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

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[*June – 2016*]

EUROPEAN COMMISSION

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LEGAL NOTICE

ISBN 978-92-79-57844-1
doi: 10.2781/949628

Luxembourg: Publications Office of the European Union, 2016

EXECUTIVE SUMMARY

The European Union (EU) and Myanmar began negotiating a bilateral investment protection agreement (IPA) in March 2014. The proposed EU-Myanmar IPA represents an ambitious step for both parties, as there are currently no bilateral investment treaties between Myanmar and any EU Member State. Negotiations for an EU-Myanmar IPA aim to encourage investment and to secure core protections against discrimination, uncompensated expropriation, and unfair and inequitable treatment.

The Directorate General for Trade (DG Trade) of the European Commission (EC) has mandated this Sustainability Impact Assessment (SIA) on the IPA to be carried out by DEVELOPMENT Solutions Europe Limited (DS). The project consists of two complementary components of equal importance: first, an assessment of how this investment agreement will impact a range of economic, social, environmental and human rights factors, conducted through desk research, including qualitative and quantitative analysis. Second, a thorough consultation process, involving a diverse range of relevant stakeholders, aimed to generate genuine and reflective feedback and provide further opportunities for information gathering on the potential impacts of the agreement.

A central function of the SIA has been to facilitate consultation with civil society stakeholders in the EU and Myanmar. The Project Team has intermediated between input from civil society stakeholders and the EC throughout the SIA. This has facilitated a continuous flow of information between stakeholders and the EC that has informed the negotiation process.

Stakeholder outreach included 49 face-to-face interviews with relevant stakeholders on the ground in Myanmar, a stakeholder workshop held in Yangon on December 17th 2015,[1] a website, two civil society dialogues in Brussels and an online questionnaire. A summary of the stakeholder outreach activities is presented in the methodology section of the report. An analysis of findings can be found in annex Inputs from stakeholders have been incorporated throughout the analysis.

Trade and investment between the EU and Myanmar have more than doubled since the latter had trade restrictions lifted and was reinstated to the Generalised Scheme of Preferences (GSP) in 2013. Commercial engagement is seen as a capable instrument for ensuring that political and economic reforms stay the course as the EU develops relations with Myanmar. However, after more than a decade of limited economic engagement, and given Myanmar's existing bilateral investment treaties (BITs) with China, India, Japan, Korea, the Philippines and Thailand, and investment agreements concluded at the ASEAN level, EU investors are currently at a comparative disadvantage in terms of legal protection for their investments in Myanmar.

The aim of the negotiation process is to conclude a standalone investment protection agreement, which would provide EU investors in Myanmar and Myanmar investors in the EU with a predictable and secure investment environment, reflecting:

- non-discrimination;
- protection against uncompensated expropriation and unfair treatment while preserving the right to regulate;
- transfer of returns;
- investment dispute settlement; and

[1] Workshop report available in Annex II

- a level-playing field with other foreign investors currently benefitting from bilateral investment protection agreements.

The agreement is also expected to help Myanmar to move up value chains and promote transparency and sustainable development (including environmental protection, core labour standards, and corporate social responsibility). The objective is to increase bilateral investment flows and, ultimately, trade activity and economic development.

This Final Report presents the key findings of the research and analysis of key sustainability issues related to the specific provisions of the IPA. This includes an analysis of the economic, social, environmental and human rights impacts which have been assessed by drawing on a tailored modelling approach and carefully selected qualitative indicators.

The below sections present the key conclusions, identified opportunities and challenges, and the policy recommendations that have resulted from this Trade SIA analysis and accompanying stakeholder outreach process.

Key conclusions

- The **economic impact assessment** finds that successful conclusion of the IPA could expand the share of EU-sourced FDI in Myanmar and bring it closer to levels of current leading foreign investor countries.
  - It is difficult to predict the quantitative effects of IPAs on FDI, and there remains disagreement in the literature as to whether IPAs cause FDI growth.[2] The lack of reliable available data in the case of EU-Myanmar trade and investment compounds the difficulties. To compensate for this the project team has made reference to some of the findings of the 49 interviews and 15 questionnaires conducted with relevant stakeholders under this SIA, which included interviews with EU business. Numerous EU company respondents expressed the view that increased investment protection would incentivise greater EU investment in Myanmar.
  - Based on this qualitative research and the EU's current FDI volume and share in Myanmar (approx. 10 per cent), the economic impact assessment of the EU-Myanmar IPA considers a descriptive scenario wherein this amount would increases by 5 percentage points (to approx. 15 per cent) when compared to the baseline, over the course of a decade. This does not factor in additional increases in FDI which would likely result from underlying market opening. Given the level of uncertainty about such estimations, the economic impact assessment does not aim to predict a particular per cent increase, rather it highlights that an increase is likely against the baseline. Any increases against the baseline would offer a reference point for how selected sustainability indicators might be affected in a scenario where the EU's share of FDI in Myanmar increases towards 2025.

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[2] *Cf*. Neumayer, E. and Spess, L. (2005). Do Bilateral investment treaties increase foreign direct investment to developing countries? London, UK: LSE. Available: http://eprints.lse.ac.uk/627/1/World_Dev_%28BITs%29.pdf; Hallward-Driemeier, M. (2003). Do Bilateral Investment Treaties Attract FDI? Only a bit…and they could bite. Washington, DC: World Bank. Available: http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3121; Franck, S. (2007). Foreign Direct Investment, Investment Treaty Arbitration, and Rule of Law. Lincoln, NE: UNL. Available; http://poseidon01.ssrn.com/delivery.php?ID=140021013065021108098065093125000120105018010061023037119087114064086010000027018000035020062104054111107010083005110108026118025011081022124113120025078118073062012032021026122031098118097066012070096087091010024098005126096028078123115087107029&EXT=pdf.

- The baseline is derived from current political and economic trends in Myanmar - including recent reforms and existing trade and investment relations - which are surveyed in Section 4.1 and applied in Section 4.2.4.1. In the IPA scenario, total gross value added (GVA) *per capita* and labour productivity respectively increased by 0.2 and 0.1 per cent more *per annum* than otherwise expected under the baseline.

- The **social impact assessment** finds that an increase in FDI from the EU could promote economic stability and growth, increase employment and as a result lead to better living standards and reduced poverty.
  - The cumulative effects of increased total EU FDI flowing into Myanmar are expected to have moderately positive effects on labour demand.

  - EU companies are more likely to apply codes of conduct, which integrate corporate social responsibility (CSR) and responsible business conduct (RBC) practices, including for labour standards. As a result a net improvement in labour standards could be expected.

  Due to weak governance structures and poor implementation and enforcement capacity in Myanmar, labour standards and social protection are generally inadequate to offer full protection to all of the labour force.

  - Possible measures to address any risks that EU companies might cooperate with local enterprises with poor labour standards could be addressed by a robust chapter on labour standards in the IPA. This could be reinforced with reference to appropriate implementation measures facilitated though the Myanmar Labour Rights Initiative and/or the grievance mechanism facilitated through the OECD Guidelines for Multinational Enterprises.[3] Furthermore, future EU cooperation projects in Myanmar could address the importance of enforcement of labour standards.

- The **environmental impact assessment** concluded that reliable estimation of potential impacts was not feasible, as increased EU investment could be positive or negative for the environment of Myanmar depending upon how it is directed.

  - A key uncertainty in terms of environmental management will be the extent to which environmental legislation and governance will improve. It is expected that legislation and governance will improve, both due to domestic efforts and international support (e.g. from UN agencies, EU policy support and bilateral assistance); however, progress will likely depend on the outcomes of the broader reform process underway in Myanmar, including efforts to tackle corruption and mismanagement in areas such as illegal logging and mining.

  - With regard to environmental management, EU companies may bring high internal environmental standards to their overseas operations and moreover call on their local suppliers to provide good environmental management as a precondition for commercial engagement.[4] Due diligence on the part of EU

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[3] More information on the EU's participation in the Myanmar labour rights initiative is available here: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1304

[4] UNCTAD and the European Business School, Making FDI Work for Sustainable Development, UN, 2004. The study focused on case studies of EU companies investing abroad. See also: Liang, F.H., Does Foreign Direct Investment Harm the Host Country's Environment? Evidence from China, 2006.

investors will be key in ensuring that investment is not directed to companies engaging in unsustainable practices.

- In several sectors, such as textiles, food and beverages, it may be the case that the scale effect leading to greater environmental pressures will outweigh improvements from better environmental management by individual operators. Overall, however, it is difficult to predict the outcomes clearly.

- This result underlines the importance that complementary measures can play: these could include, notably, direct technical assistance to the Myanmar government to support better environmental governance, as well as support for multilateral efforts via the UN and other international bodies.

- The **human rights impact assessment** projects that increased EU investment as a result of the IPA is more likely to deliver positive than negative impacts in terms of human rights. This conclusion is corroborated by input received from stakeholders; 60 per cent of all interviewees and questionnaire respondents considered that the EU-Myanmar IPA will have "positive" human rights impacts.

  - An increase in FDI from the EU could promote economic stability and growth, increase employment and as a result lead to better living standards and reduced poverty.

  - Furthermore, EU companies often have a human rights approach in their codes of conduct, which integrate CSR and RBC practices. As a result, better protection for labour standards and human rights could be introduced in Myanmar.

  - A greater commitment to, and reinforced performance of, due diligence from EU investors should be encouraged, including (for example) analysis of potential human rights issues in supply chains, so as to ensure that land for investment is made available through legal means.

  - Investors in sectors where the risk of human rights violations is higher, particularly the energy, agriculture and telecommunications sectors, should be especially diligent. The energy industry is linked to risks regarding violation of property rights, livelihood and minority rights. The telecommunications industry could be a driver of important processes like democracy and passing of information with the potential to open up society, but could also raise concerns about surveillance and censorship.

Through stakeholder consultation and general research, the project team has identified a number of opportunities and challenges for the IPA, summarised below. These are expanded in Section 8 of the Final Report.

Opportunities

- The IPA, by strengthening the protection and decreasing risks of investors is likely to lead to increased outward investment by both the EU and Myanmar, particularly investment from the EU into Myanmar.
- Increased investment could promote economic stability and growth, increase employment and as a result lead to better living standards and a reduction in poverty in Myanmar.
- Increased investment could have the dual effect of exporting capital and CSR and RBC practices. This would contribute to an improvement of labour standards and of the social environment in Myanmar by providing better and safer jobs, reducing child labour and increasing female labour market participation within the

overall increase in employment. These are considered as positive impacts with respect to the baseline scenario.

- Access to healthcare for local workers could be improved through the presence of foreign companies following CSR and RBC guidelines in Myanmar.[5] Medical insurance and healthcare for job-related injuries or health issues have been covered by certain foreign companies investing in Myanmar.
- Greater investment by companies with strong CSR and RBC practices could enhance the levels of inclusion and of equal treatment of women or minorities by abiding by international standards regulating the labour or education sectors, where the inequalities are the most striking.
- EU companies may bring corporate environmental standards to their Myanmar operations and may call on their local suppliers to ensure good environmental management as a precondition for commercial engagement.
- An EU-Myanmar IPA could provide investors from both Parties with easier access to investment dispute resolution while protecting Myanmar's interests by setting safeguards in this regard.
- An agreement would ensure a level playing field for EU investors (given the BITs that Myanmar has already concluded with China, India, Japan, Korea, the Philippines and Thailand, and the investment protection provisions agreed to in the framework of ASEAN).
- Potential to include provisions supporting sustainable and responsible investment. This could encourage sustainable development while promoting environmental protection and core labour/human rights.
- The IPA could support the policy reform process currently under way in Myanmar, in the following ways:
    - Ongoing reforms on labour and human rights issues could be supported through the transfer of EU good practices, particularly with regards to CSR and RBC.
    - Reforms to protect the environment could be supported by technology and best practices transfer in multiple sectors including sewage and waste management.
    - Transparency provisions could support positive developments concerning sustainability and responsible business conduct in Myanmar, particularly through improvements to stakeholders' awareness of key issues and improved accountability.

Challenges

- While economic impacts are likely to be positive, all of the related aspects of social, human rights and environmental impacts are difficult to predict as they very much depend on the sectors to which EU investment may be directed. For example although EU companies may bring (high) corporate environmental standards within their overseas operations, there is a risk that when partnering with local enterprises that do not operate to such standards, this could lead to a potential increase in human rights, social and environmental problems.
- As part of the ongoing reform process in Myanmar, many of the existing laws and regulations likely to be affected by the IPA are currently under revision. The agreement needs to avoid placing restraints on Myanmar's government by giving investors protection from future laws and regulations on the basis of 'indirect expropriation', particularly laws and regulations related to labour, human rights and environmental standards.

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[5] Myanmar Centre for Responsible Business. (2015). Human rights and business country guide: Myanmar. Available: http://hrbcountryguide.org/wp-content/uploads/2014/06/Human-Rights-and-Business-Country-Guide-Myanmar-Final-08.04.15.pdf.

- Dispute settlement mechanisms such as Investor State Dispute Settlement (ISDS), which aims to provide direct access to international arbitration for investors as an alternative to national courts of host countries, have been criticised due to what are seen as inconsistencies and unintended interpretations of clauses, unanticipated uses of the system by investors including challenges against policy measures taken in the public interest, costly and lengthy procedures, with limited or no transparency. The threat of foreign investors having recourse to such dispute settlement mechanisms might restrain Myanmar's government from implementing domestic policy measures to promote social inclusion and labour rights, if the domestic measures envisaged may pose a risk to the value of a foreign investment. As a result, the EU is proposing a reformed approach on investment protection, including safeguards on the right to regulate and an alternative mechanism, the 'Investment Court System' (ICS), which address a number of these issues and encourages recourse to domestic courts.
- External factors such as instances of abuse of labour rights in Myanmar by EU companies or of abuses occurring within their supply chains could erode the reputation for integrity of EU companies.
- Myanmar at present has limited institutional capacity to implement stringent commitments; therefore it may fall short of effective enforcement of the IPA measures.

Policy recommendations

Recommendations aimed at maximising the potential benefits of the agreement and at mitigating potential negative externalities are summarised in the following section.

1. **Chapters should be included in the IPA that encourage compliance with international labour, environmental and human rights standards by EU and Myanmar investors. The Myanmar government's ability to effectively promote and enforce international labour standards should be protected, following similar provisions in CETA and TTIP.**

The inclusion of sustainable development provisions, including labour aspects, within the EU-Myanmar IPA could encourage the government of Myanmar to further undertake capacity development efforts to fully implement and enforce labour standards.

The principles and text of the agreement could draw inspiration from other relevant instruments such as the ILO Better Factories programme that can be useful to monitor a particular sector and the US-Burma investors reporting requirements.

1.1. The general exceptions clause and the right to regulate article should be designed to allow both Parties to engage in legitimate regulatory actions without risk of liability to investment dispute and compensation claims. This is especially important given that Myanmar is currently engaged in an active reform process. This could be complemented by clear definition of 'fair and equitable treatment' (FET) and of 'indirect expropriation' to avoid excessive interpretations, as well as frivolous or bad-faith claims.[6] This has been the EU's approach as can be seen from the closed list of elements constituting a breach of FET in the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Singapore FTA, the EU-Vietnam FTA and the TTIP proposal.

[6] For further differentiation of direct and indirect expropriation, *cf.* TTIP Investment Chapter: Annex I http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

1.2. To address the concerns about the lack of transparency and legitimacy within some ISDS mechanisms, the EC could extend the ICS to the EU-Myanmar IPA, as was included for investment dispute resolution mechanisms in the most recent EU FTAs.

1.3. The IPA should include an article expressly excluding the right of companies to claim that Most Favoured Nation (MFN) status entitles them to use the same provisions as IPAs in place with other countries. This is especially important due to the lack of human rights and environmental protections included in Myanmar's BITs with other countries. Examples of articles addressing this issue can be found in other agreements such as CETA, article 8.7(4) and the EU-Vietnam FTA, article 4(6).

1.4. Provisions on sustainable development, including labour and human rights, should not take a selective approach but rather encompass all related issues.

1.5. Objectives of CSR/RBC for EU companies operating in Myanmar should be included in the text of the agreement, encouraging companies to adhere to similar CSR/RBC practices as are upheld in the EU, tailored to local conditions. Measures to this effect would conform with resolutions of the European Parliament, most notably that of 18 April 2012 on the "Annual Report on Human Rights in the World and the European Union's policy on the matter", which recommends that, "CSR should be binding on European companies operating in countries with institutional weaknesses."[7]

2. Considering the weakness of Myanmar's implementation and enforcement systems with respect to labour, environmental and human rights standards, the parties to the agreement should consider what existing mechanisms can be utilised to strengthen implementation and enforcement of such standards.

The complementary mechanism such as the OECD National Contact Points (NCP) under the OECD Guidelines for Multinational Enterprises could be considered in reinforcing Myanmar's enforcement system. The NCPs provide a grievance mechanism for investigating complaints about a company operating in or headquartered in a particular country. They provide non-judicial assessments on violations which result in settlements/agreements. As such the parties to the IPA agreement could discuss how existing NCPs in EU Member States could be asked to look into issues concerning the behavior of EU companies in Myanmar when such occurrences are documented.

Recognizing that neither Party is likely to agree to binding implementation and enforcement measures in this respect, parallel implementation and enforcement mechanisms therefore represent a pragmatic approach that allows stakeholders to flag ill-directed investments without breaching the legislative sovereignty of either Party.

3. Planned EC funded ex-post social, labour and human rights impact assessments conducted with regard this IPA should focus on sensitivities identified by the SIA team.

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[7] (2012). Human rights in the world and the European Union's policy on the matter including implications for the EU's strategic human rights policy. Available: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0126+0+DOC+PDF+V0//EN.

The EC is committed to conducting ex-post evaluations of its trade and investment agreements; including of their human rights and related impacts. When conducting these assessments, the analysts should remain vigilant in chapters of the assessment which focus on sectors where investment projects involve land acquisition, due to a history of land-grabbing and the customary nature of land-holding that is prevalent in Myanmar. Sensitivities in this regard lie in ensuring that land acquired has been transferred from its owner on a voluntary basis, and ensuring enforcement of adequate compensation according to the market value of the land. Should there be any documented cases of abuses tied to EU company investment, the ex-post evaluation team should consider them.

4. **An EU-Myanmar IPA should work in tandem with EU technical cooperation and capacity development initiatives. This would contribute to a strengthening of Myanmar's implementation and enforcement systems with respect to ensuring international labour and environmental standards, and social inclusion. Synergies should be built between the above recommendations and the mechanisms already in place at the EU-Myanmar bilateral level.**

As a result of current weak governance structures and poor domestic implementation and enforcement capacity, the Myanmar government may fall short of effective enforcement of the IPA measures. This may include the sustainable development provisions which could lead to negative impacts for labour rights, the environment and social inclusion. In addition, lack of enforcement and the resulting lack of legal certainty required to protect their reputation or investments might prevent EU companies from investing.

There are many EU funded projects currently underway to support institutional capacity building and encourage adherence to international labour and environmental standards in Myanmar, such as a € 10 million trade and private sector development programme, the multi-partner Myanmar Labour Rights Initiative, and sector specific projects which currently include: SMART (support to sustainable garment sector), a project in the Aquaculture sector and a Civil Society Roadmap. Other mechanisms or resources include political dialogues, including the EU-Myanmar Human Rights Dialogue, which has met annually since its creation in 2014.[8]

[8] (2014). Regional Programming for Asia Multiannual Indicative Programme. Available: http://eeas.europa.eu/asia/docs/rsp/regional-asia-mip-2014-2020_en.pdf.

NG-01-16-768-EN-N

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