, such as the NLUP and the MIL (see Chapter 2 for a discussion of the MIL). As such, it is unlikely that it will provide much additional comfort to current and future investors and landholders.

The framework for land expropriations would benefit from further reforms aligning it with international standards in this matter. Notably, the framework should ensure that expropriations occur only in a non-discriminatory manner, for a public purpose, under due process of law, and against prompt, adequate and fair compensation if there are no other feasible alternatives. The regime needs to establish explicit and well-defined limits on the ability of the government to expropriate for public purposes and determine transparent rules on the process of expropriation and the process by which compensation should be determined. Key considerations in this respect relate to:

- ensuring ample transparency and disclosure of material information related to all stages of land acquisitions, from decision-making to implementation and operation, such as: assessments of public purpose and of any related economic, social and environmental impact; appraisals of excluded alternatives; implementation strategies to address any potential harm and any other negative economic, social and environmental impact; and other operational information, including public disclosure of public lease/concession contract terms;
- ensuring the conduct of meaningful, effective and good-faith consultations with land rights holders and affected communities, in particular indigenous peoples or local communities, for obtaining their free prior and informed consent;
- exploring feasible alternatives and solutions to avoid or minimise the physical and/or economic displacement of legitimate tenure right holders;
- where evictions are not avoidable, establishing clear requirements and procedures for negotiating resettlement with affected parties and host communities and protecting affected parties' rights to alternative land, fisheries, forests and livelihoods, while making sure relocations do not jeopardize the rights and livelihoods of others;

- ensuring that compensations are timely and reflect a fair valuation of rights, including of other non-market values, such as social, cultural, religious, spiritual and environmental values where applicable.

The NLUP already set out general principles for land acquisitions that go in this direction:

- Fair, equitable and systematic public participation processes;
- Prevention and control of corruption;
- Effective, consistent and fair valuation systems when providing compensation and relocation for people affected by land acquisitions;
- Rehabilitation of livelihoods for people affected by land acquisitions;
- Permitted investments in the project covered by the land acquisition by affected persons.

In developing these principles in more detail in its national framework, the government may consider following FAO's VGGT guidance on expropriation and the lessons from other countries, such as the experience of India (Box 8.6). The VGGT provide extensive guidance on expropriation and compensation, including developing national legislation that:

- Clearly delimitates the public purposes for which the government may acquire tenure rights on a compulsory basis;
- Sets out transparent, fair procedures for acquiring tenure rights and for providing equitable compensation;
- Establishes measures to guarantee that affected stakeholders are given voice throughout the process, including during the planning phase;
- Mandates that notice is given to all potentially affected persons well in advance of an anticipated project;
- Makes mandatory public hearings at which affected stakeholders may challenge aspects of the planned project and demand downward accountability from planners and government officials;
- Requires that compensation is granted for both registered and unregistered legitimate tenure rights;
- Provides all stakeholders with the right to appeal expropriation decisions.

Box 8.6. Expropriation legislation in India

In India, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013 regulates land acquisitions, including in connection with public-private partnership projects and provides for compensation, rehabilitation and resettlement for affected persons. One key aspect of the Act is the transparent and participatory nature of the process. There is a requirement to seek the consent of at least 80% of affected families whose land is acquired for private projects and of 70% of such families in the case of public-private partnership projects (Section 2). The process to obtain the consent must be conducted at the same time as a social impact assessment (SIA), undertaken in consultation with local municipalities (Section 4). There must be a public hearing (Section 5) and the SIA must be made available to the public (Section 6). The SIA must consider issues such as whether land acquisition elsewhere has been considered and found not feasible, as well as the impact that the project is likely to have on the livelihoods of local communities. The Act also includes detailed provisions setting out how compensation will be calculated (sections 26–30 and Schedule 1).

Source: reproduced from FAO (2016, p. 53).

Develop a single administration system

The complexity of the legal system is currently matched by the complexity of the land administration system. The current system is ineffective and inefficient, discouraging investors and failing to serve the Myanmar public. An overhaul of the system is needed, and should build on the diagnostic work that has been done with partners and in building the NLUP.

The consolidation and simplification of Myanmar's land framework needs also to encompass the re-organisation of land administration, possibly into a single land authority. The establishment of a single land administration system would help to improve policy and procedural consistency and avoid situations of institutional voids or weak co-ordination among land-related agencies as sometimes observed. This new institutional arrangement should also envision a process for updating and then digitising existing land records and information in a consistent manner (e.g. for instance based on the OneMap Myanmar model) with the vision of moving to an unified cadastre and registry system in the future. While many countries with separate cadastre and registry institutions have strong land administration systems, given Myanmar's outdated systems, there is an opportunity to leapfrog to a unified system almost from the start, instead of developing separate systems first and eventually looking to integrate them in the future. A unified system is in principle less prone to inconsistencies and entails lower transaction costs for users.

Such a reform could draw on the framework put forward in the ADS (see Box 8.1 above), which sets important goals for improved service delivery of land administration to the public, including to women and the poorest, in addition to proposing meaningful activities to improve land rights (outcome 1.6). Land administration offices would be mandated to: update and generate cadastral information, register land holding titles, document customary land rights, maintain land management systems, produce new *kwin* maps, resolve land conflicts, address land confiscation issues, inventory and audit VFV land, and implement land allocation and restitution programmes, among others (MOALI, 2018). The World Bank (2018) suggests establishing several model land administration offices with enhanced service delivery to demonstrate how such services could work as a preparatory measure for wider land administration reform.

The single administration system could be disciplined by a dedicated Land Administration Law. FAO and EU (2018) suggests developing a Land Administration Law that includes:

- Provision of public services: first registration, land tenure regularisation, registration of transfers; land use conversions
 - Registration of all categories of land, including 'new' agricultural lands: fishponds, village grazing lands, home gardens and rural settlement plots, land under agro-forestry, rotating cultivation. The registration of individual and communal claims to customary land should also be recognised, as well as women's rights over land should be explicit by systematically encouraging registration in their names on conjugal titles;
- Management of public land;
- Management of land records: updating *kwin* maps, updating LUC information, recording transfers, shifting to a digitised land system based on updated rather than existing land records etc.;
- A rationalised immovable property tax so as not to discourage official transfers of land as under the current system, while discouraging speculation.
- Address institutional arrangements to develop a single Land Administration Authority that would absorb all/many specific land related departments, divisions, committees, commissions: DALMS, VFV Committees, FABs, Survey Department, others
 - The single land administration agency would operate at the village level, dealing with registering land and land use rights transfers, land use rights subdivision and consolidation, land use change, with a set process and non-prohibitive fees. This would help accelerate land registration and streamline and simplify the payment of fees and taxes

- Immediately establish model land offices with a focus on the delivery of good quality land administration services to DALMS' clients to model and test in anticipation of longer-term reforms (World Bank, 2018).
- In parallel, designate one lead land committee in each chamber of the Parliament to deal with land issues.

Establish a land use planning framework

The OECD (2017) makes a number of general recommendations for establishing efficient land use governance systems that are highly relevant to Myanmar. Currently there is no overarching framework for land use planning in Myanmar which leads to inefficient spatial developments and situations of land degradation.

In filling this gap, Myanmar could envisage developing a Land Use Planning Law that would help to ensure a more sustainable and efficient pattern of spatial development, while appropriately balancing public and private interests. Adequate advance planning is essential because once land is built-up it becomes much harder to change its use. For avoiding potential inefficiencies in spatial development (e.g. residential area next to an airport or office buildings far away from public transport networks), there must be high levels of co-ordination across branches of government at all levels of the administration.

Higher levels of government may retain the responsibility over the broad framework setting the planning system and the general environmental and social legislations that help to avoid any negative externalities of different land uses, and establishing rules for protecting historical patrimony. Likewise, they should co-ordinate territorial development across regions and establish the overarching framework to allow the co-ordination of land use planning with other public policies, such as tax, environmental and social policies, as well as with sectoral policies, such as infrastructure development, agriculture and extractives. In various cases, other policies will play a crucial role in supporting or hampering land use planning decisions.

Because land use is highly engrained in the local context, it requires a certain level of decentralisation to local authorities who can better grasp local realities and engage in consultations with the local community. Local authorities should be given more flexibility to decide about detailed land-use plans, including the development of zoning for instance. Some zoning flexibility is important to shape development and allow neighbourhoods to change over time, so regulation and planning decisions should rather address nuisance levels instead of restricting land uses, except in some specific cases (e.g. hazardous industrial areas). For land use planning to work, there must also be appropriate planning procedures, with special attention to information sharing and consultation with local communities, and appeal processes in place.

In line with what has been proposed by FAO and EU (2018), it is also important to develop a land use planning policy and legal and institutional framework that allows the above points to materialise. For this, the government could consider developing a Land Utilisation Policy establishing an inter-sectoral land use vision that brings together land use needs and plans of different sectors and addresses current and future economy-wide challenges such as climate change, livelihoods support, nutrition, environmental conservation (FAO and EU, 2018). Implemented in isolation, land use policies risk generating avoidable negative externalities and inefficiencies (e.g. allocating land for agro-businesses in areas of high biodiversity, such as reserved forests and protected areas).

Develop a land dispute settlement system that is timely, affordable, effective and widely accessible to all

The current means for addressing land disputes is weak and needs complete revamping. A new dispute settlement mechanism could partly draw on the formal system adopted in the MIL and be enshrined in the new NLL (see Chapter 2). It is important for such a system to provide timely, affordable and effective means for settling disputes over tenure rights either through impartial and competent judicial and

administrative bodies or through alternative dispute resolution mechanisms, including arbitration, mediation and conciliation. The latter may allow settling disagreements between parties at reasonable costs and delays where recourse to the judiciary system may often be slow and expensive.

The new system should also formally provide for a mechanism to avoid or resolve potential disputes at a preliminary stage, either within the implementing agency or externally through an independent body. In contrast to the current system, the new mechanism needs to be shielded from conflicts of interest, providing for the involvement of stakeholders in their governance and allowing decisions to be appealed to an independent judicial or administrative body with power to review and if necessary overturn agency decisions.

The new system should also recognise customary and any other established forms of informal dispute settlement in Myanmar, but where such systems exist they should provide for fair, reliable, accessible and non-discriminatory ways of promptly resolving disputes over tenure rights. The government can contribute to strengthen such systems by issuing guidelines and establishing clear mandates for local providers. Some evidence suggest, for instance, that while Ward/Village Tract Administrators play a central role as mediators, resolving disputes at the community level, with very few dispute proceeding beyond this level, they are nonetheless detached from the judiciary, having no system of appeal and referrals, nor clear mandates for dealing with cases (MyJustice, 2018; DIIS, 2017).

The quality of the system also depends on the capacity of its agents to decide and process in a fair, instructed and efficient manner. This requires staff with the necessary skills and competencies in land tenure rights and resolutions issues. For this, capacity building activities are important. In addition, the government may consider establishing dedicated land tribunals or independent bodies to deal with land-related disputes. Alternatively, it may introduce specialised units within the implementing agencies, independent bodies and at the courts to ensure efficient and high-quality decision-making. In all instances, rulings need to be timely, transparent and fully explained.

Wide access to dispute settlement also requires the promotion and facilitation of complementary legal assistance services that help to bridge the awareness and information gap of parties involved in land transactions and disputes, notably of vulnerable and marginalised populations.

Addressing links to the peace processes/ceasefires, including restitution

The NLL process should also be mandated with considering how land issues from the evolving peace processes and ceasefire agreements could be incorporated into the evolving legal framework and other processes and vice-versa – how strengthening tenure security, including customary tenure rights in conflict areas, can catalyse the ongoing peace process (World Bank, 2018). This would include specifically developing or modifying existing systems to address restitution rights of the returning refugees and IDPs or developing one-off restitution measures. In doing so, Myanmar should give due consideration to the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the ‘Pinheiro Principles’). Any institution or process established for such purposes shall aim for the highest standards of transparency and accountability, and nurture the involvement of local communities, including in the design of policies and their implementation, such as in the development of procedures for re-integration of IDPs and in dispute resolutions mechanisms.

Set up monitoring and reporting mechanisms for large-scale agricultural land allocations

Numerous stakeholders and the ADS have called for priority enforcement of the provisions of the VFV Law with respect to large-scale agricultural allocations. As mentioned above, only about 20-25% of the land allocated under the VFV Law is actually being used according to contractual lease contract

agreements (MOALI, 2018; Woods, 2015; San Thein *et al.*, 2017). The current legal framework provides for land that remains unused for four years to be returned to the state.

In line with Outcome 1.6 of the ADS, this process could include:

- Inventorying issued VFV land focusing on agricultural concessions exceeding a certain acreage (larger than 50 acres for instance);
- Auditing allocated VFV land to assess whether the lands are being adequately used, if they are still in the hands of the initial grantees; review tax incentives and revenue payments;
- Reclaiming VFV land that does not comply with the contractual agreement for land use development (almost some 3 million acres) and (i) returning the undeveloped agricultural land to their legitimate, mainly customary rights holders, (ii) allocating the land to smallholder farmers and effectively landless farmers; and/or (iii) creating social land concessions (MOALI, 2018). While the returning of land to individuals could be pursued, notably in cases where a legitimate individual holder can be easily identified, it may prove more practical to return land to communities as community land. For this, the legal framework would need to be updated to properly accommodate collective forms of tenure and farming;
- Establishing a moratorium on new large-scale land allocations until land reforms are in place, unless it relates to returned VFV land over which there are no existing claims (including of customary rights holders) or over which land legacy issues can realistically be addressed and there is no risk of infringing on customary rights of local communities;
- Improving the collection, management and analysis of data related to large-scale land acquisitions in order to inform day-to-day decision making and policy making. The OneMap project has made some advancements in mapping land concessions in selected areas, providing a good basis model for achieving this at a larger scale;
- Disclosing contracts of any large-scale land acquisitions over a certain acreage (larger than 100 acres would align with some of the requirements in the MIL);
- Reviewing the experience with large-scale agricultural development to assess their efficiency and sustainability, including against criteria on the prevalence of conflicts, local employment, productivity and environmental protection (FAO and MRLG, 2019).

Eliminate or at least restrict criminal sanctions to the most severe cases

Myanmar land laws are replete with criminal sanctions for a wide range of actions that are overly punitive, in many cases counter-productive, and misaligned with international standards, such as the VGGT that seek to strengthen rather than weaken tenure security. The widespread condemnation by farmer's and community organisations, investors and donors of the 2018 VFV Law amendments that criminalise the occupation of VFV land by people who may have been occupying the land for generations is emblematic of the mistrust these kinds of provisions create, just as the government is about to launch a consultation process that will already be challenging.

The legal review as part of the NLL process should include a review and catalogue of all the sanctions across land laws – fines, imprisonment, forfeiture, etc. – and specifically reconsider a more balanced approach to the limited circumstances in which sanctions are necessary. Sanctions should also be reviewed from the perspective of their impact on livelihoods and food security.

Key considerations for responsible investors in agriculture and other land-intensive projects

Detailed due diligence, including consultations and negotiations

Detailed due diligence is a necessary part of any investment involving land to ensure that investors are not involved in dispossession of existing users that does not comport with international standards, given all the challenges and gaps identified in existing Myanmar law. Tenure rights over land are reflected in existing international RBC standards now referenced in the NLUP, such as the VGGT. Companies should take a broad view in consulting and negotiating with occupiers and users of land, recognising that potential claimants or occupants may not have full documentation of their tenure rights, nor in some cases, tenure rights that are protected under current law. Ignoring claims based on long-standing occupancy and use, including customary use, or requiring current occupants or claimants to pursue them through the courts, is not a viable alternative for negotiating access to land in Myanmar. Nor is it practical, especially where claimants are already occupying the land.

Given the lack of a centralised land registry, land due diligence requires on-the-ground consultations and negotiations with land rights holders, their neighbours, village heads and relevant land committees. Consulting with local communities and local authorities will give the investor an insight into their situation, their existing or potential rights and their views and concerns about using the land and to discuss how to prevent or mitigate particular impacts. For larger-scale projects, this may open the possibility of involving local small holder farmers present on the land into the investor's plans for developing the land, as land-connected communities traditionally involved in agriculture may have few other options to restore their livelihoods. Several of Myanmar's laws reinforce this consultation imperative.

The MIL includes changes to existing land use as one criterion for requiring an investor to apply for an MIC approval. While the MIR does not set out how the consultations in these situations must be carried out, investors should be actively involved in the consultation and negotiation process. As noted above, the MIR (Rule 5) requires investors to seek an MIC permit if land users are affected in the following ways:

- The land has been or is likely to be acquired through *expropriation, compulsory acquisition procedure* or by agreement in advance of such expropriation or compulsory acquisition procedure and will either: (i) cause the relocation of at least 100 individuals permanently residing on such land or (ii) comprise an area of more than 100 acres
- comprises an area of more than 100 acres and would be likely to cause *involuntary restrictions on land use and access to natural resources* to any person having a legal right to such land use or access
- comprises an area of more than 100 acres and which is the subject of a *pre-existing bona fide claim* or dispute by a person regarding rights to occupy or use such land in a way which would conflict with the proposed Investment
- would otherwise adversely affect the *legal right of at least 100 individuals occupying* such land to continue to occupy such land

Both the *Farmland Law and the VFV Law* provide for a 30-day window for those with competing claims to land to object to an application for land. The VFV Rules require that the applicant verify whether or not the land is actually vacant; while there is no similar provision in the Farmland Rules. The local FAB and VFV land administrator are supposed to publish notices of the application for land acquisition in the area where the land is situated and the township office. This process should help in identifying possible competing claims to land but operates on the assumption that notices are posted, that occupants see them, can read them, and have the capacity to respond to them. The VFV Rules include the possibility of an on-the-ground inspection to resolve any objections raised. Investors should therefore be proactive in establishing existing use and identifying any potential for competing claims, including during the 30-day window period.

In addition, the *VFV Law* contains specific provisions covering farmers cultivating the land “even if they do not have the legal right to cultivate”. They must be negotiated with and it must be ensured that “they are not unfairly or unjustly dealt.”. While these terms have not been clarified, together they provide a sufficiently clear indication that those on the land who can show a history of long-term use must be recognised and addressed through negotiations.

For land that is covered by the *EIA Procedures*, those procedures also include a consultation process as part of the EIA. MONREC has developed detailed draft Public Participation Guidelines that are not yet officially issued but are widely available in draft form. While the EIA consultation process focuses on potential environmental and social impacts of projects, it also provides an occasion for understanding how local communities use and access land and local resources.

Neither the *Forest Law* nor the *draft Forest Rules* contain specific requirements about verifying existing land use or consulting existing land users.

MIC may itself carry out consultations on investments that require a MIC permit or endorsement, in particular circumstances: (i) where it considers that stakeholders and persons that may be affected by its determination or have information relevant to its determination; and (ii) if Article 5 of the 2015 Law on the Rights of Protection of Ethnic Nationalities is relevant to the investment. The MIL provision underlines that such consultations with local ethnic nationalities should begin at an early stage in the process, before taking the project to the MIC. It also suggests that the MIC permit may be issued conditional on negotiations having been successful, although this has not yet been tested (MCRB, 2019).

Due diligence should also establish whether there are any land-related *legacy situations*. This could include historic displacements of local communities by the military, suppression of protests around land issues, allocations of land to companies or military affiliates that local community members considered unjustified and that have not been addressed. While governments since 2011 have established commissions and inquiries on land restitution (see related section above) not many of the complaints raised have been resolved yet and therefore cloud related land allocations. While these legacies may date back decades, and be unrelated to the incoming investor, investors may find that these situations raise tension and distrust and are better recognised and addressed, including by government.

Where ethnic minorities are present, investors should also consider the requirements to negotiate with local ethnic communities under Article 5 of the 2015 *Ethnic Nationalities Law* that says for projects which affect *ta-ne tain-yin-tha* (i.e. ‘indigenous peoples’ although not defined by Law): they “should receive complete and precise information about extractive industry projects and other business activities in their area before project implementation so that negotiations between the groups and the government/companies can take place.” The process could be considered an embryonic form of free, prior and informed consent (FPIC) for indigenous peoples as included in the UN Declaration on the Rights of Indigenous Peoples. The aim is to recognise communities’ rights (formal or customary) and engage in a process of dialogue and negotiation that results in an agreement about the conditions under which an investor will (or will not) have access to the land. The Rules implementing the law, adopted in August 2019, provide more detail on the process to be followed, including the requirement to submit consultation plans as well as the final outcome and undertakings to the Ministry of Ethnic Affairs (MCRB, 2019)

Where companies are not able to reach agreement with those on the land, they should consider pausing investment decision-making until land claims are effectively resolved – which may be through a process they help co-create with community members and local authorities to resolve the disputes. Community members may also choose to raise claims through other mechanisms – such as the MIC or the land dispute commissions. Companies should not interfere with, or try to block, those processes.

References

- Alleverdian, C. (2016), "Formalisation of land rights in Myanmar", Presentation made to the Land Core Group monthly workshop, March 11.
- Andersen, K. E. (2016), "The Recognition of Customary Tenure in Myanmar", *MRLG Thematic Study Series No. 3*, Mekong Region Land Governance, Vientiane.
- Chau, T., Daudier, F. (2019), "Myanmar's land law is a ticking time bomb", Myanmar Times, website article, January 23, <https://www.mmtimes.com/news/myanmars-land-law-ticking-time-bomb.html> (accessed on 25 May 2020).
- Bello, W. (2018), *Paradigm Trap: The development establishment's embrace of Myanmar and how to break loose*, Transnational Institute, Paung Ku and Dawei Development Association, Yangon.
- Boutry, M., Allverdian, C. and M. Mellac (2017), *Land tenure in rural lowland Myanmar: from historical perspectives to contemporary realities in the Dry zone and the Delta*, GRET, Yangon.
- Displacement Solutions, Norwegian Refugee Council and Joint Peace Fund (2019), *Building Agreement on Restitution Rights within the Myanmar Peace Process and National Legal Framework: A guide for Practitioners*, March.
- Displacement Solutions and Norwegian Refugee Council (2018), *Housing, Land and Property Rights and Peace Agreements: Guidance for the Myanmar Peace Process*, February.
- Displacement Solutions (2015), *Land Acquisition Law and Policy in Myanmar: Overview, Gap Analysis with IFC Performance Standards PS 1& PS 5 and Scope of Due Diligence Recommendations*, May.
- Danish Institute for International Studies (2017), "Reforms Need to Consider Local Dispute Resolution: Justice Provision in Myanmar", *DIIS Policy Brief*, March.
- Eckestein, D., Hutfils, M-L and Maik Wings (2019), *Global Climate Risk 2019: Who Suffers Most From Extreme Weather Events? Weather-related Loss Events in 2017 and 1998 to 2017*, Briefing Paper, Germanwatch: Bonn.
- FAO (2017), "Third national workshop to improve governance of tenure with the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security", conference proceedings, Nay Pyi Taw.
- FAO (2016), "Responsible governance of tenure and the law: a guide for lawyers and other legal service providers", *Governance of Tenure Technical Guide No. 5*, Food and Agriculture Organization, United Nations: Rome.
- FAO (2012), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Food and Agriculture Organization, United Nations: Rome.
- FAO and EU (2019), "Policy and Legal issues: Theory and Practice", presentation to the workshop "Legal awareness and capacity building", GEF-SLM project, Paul De Wit, Senior Land Tenure Advisor, FAO-EU Partnership Programme FIRST, Mindat, August.
- FAO and EU (2018), "National land use policy: unpacking and strategizing its implementation", Presentation to National Land Use Policy Forum, by Paul De Wit, Senior Land Tenure Advisor, FAO-EU Partnership Programme FIRST, Nay Pyi Taw, October 2-3.
- FAO and EU (2016), "Do agricultural and land policies support food and nutrition security in Myanmar?", draft prepared by Paul De Wit, Senior Land Tenure Advisor, FAO-EU Partnership Programme FIRST, Nay Pyi Taw.
- FAO and MRLG (2019), *Challenges and opportunities of recognising and protecting customary tenure systems in Myanmar*, Policy Brief, Bangkok.

- FAO, MOALI and LIFT (2016), "Formulation and Operationalization of National Action Plan for Poverty Alleviation and Rural Development through Agriculture (NAPA)", *Working Paper No. 10*, Land Tenure and Administration, Yangon, June.
- Food Security Working Group (2013), *Farmer Extension Note on Land Tenure Security*, Yangon, March.
- Frontier Myanmar (2019), "Kachin's plantation curse", website article, January 17, <https://www.frontiermyanmar.net/en/kachins-plantation-curse/> (accessed 27 September 2019).
- Gelbort, J. (2018), "Implementation of Burma's Vacant, Fallow and Virgin Land Management Law: At Odds with the Nationwide Ceasefire Agreement and Peace Negotiations: a commentary by Jason Gelbort", website article, Transnational Institute, December 10, <https://www.tni.org/en/article/implementation-of-burmas-vacant-fallow-and-virgin-land-management-law> (accessed 27 September 2019).
- Government of Myanmar (2016), *National Land Use Policy*, Government of Myanmar: Nay Pyi Taw, January.
- Kapoor, M., Soe, N. N., & Viswanathan, V. (2018), *Midcourse Manoeuvres: Community strategies and remedies for natural resource conflicts in Myanmar*, Centre for Policy Research (CPR) and Namati: New Delhi.
- Land Core Group (2018), *Technical Review of the Draft Myanmar Land Acquisition Law 2017*, February.
- Land in Our Hands (2015), *Destroying People's Lives: the Impact of Land Grabbing on Communities in Myanmar*, December.
- Land in Our Hands (2017), *A Promise Unfulfilled: A critique of the Land Reinvestment Committee*, December.
- Landesa and Namati (2015), *Recommendations for Implementation of Pro-Poor Land Policy and Land Law in Myanmar: National Data and Regional Practices*, October.
- Lawry, S., Samii, C., Hall, R., Leopold, A., Hornby, D. and Farai Mtero (2014), "The impact of land property rights interventions on investment and agricultural productivity in developing countries: a systematic review", *Campbell Systematic Reviews* 2014:1.
- Lift (2015), "Updating Land Records with the Lamp Project", LIFT website article, March 12, <https://www.lift-fund.org/news/updating-land-records-lamp-project> (accessed 27 September 2019).
- Mark, S. (2016) "Are the Odds of Justice "Stacked" Against Them? Challenges and Opportunities for Securing Land Claims by Smallholder Farmers in Myanmar", *Critical Asian Studies*, 48:3, 443-460.
- Ministry of Agriculture, Livestock and Irrigation (2018), *Myanmar Agriculture Development Strategy and Investment Plan (2018/19 – 2022/23)*, Government of Myanmar: Nay Pyi Taw, June.
- Ministry of Planning and Finance (2018), *Myanmar Sustainable Development Plan (2018 – 2030)*, Government of Myanmar: Nay Pyi Taw, August.
- Myanmar Centre for Responsible Business (2019), *Land Rights and Business in Myanmar, MCRB Briefing Paper*, (forthcoming).
- Myanmar Centre for Responsible Business (2018), "MCRB's comments to Parliament on the draft Land Acquisition Act", August 20.
- MyJustice (2019), *A Feasibility Assessment on the Possibility of Introducing Alternative Dispute Resolution (ADR)/ Collaborative Dispute Resolution (CDR) to Resolve Land Disputes in Myanmar*, May.
- MyJustice (2018), *Searching for justice in the law: Understanding access to justice in Myanmar: Findings from the Myanmar Justice Survey 2017*, British Council: London.
- Namati (2016), *Gendered Aspects of Land Rights in Myanmar: Evidence from Paralegal Casework*, April.
- National League for Democracy (2015), *2015 Election Manifesto: Authorised Translation*.
- Nomura, K., Mitchard, E. T. A., Patenaude, G., Bastide, J., Oswald, P. and Thazin Nwe (2019), "Oil palm concessions in southern Myanmar consist mostly of unconverted forest", *Scientific Report*, Vol. 9, Article No. 11931.

- Oberndorf, Robert B. (2012), *Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law: Improving the Legal & Policy Frameworks Relating to Land Management in Myanmar*, Food Security Working Group's Land Core Group, November.
- OECD (2017), *The Governance of Land Use in OECD Countries: Policy Analysis and Recommendations*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264268609-en>.
- OECD (2014), *OECD Investment Policy Reviews: Myanmar 2014*, OECD Investment Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264206441-en>.
- Public International Law & Policy Group (2017a), "Analysis of Land Acquisition Act", November.
- Public International Law & Policy Group (2017b), "Analysis of Burma's Farmland Law", February.
- Rights and Resources Initiative (2015), *Who owns the world's land? A global baseline of formally recognized indigenous and community land rights*, September.
- San Thein, Aung Tin Moe, Diepart J.-C. and C. Allaverdian (2017), "Agro-Business Large Scale Land Acquisition in Myanmar: current situation and ways forward", Presentation at Policy Dialogue with Ministry of Agriculture, Livestock and Irrigation and Upper House (AmyotharHluttaw) and Lower house (Pyithu Hluttaw) of the Parliament, 14-15 February.
- San Thein, Hlwan Moe, Diepart J.-C. and C. Allaverdian (2018), "Large-Scale Land Acquisitions for Agricultural Development in Myanmar: A Review of Past and Current Processes", *Mekong Region Land Governance Thematic Study Series No. 9*, Vientiane.
- USAID (2017), "Land Stakeholder Analysis: Governance Structures and Actors in Burma", USAID Tenure And Global Climate Change (Tgcc) Program, May.
- USDA (2019), "Farms and Land in Farms 2018: Summary (April 2019)", United States Department of Agriculture, April.
- VDB-Loi (2019), "Myanmar Passes New Law for Land Acquisition, Resettlement and Rehabilitation", Client briefing Note, Yangon, September 30.
- VDB-Loi (2018), "The Legal and Regulatory Structure for Foreign Investment in Myanmar's Power Sector: Analysis and Opportunities for Reform", Yangon.
- VDB-Loi (2017), "Investing in the Myanmar Real Estate Sector", Yangon.
- Woods, K. (2015), *Commercial Agriculture Expansion in Myanmar: Links to Deforestation, Conversion Timber, and Land Conflicts*, Forest Trends Report Series, Forest Trade and Finance, March.
- Woods, K. (2014), "Agribusiness and Land Grabs in Myanmar", Mekong Commons, website article, February 5, <http://www.mekongcommons.org/agribusiness-land-grabs-myanmar/> (accessed 27 September 2019).
- Woods, K. (2012), "The Political Ecology of Rubber Production in Myanmar: An Overview", Yangon, December.
- World Bank (2018), *Towards a Sustainable Land Administration and Management System in Myanmar*, Land Sector Needs Assessment; Thematic Policy Notes, World Bank: Washington D.C., January.
- World Resources Institute (2017), *The Scramble for Land Rights: Reducing Inequity between Communities and Companies*, Washington D.C.

Annex 8.A. Main types of land use rights in Myanmar

Land categories	Key characteristic
Freehold land	Can only be owned by Myanmar nationals. It can be used for any lawful purpose and may be inherited, leased, transferred or sold. Freehold ownership of parcels is a rarity rather than the norm.
Grant land	At the disposal of the government that can be leased for residential or business purposes to public agencies, private individuals and companies for periods of 10, 30 or 90 years, extendible upon application. It is the most extensive type of land in urban areas. Holders of grant land are subject to an upfront land fee at the signature of the lease agreement. Holders of grant land can lease, transfer, mortgage or sell their interests in the land. Grant land is the most extensive type of land.
Agricultural / farmland	Land at the disposal of the government that can be leased to Myanmar nationals for the sole purposes of cultivating paddies or any type of crop respectively. Holders of a Farm Land Work Permit (Form 7), which states the legal right to use farm or agricultural land, may freely lease, sub-lease or transfer the whole or a part of the land, except to a foreign company where the approval the government is required.
Forest land	Demarcated and administered by the Ministry of Natural Resources and Environmental Conservation (MONREC) It may only be converted into other types of land upon approval by the Cabinet.
Grazing land	Land assigned by Village Tract Peace and Development Councils for the grazing of cattle in their respective village tracts. It may only be used for such purposes by the cattle of the people who are residents of the villages permitted access to it.
Vacant / Fallow / Virgin land (VFV)	Land that has never been cultivated or has been abandoned by its owner. Citizens may obtain, from the Central Committee for the Management of VFV lands, the right to cultivate up to 5 000 acres of VFV land for a period up to 30 years. This can be expanded up to 50 000 acres at the rate of 5 000 acres at a time upon demonstration of adequate land use. VFV land can be used for agriculture, livestock, mining or any other use permitted by the Central Committee. Holders of VFV land may lease, sub-lease or transfer their interests in it only with the permission of the government. Approval from the Myanmar Investment Commission is required for permitting a foreign company to use VFV land for purposes other than the cited above.
Government leased land	Not an official classification but merits a dedicated entry because it is often the basis for foreign-invested projects. Government leased land is land owned by the state and administered by a municipal or government authority, such as a Union Ministry or a state or region body. Holders of government leased land can use the land only for the purposes stated in the lease and need the permission of the lessor to transfer and mortgage the land.
Military land	Land designated by the Ministry of Home Affairs as 'Cantonment Area' for military use. The land is to be surrendered to the government if it is not required anymore for military use.

Source: VDB-Loi (2017) and FAO et al. (2016).

Notes

¹ For the sake of comparison, the average farm size in the United States in 2018 was 443 acres (USDA, 2019).

² See Lawry et al. (2014) for a systematic review of the literature on the impact of land property rights interventions on investment and agricultural productivity in developing countries.

³ There could be many reasons for not registering, starting with the law's underlying definition of "vacant land" that clashes with current ethnic practices, lack of awareness of the requirements, it is difficult if not impossible for people to know if their land is considered VFV land because of the state of records, many states have thousands of displaced people who will not be able to return in time to complete the necessary paperwork, overlaps with unresolved returns of land etc.

⁴ Some efforts are, however, underway to establish standard operating procedures (SOPs) for land administration processes. According to the authorities, the GAD, for instance, is currently working to establish SOPs for issuing of land leases and grant certificates with the support of the Regulatory Reform Unit (RRU) of the Minister's Office. Draft SOPs have been prepared and distributed to branch offices and senior practitioners' association for review and collection of recommendations to help improve and harmonize the current situation of the different parts of the country. Once implemented, these SOPs are expected to reduce the complexity and inconsistencies of current processes, ultimately improving the situation for investment and the public in general.

⁵ Adverse possession rights, colloquially known as 'squatters rights', refers to the legal process of obtaining ownership through possession (from the ancient Roman law 'usucapio'). Essentially, it refers to the acquisition of title to someone else's property by continually possessing or residing in his/her property for a specific period of time without the legal owner receiving any compensation or engaging in any contract.

⁶ The OneMap initiative aims to update, unify and make accessible all government held, land-related spatial data sets for government and public use. It brings together government authoritative data on land use, cover, and tenure, and combines them with participatory maps developed by local communities and crowdsourced public contributions. The initiative currently involves 25 land-related government agencies, civil society organizations and academia.

⁷ A gap analysis conducted in 2015 comparing the Myanmar legislation against the IFC Performance Standard No 5 on Land Acquisition and Involuntary Resettlement (PS5), which is generally viewed as the most relevant standard on involuntary resettlement in the context of private sector investments, as well as against the IFC Performance Standards No 1 on Environmental and Social Management Systems (PS1), revealed that there were "significant gaps between the contents of PS1 and PS5 and Myanmar domestic law and practice regarding land acquisition, both historically and under the current reformist government" (Displacement Solutions, 2015, p. 21).

OECD Investment Policy Reviews

MYANMAR

Only six years sets this second *OECD Investment Policy Reviews: Myanmar* apart from the first review published in 2014, but much progress has occurred in investment policies and related areas in Myanmar in the interim. Nonetheless, the reform momentum needs to be sustained and deepened for the benefits of recent investment climate reforms to be shared widely and for growth to be environmentally sustainable, ultimately contributing toward the Sustainable Development Goals (SDGs). This second review takes stock of recent achievements and assesses remaining challenges in selected policy areas for nurturing an enabling responsible business environment and ensuring benefits are shared with society at large. It places strong emphasis on impact and on how foreign investment can help Myanmar achieve the SDGs and improve the lives of the people of Myanmar.



Norwegian Ministry
of Foreign Affairs



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra



PRINT ISBN 978-92-64-80871-3
PDF ISBN 978-92-64-53297-7



9 789264 808713