

The Pending EU-Myanmar Investment Protection Agreement: RISKS & OPPORTUNITIES



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Executive Summary

In March 2014, the European Union (EU) and Myanmar began negotiating a bilateral investment protection agreement (IPA). An EU-Myanmar IPA would offer EU investors key guarantees in their relationship, and create a level playing field with investors from countries that already have such an agreement. For Myanmar, creating legal certainty and predictability for companies may help to attract foreign direct investment (FDI) to underpin the country's development. However, such a treaty could also come with risks for Myanmar. Legacy issues related to land and overall weak human rights protections mean that it is likely that more investment will negatively impact people's livelihoods and human rights. Particularly land rights and therewith the right to food and its fair distribution, the right to adequate housing, and the right to self-determination including the rights of indigenous people. As such, an IPA that encourages more investment and that protects investors' interests may affect Myanmar's obligation to uphold human rights, particularly the obligation to protect people's rights from violations by other people. The obligation to pass laws and actions that ensure that people are able to enjoy their human rights may also be violated. This is because the IPA may deprive the Government of Myanmar of the policy space necessary to harness investment to serve the country's goals of democratic development and sustainable peace.

In the draft agreement¹, there are a number of provisions that could have these effects, particularly the following. **National Treatment** provisions limit the use of preferential laws and policies to favour nationally owned investments. These are all policies that a developing country like Myanmar may well wish to implement (temporarily). A **Most Favoured Nation** clause limits a host state's ability to implement laws and policies that treat foreign investors from one country less favourably than foreign investors from another country. It also allows foreign investors covered by one investment treaty to rely on more favourable provisions contained in the host state's other investment treaties. In Myanmar there are 12 in total, all with less human rights protection.² **Fair and Equitable Treatment** seeks to protect the right to a "stable and predictable" business and regulatory environment, allowing investors to seek compensation for "unexpected" changes in tax and regulatory standards. Particularly the mentioning of "legitimate expectations" in the Myanmar draft agreement is open to wide interpretation. Globally, claims under Fair and Equitable Treatment are the most often invoked provision in investor-state arbitration with which investors have the best rate of success. Provisions for **Expropriation** are also difficult for a country like Myanmar. This is because there might be direct expropriations in the future where Myanmar law has earlier failed to adequately protect citizens, and may be compelled to allow land redistribution in the future. Provisions stating that **Compensation** must be at market value, may exacerbate costs. Given the very low rates at which the Government of Myanmar hands out land concessions, it is likely there will be a substantial gap between the circumstances in which a concession is acquired, and in which it would later have to be compensated.

One of the, if not the most, controversial provision in the draft EU-Myanmar IPA is the provision for **Investor-to-State Dispute Settlement (ISDS)** as an alternative to Myanmar's national judicial system. Such an ISDS clause, which forms a standard part of many investment agreements, enables foreign investors to bypass national courts and take a complaint to an international tribunal consisting of three commercial investment lawyers. If the investor's claim is successful, the tribunal will make a binding monetary award against the state. ISDS has been criticised for what are seen as inconsistencies and unintended interpretations of

¹ The leaked draft text from 29 May 2015 following the second round of negotiations.

² Israel, Korea, USA, Indonesia, Japan, India, Thailand, Kuwait, Laos, China, Vietnam, and Philippines (12 total)

clauses by investors. They include challenges against policy measures taken in the public interest, and costly and lengthy procedures with limited or no transparency. Moreover, these courts are only accessible to investors, while communities often have to rely on underdeveloped national legal systems that do not provide adequate access to justice. Evidence shows that many of the 608 arbitration awards that have become known globally, have overridden national law and hindered countries in the sovereign determination of fiscal and budgetary policy, labour, health and environmental regulations. They also have had adverse human rights impacts, also on third parties, including a “chilling effect” with regard to the exercise of democratic governance.³ While the EU has replaced ISDS by an ‘investment court’ and has limited claims related to investment protection and non-discrimination, the critique of introducing a separate dispute settlement with lack of rights for redress for affected communities, remains valid.

With regards to land, at present there are almost no concessions in Myanmar that are not in some way contested. Even today, amongst others under the Land Acquisition Act, the Farmland Law, and the Vacant, Fallow & Virgin Law, the government is able to re-possess and re-dedicate land on the basis of unclear criteria and for ambiguously defined reasons (for example “useful to the public”). More investment in the context of weak land tenure also leads to risks for land-related human rights. Loss of land, as well as an investment’s negative impact on the environment, threatens people’s right to food. At the same time, more protection for international investments in agriculture favours commercial seeds at the loss of local seed varieties, threatening people’s food sovereignty. Land grabbing and environmental impact also lead to eviction and lack of adequate housing for people. Overall, the most serious concerns around the IPA relate to the rights of indigenous or ethnic peoples, and future plans for their governance. While Myanmar has adopted a new National Land Use Policy spelling out more recognition of customary land tenure, overall such recognition is still very weak. Moreover, in the context of the peace process, it is unclear who in the future will govern and decide on investments in Myanmar’s ethnic states, and what revenue-sharing models may be implemented there. At present, Myanmar lacks an overarching piece of legislation governing land ownership and land use. Since last year, Myanmar is at the beginning of what could potentially be a large overhaul of its land governance system. If this will happen indeed, the government will need a lot of policy space. It appears that with the new Myanmar Investment Law and the forthcoming Investment Rules, Myanmar is making steps towards better regulation of responsible business conduct in its national laws⁴. This is while several concerns also remain, particularly in relation to land rights and environmental concerns. These are also not being solved with the EU-Myanmar IPA. However, no further large legal reforms are expected after the passing of the Investment Rules as well as the new Companies Act.

There is no evidence that an IPA will have direct positive consequences. The assumption that investments will lead to more investments is globally contested. Especially in the case of Myanmar, prospecting investors cite multiple more urgent barriers to investment, including corruption, the lack of infrastructure and unavailability of skilled local labour. Moreover, it cannot be assumed that an agreement will lead to better investments, from the EU or elsewhere. None of the provisions in the chapter on sustainability actually bind companies to good behavior. While a number of international standards are name-checked, they only state a commitment. Overall, for local civil society it is difficult to accept the promise that the EU will indeed follow better social and environmental standards, while being unwilling to include

³ Statement of Mr. Alfred-Maurice de Zayas, Independent Expert on the promotion of a democratic and equitable international order at the Human Rights Council 30th Session, Geneva, 16 September 2015

⁴ During interviews, a CSO representative noted that the new MIL affords enough protection to foreign investors, including the EU.

binding standards and compliance mechanisms in the agreement. An IPA is not likely to lead to better domestic regulatory frameworks, as it takes away incentives to improve domestic regulatory frameworks such as reform of the judicial system.

In addition to the need for protection of land-related human rights, and the need for policy space, Myanmar has limited institutional capacity to implement stringent commitments, due to which it may fail to effectively enforce IPA measures. There is limited intra-government information sharing and coordination, which could unintentionally expose the country to expensive litigation risks. Combined with the ‘umbrella clause’ included in the agreement, this may increase the vulnerability of host states to litigation under investment treaties. Given the NLD’s Economic Policy vision of the government is supposedly *“people-centred, and aims to achieve inclusive and continuous development, and that it aims to establish an economic framework that supports national reconciliation, based on the just balancing of sustainable natural resource mobilization and allocation across the States and Regions”*, there may be issues with specific IPA provisions in the future, for which intensified lobby at this stage is warranted.

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Chapter 1: Introduction

1.1. Background

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 (BIT) between any EU member state and Myanmar, nor between the EU and any least developed country (LDC).

An EU-Myanmar IPA would offer EU investors key guarantees in their relationship with Myanmar such as:

- Protection against discrimination;
- Protection against expropriation without compensation;
- Protection against unfair and inequitable treatment;
- Protection for the possibility to transfer capital.

These provisions are intended to provide guarantees to European companies that their investments will be treated fairly and on an equal footing to other investors.

For Myanmar, creating legal certainty and predictability for companies may help to attract and maintain foreign direct investment (FDI) to underpin Myanmar's development and help it to achieve the realisation of the Sustainable Development Goals/Global Goals.

However, such a treaty could also come with risks for Myanmar. Myanmar has become one of Asia's last frontiers for plantation agriculture and natural resource extraction. Its strategic location makes for even more investment interests at a time when the rights of communities are not yet well protected. Poor and marginalized people and communities in Myanmar are already experiencing land grabbing related to foreign investments.⁵ Since the first set of major foreign investors entered the country under the new legal regime, demand for land has in fact become a major factor in conflict. There is a fear that an investment agreement between Myanmar and EU will escalate these problems. In addition, the agreement may also deprive the Government of Myanmar of the policy space necessary to harness investment to serve the country's goals of democratic development and sustainable peace.⁶

Early December 2016, the fourth and latest round of negotiations were held between the EU and Myanmar. Afterwards, on 14 December 2016 a consultation meeting was also organised for local civil society organisations (CSOs) and Myanmar staff of international non-governmental organisations (INGOs), which about 8 representatives attended. At present, the status of the negotiations is unclear, although it is generally expected that the negotiations will take at least another 6 months to be concluded.⁷ Since a leaked version following the second round of negotiations in May 2015, there has been no access to more recent drafts. Overall, INGOs and local CSOs lament the lack of transparency around the process. A number

⁵ For example, land issues around the country's newly Special Economic Zones at Thilawa, Dawei and Kyauk Phyu have been well documented.

⁶ See the NLD's 12-point economic policy from 2016, <http://www.mmtimes.com/index.php/business/21664-nld-12-point-economic-policy-announcement.html>

⁷ It is generally expected that the new Myanmar Investment Rules will be completed first (April 2017)

of INGOs and a significant number of local CSOs are actively advocating against the signing of an EU-Myanmar IPA.⁸

1.2. Objectives of this study

This study was commissioned to explore in more detail the risks that an EU-Myanmar IPA may pose to local communities, particularly in relation to land. The study takes a rights based approach and focuses first of all on implications of the agreement for land related human rights, particularly the right to food and its fair distribution, the right to adequate housing, and the right to self-determination including the rights of indigenous people.

Secondly, the report seeks to answer whether there are any elements in the current draft agreement that could limit the possibilities for reform of national laws related to land and investment in Myanmar.

Thirdly, the report looks into possible positive outcomes of an IPA.

Fourth and last, the report reflects on investment protection on a more abstract level and offers recommendations on strategic entry points for doing lobby and advocacy - both at the national and EU level - to influence the process.

While the process of CSO consultation and drafting of the Sustainability Impact Assessment itself have also led to extensive criticism, this report primarily focuses on the content of the draft agreement and its implications. In the conclusions and recommendations chapter some procedural comments will also be shared.

1.3. Methodology

The information and analyses in this report are based on the following:

- Desk-analysis of the draft agreement as per the leaked version from May 2015;
- Analysis of the possible effects of an agreement, on Myanmar, with special focus on local communities hosting foreign investments;
- Review of existing relevant evidence-based, peer-reviewed, research and analysis on investment protection globally and in Myanmar;
- Consultations and interviews with a number of CSOs, INGOs and private sector representatives from Myanmar (see Annex 1).

The analysis and identification of risks is based on principles for business and human rights as outlined in the United Nations Global Compact⁹, the United Nations Guiding Principles on Business and Human Rights¹⁰, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests¹¹, Free Prior and Informed Consent¹², as well as more

⁸ See, <https://www.tni.org/en/article/more-than-500-civil-society-organisations-from-myanmar-express-their-concerns-about-the> (14 January 2016), and <https://www.tni.org/en/article/suspend-negotiations-for-an-investment-protection-agreement-between-the-eu-and-myanmar> (16 November 2016)

⁹ See <https://www.unglobalcompact.org>

¹⁰ http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹¹ See <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>

¹² See <http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf>

practical guidance tools like Investing the Right Way¹³ and Interlaken Guide on Respecting Land and Forest Rights¹⁴.

1.4. This report

In the next chapter, Chapter 2, first of all an overview will be provided of the provisions in the agreement with the most significant implications for human rights and/or policy space. The table follows the order of the draft agreement, and lists the provisions of most relevance to land issues and policy reform while also indicating whether they present a high, medium or low risk. In the third chapter, specific risks particularly for land rights in Myanmar will then be elaborated and motivated. Chapter 4 looks at whether the IPA may influence regulatory reform in the areas of land governance and investment. Chapter 5 goes into possible positive effects, and Chapter 6 offers a few more general reflections as well as a set of recommendations on strategic entry points for doing lobby and advocacy as well as other possible interventions.

¹³ See <https://www.ihrb.org/pdf/Investing-the-Rights-Way/Investing-the-Rights-Way.pdf>

¹⁴ See https://www.ifc.org/wps/wcm/connect/31bcd8049facb229159b3e54d141794/InterlakenGroupGuide_web_final.pdf?MOD=AJPERES

Chapter 2: Key Provisions of the Draft EU-Myanmar IPA

Table 1: Key Provisions of the Draft EU-Myanmar IPA¹⁵

Clause	Passage	Meaning	General implications for human rights and/or policy space
National Treatment (Chapter I, Article 2) <i>Medium Risk</i>	“Each Party shall accord to investors of the other Party and to their covered investments, as regards their operation in its territory, treatment no less favourable than the treatment it accords, in like situations, to its own investors and their investments” ¹⁶	This provision requires the Government of Myanmar to treat foreign investors and investments at least as well as they treat their own investors. Assessments of the provision contain two major components: first, it has to be decided whether the foreign investor and the domestic investor are placed in a comparable setting. Secondly, it has to be determined whether the treatment accorded to the foreign investor is at least as favourable as the treatment accorded to domestic investors.	Behind this seemingly simple clause lie complex issues, such as: Which policies of the host country may justify differential treatment between a foreigner and the national? Or what role, if any, will be attributed to the intentions which a government pursues with the act that allegedly discriminates? What evidence is required to demonstrate “intention”? Or when the foreign investor is compared with the domestic investor, is it necessary to identify a domestic investor who is in exactly the same business, or is it sufficient to point to an investor who is not in the same line of business but in the same economic sector? How do we define “business” and “sector” in this context? ¹⁷ Overall, national treatment provisions limit the use of preferential laws and policies to favour nationally owned investments, as well as laws and policies affirming ethnicity or gender.

¹⁵ As per the leaked draft text from 29 May 2015 following the second round of negotiations

¹⁶ EU-Myanmar IPA draft text 29 May 2015, p. 16

¹⁷ Professor Rudolf Dolzer, 2005, “Making the most of international investment agreements: a Common Agenda. National Treatment: A New Agenda”, a symposium organised by ICSID, OECD AND UNCTAD, p. 2. See <https://www.oecd.org/investment/internationalinvestmentagreements/36055356.pdf>

Intellectual Property (Chapter 1, Article 2 (iv)) <i>Medium Risk</i>	“Investment means every kind of asset which has the characteristics of an investment... Forms that an investment may take include: ... (vii) intellectual property rights, as defined in this article, ¹⁸ technical processes, know-how and goodwill.” ¹⁹	This means that intellectual property rights are qualified as covered investments. However, given the proposal by MM to delete a number of items, it is unclear whether the latest draft includes plant varieties under IPR.	In relation to agriculture, this provision means that international breeders are provided with effective IP protection for new plant varieties. Such provisions create more favourable condition for international breeders, at the expense of smallholder farmers whose farm-saved seed systems have fed Myanmar for centuries, and which may be more resilient in case of natural disasters. Many farmers and farmer organisations are opposed to such policy frameworks.
Most Favoured Nation (MFN) (Chapter II, Article 3) <i>High Risk</i>	“Each Party shall accord to investors of the other Party and to their covered investments as regards their operation in its territory, treatment no less favourable than the treatment it accords, in like situations, to investors and investments of any non-Party.” ²⁰	The effect of this provisions is that any benefit extended to foreign investors from one country under one investment treaty may need to be extended to foreign investors covered by Myanmar’s other investment treaties.	This provision limits a host state’s ability to implement laws and policies that treat foreign investors from one country less favourably than foreign investors from another country. It also allows foreign investors covered by one investment treaty to rely on more favourable provisions contained in the host state’s other investment treaties. ²¹ As such, this provision links Myanmar’s BITs to each other. ²² For example, an investor protected by a treaty without a prohibition of performance requirements may use the MFN clause to import a prohibition of PRs from another of the host country’s treaties and benefit from it as more favourable treatment.
Fair and equitable treatment	“Each Party shall accord in its territory to covered investments of the other Party and investors with respect to	This provision seeks to protect the right to a “stable and predictable” business and regulatory environment, allowing	The fair and equitable treatment (FET) provision of investment treaties is the provision most often invoked by foreign investors in investor–state

¹⁸ “means at least copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights,” EU-Myanmar IPA draft text 29 May 2015, p. 13

¹⁹ EU-Myanmar IPA draft text 29 May 2015, p. 13-14

²⁰ EU-Myanmar IPA draft text 29 May 2015, p. 16

²¹ Bonnitche, J./International Institute for Sustainable Development, 2014, “Myanmar’s Investment Treaties: A Review of Legal Issues in Light of Recent Trends”, p. 16

²² Myanmar currently has BITs with Israel, Korea, USA, Indonesia, Japan, India, Thailand, Kuwait, Laos, China, Vietnam, and Philippines. See <http://www.dica.gov.mm/en/printpdf/165>

<p>(FET) (Chapter II, Article 5)</p> <p><i>High Risk</i></p>	<p>their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 5.”</p> <p>(Breaches include amongst others: fundamental breach of due process, including a fundamental breach of transparency and in judicial and administrative proceedings; harassment, coercion, abuse of power, corruptive practices or bad faith conduct; or a breach of legitimate expectations of investors arising from a Party’s specific representations to an investor to induce a covered investment, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated)²³</p>	<p>investors to seek compensation for changes in tax and regulatory standards.</p> <p>It is unclear whether the latest version of the text adequately protects the state’s right to regulate for legitimate policy objectives (such as CETA, Article 8.9) and includes an exhaustive list of elements that constitute a breach of FET (such as CETA, Article 8.10).</p>	<p>arbitration, and the claim with which investors have the best rate of success.²⁴</p> <p>Tribunals have disagreed about the nature and extent of the obligation to treat foreign investment fairly and equitably, and the OECD recommends governments wishing to include a reference to this principle in their investment legislation to “define clearly its scope and content so as to avoid giving excessive leeway to arbitral interpretations of its legal provisions and to protect against potentially costly arbitral awards.”²⁵</p> <p>The EU-Myanmar IPA contains a closed list. However, in this list the draft provision that the FET standard is breached if the government does not respect an investor’s “legitimate expectations” is open to interpretation giving much space to investor claims.</p>
<p>Expropriation (Chapter 2, Article 7 and</p>	<p>“Neither Party shall nationalise or expropriate a covered investment either directly or indirectly through</p>	<p>These provisions allow the host state to expropriate foreign investments owned by investors of the home state only if</p>	<p>The question of whether government measures that prevent a foreign investment from continuing to operate profitably amount to “indirect expropriation”</p>

²³ EU-Myanmar IPA draft text 29 May 2015, p. 17-18

²⁴ See UNCTAD, 2012, “Fair and Equitable Treatment. UNCTAD series on issues in international investment agreements II”, p. xiii. See http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf

²⁵ Organisation for Economic Co-operation and Development, 2014, “Investment Policy Reviews: Myanmar 2014.” See <http://www.oecd.org/daf/inv/investment-policy/Myanmar-IPR-2014.pdf>

8) <i>High Risk</i>	<p>measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') except:</p> <ul style="list-style-type: none"> a) for a public purpose; b) under due process of law; c) in a non-discriminatory manner; and d) against payment of prompt, adequate and effective compensation.”²⁶ 	<p>compensation is paid to the investor. This provision deals with two distinct situations. The first is “direct expropriation,” which occurs when a government nationalizes or permanently takes over possession of an investment. The second is “measures equivalent to expropriation,” more commonly referred to as “indirect expropriation.” Indirect expropriation occurs when a government takes a measure akin to expropriation that does not involve nationalization or the ousting of the investor from possession of the investment.</p>	<p>for which compensation is required has proven controversial in practice.²⁷</p> <p>Also regarding direct expropriation: as the EU’s Sustainability Impact Assessment also notes, the law on expropriation poses significant risk especially for public initiatives that require the acquisition or redistribution of property potentially owned by EU investors. Given the early stages of democratization and nation-building in Myanmar, conflicts may well arise (as so far Myanmar law has not effectively protected people against expropriation due to overlap, contradiction and confusion).²⁸</p>
<p>Compensation at fair market value (Chapter 2, Article 7)</p> <p><i>High Risk</i></p>	<p>“Such compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.”²⁹</p>	<p>Compensation should be equivalent to the fair market value of the investment at the time when the expropriation was announced.</p>	<p>As Jonathan Bonnitcha points out in an analysis of existing Myanmar BITs: “While this standard of compensation is common to investment treaties, its application can lead to irregular results in practice. For example, if an investor acquires an investment for significantly less than its fair market value—perhaps because a competitive tender was not originally conducted—it would still be entitled to full compensation if the investment was renationalized, a situation that would grant the investor a substantial windfall.”³⁰ In the case of Myanmar, given the very</p>

²⁶ EU-Myanmar IPA draft text 29 May 2015, p. 18-19

²⁷ Jonathan Bonnitcha/International Institute for Sustainable Development, 2014, “Myanmar’s Investment Treaties: A Review of Legal Issues in Light of Recent Trends”, p. 13

²⁸ Development Solutions, 2016, Sustainability Impact Assessment in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, p. 156

²⁹ EU-Myanmar IPA draft text 29 May 2015, p. 19

³⁰ Jonathan Bonnitcha/International Institute for Sustainable Development, 2014, “Myanmar’s Investment Treaties: A Review of Legal Issues in Light of Recent Trends”, p. 14

			low rates at which the government is currently handing out land concessions, it is likely there will be a substantial gap between the circumstances in which a concession is acquired and in which it could later be compensated.
Transfers (Article 9) <i>Low risk</i>	“Each Party shall permit all transfers relating to a covered investment to be made in a freely convertible currency... ” (see paragraphs 1-6) ³¹	This provision requires Myanmar to allow free inward and outward movement of capital at market exchange rates, except when “in circumstances of serious difficulties for the operation of monetary and exchange rate policy, in the case of Myanmar, or for the operation of the economic and monetary union, in the case of the European Union, or threat thereof, safeguard measures that are strictly necessary may be taken by the concerned Party with regards to transfers for a period not exceeding six months”	With Article 4 most risk is mitigated, as this provision will allow Myanmar to restrict cross-border capital movements in times of economic crisis, acting swiftly and decisively to maintain its financial reserves.
Observance of written commitments (“Umbrella Clause”) (Chapter 2, Article 10) <i>High Risk</i>	“Where a Party, either itself or through any entity mentioned in Article 2 [Definition of ‘measures by a Party’ or ‘treatment by a Party’] of Chapter I [Objectives and definitions] has entered into any written commitment with investors of the other Party or with their covered investments, that Party shall not, either itself or through that entity breach the said	“Umbrella clauses” elevate any breach of an obligation to the level of a breach of the treaty. According to this view, any breach of a contract with an investor would amount to a breach of the investment treaty.	Umbrella clauses can radically expand the scope of host states’ liability under investment treaties by allowing claims for breach of investor–state contract to be pursued on the level of a breach of a treaty through investor–state arbitration. This ‘umbrella clause’ would allow a company to sue the Myanmar government if any government authority (e.g. Ministry, sub-national government etc.) has breached any written commitment, regardless of the reasons. ³³

³¹ EU-Myanmar IPA draft text 29 May 2015, p. 20-21

³³ Myanmar Centre for Responsible Business, December 2015, Challenges of the proposed EU-Myanmar Investment Protection Agreement

	commitment through the exercise of governmental authority.” ³²		
Performance requirements (Chapter 2, Article 12) <i>Medium Risk</i>	“Neither Party may impose, or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the operation of all investments in its territory to: (amongst others, to hire a given number or percentage of its nationals, or to achieve a given level or value of research and development in its territory).” ³⁴	Performance requirements are requirements concerning the location or the origin of the inputs, outputs or activities associated with an investment. Examples of performance requirements include requirements that a foreign investor use a certain percentage of Myanmar-produced inputs, requirements that investors export a minimum percentage of their output and requirements that investors employ a certain percentage of Myanmar staff.	Developing countries often use local content or employment requirements to encourage FDI to build skills and capacity in the local economy (e.g. the 2012 Myanmar Foreign Investment Law required 100% non-skilled employees to be Myanmar, 25% of skilled workers to be Myanmar within 2 years, 30% within 4 years, and 75% within six years). This provision would disable Myanmar from making such requirements. ³⁵ There is a direct risk here for inconsistencies here with Myanmar domestic law, as currently performance requirements may be imposed by line ministries and state/region subnational governments as a condition for approval of investments. ³⁶
Transparency (Chapter 3, Articles 1-9) <i>Low Risk</i>	Recognising the impact which their respective regulatory environment may have on investment between them, the Parties shall pursue an efficient, transparent and predictable regulatory environment for economic operators, including small and medium-sized enterprises, doing business in their territories.” For other	These provisions on transparency refer to laws applying to investment, and are intended to encourage a more predictable investment climate	Such a provision could support more transparent business conduct in Myanmar. However, they are quite weakly formulated, and similar requirements in the Myanmar/Japan Investment Agreement (Article 8) have not resulted in more transparency in Myanmar law-making.

³² EU-Myanmar IPA draft text 29 May 2015, p. 18-19. During the second round of negotiations the government of Myanmar suggested to delete this provision

³⁴ EU-Myanmar IPA draft text 29 May 2015, p. 22-23

³⁵ Myanmar Centre for Responsible Business, December 2015, Challenges of the proposed EU-Myanmar Investment Protection Agreement

³⁶ See Jonathan Bonnitcha, 2016, Trends in investment treaties and their interaction with other legal instruments: A Discussion Paper, p. 9.

	elements see Chapter 3 ³⁷		
Sustainable development (Chapter 4, Article 1-9) <i>Low Risk</i>	“The Parties are committed to pursue sustainable development, whose pillars – economic development, social development and environmental protection – are inter-dependent and mutually reinforcing. They underline the benefit of considering investment-related labour and environmental issues as part of a global approach to sustainable development.” For other elements see Chapter 4 ³⁸	The key purpose of this chapter is to ensure that high standards for labour and environment are upheld. Specifically, the proposal refers to commitments made as part of the International Labour Organisation (ILO) and Multilateral Environmental Agreements, to ensure that both sides respect a common set of fundamental labour standards and environmental rules. In addition, the text includes an obligation not to relax domestic labour or environmental protection laws as a means to attract trade or investment.	These provisions are not legally binding and therefore merely good intentions. ³⁹
Right to Regulate (Placeholder Chapter 2 and Article 2 in Chapter 4) <i>High Risk</i>	“The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify its relevant laws and policies accordingly, consistently with the internationally recognised standards and agreements referred to in Article 3 and 4.” ⁴⁰	This provision is intended to safeguard Myanmar’s regulatory power and guide and limit the interpretive power of arbitral tribunals by reserving Myanmar’s right to pursue specific public policy objectives.	Several facets of Myanmar’s public policy framework are still in the nascent stages of development. Provisions on the right to regulate are therefore particularly important. Given the final text is not known it is unclear whether the right to regulate is sufficiently protected. ⁴¹

³⁷ EU-Myanmar IPA draft text 29 May 2015, p. 24-27

³⁸ EU-Myanmar IPA draft text 29 May 2015, p. 29-34

³⁹ Harrison, J. et al (2017) Governing Labour Standards through Free Trade Agreements: Limits of the European Union’s Trade and Sustainable Development Chapters. University of Warwick; Draft paper (forthcoming publication).

⁴⁰ EU-Myanmar IPA draft text 29 May 2015, p. 29

⁴¹ Myanmar Centre for Responsible Business, December 2015, Challenges of the proposed EU-Myanmar Investment Protection Agreement

Investor to State Dispute Settlement (Section 2) <i>High Risk</i>	See Section 2 of the agreement ⁴²	This provision allows foreign investors to bring claims under the treaty directly to investor–state arbitration. In such disputes, an arbitral tribunal will decide if the state in which the investment is located has breached the treaty. If the investor’s claim is successful, the tribunal will make a binding, monetary award against the state.	The vast majority of investor–state disputes under investment treaties concern allegations that the host state has failed to comply with the investment protection provisions of the relevant treaty. Small differences in the drafting of investment protection provisions can be decisive when a tribunal is determining whether particular actions taken by a government breach the treaty.
General Exceptions (Chapter VII, Article 2) <i>Medium Risk</i>	“The Parties understand that measures referred to in GATT 1994 Article XX (b) also include environmental measures necessary to protect human, animal or plant life or health. The Parties further understand that GATT 1994 Article XX (g) applies to measures for the conservation of living and non-living exhaustible natural resources.” ⁴³	The purpose of such exceptions is to ensure that the implementation of measures pursuing specified public-interest objectives do not trigger a host state’s liability under an investment treaty.	If drafted carefully, these provisions can address some of the concerns about investment treaties’ impact on legitimate laws and policies designed to protect the public interest. In the EU-Myanmar draft IPA, few exceptions have been included. In addition the existence of exceptions clauses does not reduce the need to draft the other provisions of an investment treaty carefully, as no exceptions clause can ever address the full variety of situations that might result in investment treaty disputes and because the exceptions clauses themselves may be subject to unexpected interpretations by arbitral tribunals.
Sunset clause (Chapter VII, Article 13 and Article 14) <i>Medium Risk</i>	“This Agreement shall be valid indefinitely” “In the event that the present Agreement is terminated pursuant to Article 12 of this Chapter [General and final provisions], the provisions of the	This clause protects authorised investments for a specified period after termination.	The EU-Myanmar IPA lacks an end date. If Myanmar wishes to terminate the agreement, European investments will still enjoy protection for another 10 or 20 years (depending on the final text).

⁴² EU-Myanmar IPA draft text 29 May 2015, p. 43-56

⁴³ EU-Myanmar IPA draft text 29 May 2015, p. 77

	Chapter II [Investment protection] and those of Section 2 of Chapter V [Investor-to-State dispute settlement] shall continue to be effective for a further period of [EU proposal: 20] [MM proposal: 10] years from the date of termination, with respect to investments made before the date of termination of the present Agreement.” ⁴⁴		
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⁴⁴ EU-Myanmar IPA draft text 29 May 2015, p. 80-81

Chapter 3: Implications for Human Rights, specifically Land Rights

3.1. Human rights commitments in Myanmar

Myanmar's current legal framework is the product of its colonial past, post-independence military rule, and reforms undertaken since 2011. The framework is a patch-work combination of customary family law, codified British common law, and new laws. Many key laws were enacted and implemented by the British in colonial India between 1885 and 1948.⁴⁵ During the military rule that followed independence in 1948, other laws were enacted, but mostly in the form of martial decrees without public consultation and in breach of international standards. The main body of law is the "Burma Code", whose general provisions apply when there is no law regulating a particular matter, and which has not been updated since 1954.⁴⁶

When Myanmar became a United Nations member state, it signed the Charter of the United Nations, binding it to the United Nations Universal Declaration for Human Rights. In the last two decades, Myanmar has also signed the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC).⁴⁷ Myanmar has also agreed to protect and promote human rights under the ASEAN Charter. However, Myanmar has yet to become a party to most other international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the International Covenant on Civil and Political Rights (OPICCPR), the Convention Against Torture (CAT) and five of the eight fundamental ILO Conventions (a full overview is provided in Table 2). In 2015 the government signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict but has not yet ratified these.⁴⁸

Table 2: Key Human Rights Treaties Signed/not Signed by Myanmar⁴⁹

Signed	Not Signed
<ul style="list-style-type: none"> • Universal Declaration of Human Rights • Convention on the Rights of the Child (CRC) on 15 July 1991 • Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OP-SC) on 16 January 2012 • Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) on 22 July 1997 • Convention on the Rights of Persons 	<ul style="list-style-type: none"> • Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) • Optional Protocol of the Convention against Torture (CAT-OP) • International Covenant on Civil and Political Rights (ICCPR) • Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty (ICCPR-OP2-DP) • International Convention on the

⁴⁵ Overall, about half of the 800 laws in Myanmar, including the existing Penal Code, were enacted under colonial rule

⁴⁶ International Trade Union Confederation, 2015, "Foreign Direct Investment in Myanmar: What Impact on Human Rights", p. 11

⁴⁷ See <http://hrlibrary.umn.edu/research/ratification-myanmar.html>

⁴⁸ See Lutheran World Federation, Universal Periodic Review, second cycle 2012-2016, April 2016, p. 5

⁴⁹ Ibid.

<p>with Disabilities (CRPD) on 7 December 2011</p> <ul style="list-style-type: none"> the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict were signed in 2015 but not yet ratified Three out of eight fundamental ILO Conventions.⁵⁰ 	<p>Elimination of All Forms of Racial Discrimination (CERD)</p> <ul style="list-style-type: none"> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) Optional Protocol of the UN Convention on the Rights of Persons with Disabilities (OP-CRPD) Optional Protocol of the UN Convention for All Forms of Discrimination against Women (OP- CEDAW) Optional Protocol of the International Covenant on Economic, Social and Cultural Rights (ICESCR) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction Rome Statutes of the International Criminal Court (ICC) Five of the eight fundamental ILO Conventions⁵¹
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In 2008, the Myanmar government adopted a new constitution, which also provides enforceable guarantees for a number of rights and freedoms. There are however also limitations contrary to international human rights standards. For example, citizens have the right to freedom of expression, assembly and association if not contrary to “law and order, community peace and tranquility, or public order and morality”⁵². However, what constitutes morality is not defined. Some rights are granted to all persons, while others to “citizens” only (thus excluding Chinese, Nepali and Indian ethnic minorities) – including the right of non-discrimination, freedom of movement, of expression, of assembly and association, the right to property, health, education, just and fair conditions of work, and privacy.⁵³

Since the reform process began in 2011, there has been an increase in calls by CSOs to provide redress for human rights abuses, particularly land grabbing, forced relocation, and environmental damages. The government’s response has been relatively weak. The government has formed the Myanmar National Human Rights Commission, a number of

⁵⁰ Convention no 29 on Forced Labour, Convention no 87 on Freedom of Association and Protection of the Right to Organise, and Convention No 182 on the Worst Forms of Child Labour

⁵¹ Including Convention 169 on Indigenous and Tribal Peoples, Convention 138 on Minimum Age and Convention 105 on the Abolition of Forced Labour. See the Myanmar Centre for Responsible Business, 2015, Myanmar Human Rights and Business Guide, p. 14

⁵² Constitution of Myanmar, 2008, article 354. “Every citizen shall be at liberty in the exercise of the following rights, if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality...”

⁵³ International Trade Union Confederation, 2015, “Foreign Direct Investment in Myanmar: What Impact on Human Rights”, p. 11

parliamentary committees and investigative bodies to deal with complaints. These bodies, however, have mostly failed to conduct credible investigations and have proven ineffective. The judicial system remains weak, and human rights defenders are still being arrested and charged for peaceful activities.

Land rights

There is no right to land codified in international human rights law. However, land is a cross-cutting issue, and often fundamental for access to other economic, social and cultural rights. Land rights constitute the basis for access to food, housing and development, and are a gateway for many civil and political rights.⁵⁴

Under the 2008 Constitution, the state of Myanmar is the owner of all land, although the 2012 Farmland Law allows for registration and sales of private ownership rights in land. However, the Farmland Law does not have adequate representation of farmers in the Farmland Management Body which is responsible for issuing LUCs (Land Use Certificates). The LUCs can be revoked by the government, thus tenure rights are not secured. Farmland rights continue to be easily transferable with no independent body to decide the amount of compensation nor is there a proper mechanism to bring the disputes to court.

Laws up until now do not recognize rights in traditional collective land ownership and shifting cultivation regimes, which are particularly prevalent in upland areas inhabited by ethnic minority groups. In addition, the Vacant, Fallow & Virgin Lands Management Law 2012 leaves open to interpretation and exploitation the definitions of key words like 'regular', 'fallow' etc. At the same time, laws such as the 1994 Myanmar Mines Law contain no provision for public participation, public disclosure, or socio-impact assessment (SIO) or environmental impact assessment (EIO). The 'interest of the state' is sufficient enough reason to confiscate.⁵⁵

Another aspect of the legal framework are the multiple categories of land classification (twelve) noted in 2009 (freehold, grant, agricultural, garden, grazing, cultivable, fallow, waste, town, forest, village, monastery & cantonment) could lead further to confusion. Land classification and mappings do not reflect the ground reality of land use patterns.⁵⁶

Myanmar has endorsed the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security, which is currently the highest international standard on tenure issues agreed upon by governments and adopted by the UN Committee on World Food Security in 2012. Civil society heavily relied upon these Guidelines during the drafting process of the relatively new National Land Use Policy (NLUP, 2016), and as a consequence this policy now recognizes traditional land ownership and shifting cultivation regimes.⁵⁷ However, the policy has not yet been translated into law.

⁵⁴ In a report of Special Rapporteur Miloon Kothari on adequate housing as a component of the right to an adequate standard of living, the Special Rapporteur recognized and emphasized the importance of land as a "critical element" of the right to adequate housing, and called on the Human Rights Council to ensure "the recognition in international human rights law of land as a human right." (A/HRC/4/18, paras. 26 and 31).

⁵⁵ Oxford Myanmar Brief on Land, Volume 1.1. August 2016

⁵⁶ Ibid

⁵⁷ For a comparison between the TGs and Myanmar's land policy draft, please see: Jennifer Franco et al., Transnational Institute, "The Challenge of Democratic and Inclusive Land Policymaking in Myanmar", https://www.tni.org/files/download/the_challenge_of_democratic_and_inclusive_land_policymaking_in_myanmar.pdf

Right to adequate food

The right to adequate food is realized when every man, woman and child, alone or in community with others, has the physical and economic access at all times to adequate food or means for its procurement.⁵⁸ The right to food is closely linked to the concept of food security. Food security has three important parameters: firstly, food availability, which is a function of domestic production of food grains and imports/exports. Sustainability, including environmental sustainability, is critical to long-term food availability. A second parameter is food accessibility, both physical and economic. This parameter includes employment opportunities, levels of poverty, functioning of the public distribution system and the running of employment/poverty alleviation schemes. Finally, the third parameter is food absorption, which means the ability to assimilate the food consumed for a healthy life. Food absorption depends upon multiple factors like the health of the individual, environmental sanitation, hygienic and safe drinking water, a balanced diet, knowledge of nutrition, and good dietary practices.⁵⁹

About 30 countries in the world have an explicit recognition of the right to adequate food in their national constitution. Myanmar has directive principles⁶⁰ that contribute to the realization of the right to adequate food. Article 26B of the Constitution states: “The Union shall enact necessary laws for Civil Services personnel to have security and sufficiency of food, clothing and shelter, to get maternity benefits for married women in service, and to ease livelihood for welfare of retired Service personnel.” Furthermore, there are references to the right to food in the following international instruments that Myanmar has signed:

- The Universal Declaration of Human Rights (Article 25)
- International Covenant on Economic, Social and Cultural Rights (Article 11) *not ratified*
- Convention on the Elimination of all forms of Discrimination Against Women (Article 12 and 14)
- Convention on the Rights of the Child (Article 24 and Article 27)
- Convention on the Rights of Persons with Disabilities (Article 28)⁶¹

Food Security Working Group (FSWG), a CSO in Myanmar working on improving local food supplies, local food access and food security in Myanmar, noted in December 2015 that there has been no national level policy framework or law that specifically addresses food sovereignty or food security for Myanmar, but that food security and its core issues are increasingly addressed in policy and law across a range of sectors beyond its traditional focal point of the Ministry of Agriculture, Livestock and Irrigation.⁶² Overall, there are few actors in Myanmar working on food security from a right-based perspective.⁶³

Right to adequate housing

The right to adequate housing is defined in the International Covenant on Economic, Social and Cultural Rights of which Article 11 states that State Parties (governments) who sign up must: “recognise the right of everyone to an adequate standard of living for himself and for

⁵⁸ General Comment 12 (CESCR)

⁵⁹ See <https://teacircleoxford.com/2016/06/15/food-security-in-myanmar-future-rice-bowl-of-asia/>

⁶⁰ Directive principles are not enforceable by the courts, but the principles on which they are based are fundamental guidelines for governance that the State is expected to apply in framing and passing laws.

⁶¹ See <http://www.fao.org/right-to-food-around-the-globe/countries/mmr/en/>

⁶² Food Security Working Group, 2015, “Food Security Related Policy Analysis”, p. 4

⁶³ Interviews with CSO representatives, February 2017

his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” The right to adequate housing contains freedoms, such as protection against forced evictions and arbitrary destruction and freedom to determine whether to live and freedom of movement; entitlements, such as security of tenure, housing, housing/land/property restitution, and participation in housing-related decision making at the national and community levels, and for housing to be adequate it must meet a number of criteria such as affordability and habitability.⁶⁴

Myanmar did not ratify the International Covenant on Economic, Social and Cultural Rights. International instruments with reference to the right to adequate housing that Myanmar has signed include:

- The Universal Declaration of Human Rights (Article 25)
- International Covenant on Economic, Social and Cultural Rights (Article 11) *not ratified*
- Convention on the Elimination of all forms of Discrimination Against Women (Article 14)
- Convention on the Rights of the Child (Article 16.1, and 27.3)

Right to self-determination

The right to self-determination is contained in Article 1 of the International Covenant on Economic, Social and Cultural Rights and Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and in Article 1 of both Covenants states that by virtue of the right to self-determination people freely determine their political status and freely pursue their economic, social and cultural development. The principle of Free, Prior and Informed Consent is a key expression of self-determination.⁶⁵

Myanmar has signed but not ratified the CESC and has not signed the ICCPR. Myanmar has also not signed ILO Convention No 169, aimed at overcoming discriminatory practices affecting indigenous and tribal peoples and enabling them to participate in decision-making that affects their lives. Myanmar is a signatory to the Declaration on the Rights of Indigenous People (UNDRIP, 2007).⁶⁶ However, the government does not recognize the term indigenous peoples in law, policy or practice, dismissing the applicability of UNDRIP, and they have not taken a position concerning whether there are indigenous peoples in Myanmar.⁶⁷

The 2008 Constitution grants some rights to ethnic nationalities. Article 22 of the Constitution provides for “(i) development of language, literature, fine arts and culture of the national races; and (ii) promotion of solidarity, mutual amity and respect and mutual assistance among the national races; and promotion of socio-economic development including education, health, economy, transport and communication, of less-developed national races.” Article 365 provides for the enforceable right of Myanmar citizens to freely develop literature, culture, arts, customs and traditions that are being cherished. This also states that “any particular action which might affect the interests of one or several other of the national races shall be taken... after obtaining the settlement of those affected.” The 2015 Protection of the Rights of National Races Law gives further effect to Article 22 and provides a basis for a Minister for

⁶⁴ UN Habitat & Office of the United Nations High Commissioner for Human Rights, Fact Sheet no 21 (revision 1), “The Right to Adequate Housing”, p. 3-4

⁶⁵ See <http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf>

⁶⁶ The Myanmar government noted that it “would seek to implement it with flexibility”

⁶⁷ Myanmar Centre for Responsible Business, 2016, “Briefing Paper: Indigenous People’s Rights and Business in Myanmar”, p. 7

National Races. Article 5 of this Law states that indigenous “should receive complete and precise information about extractive industry projects and other business activities in their areas before project implementation so that negotiations between the groups and the Government/companies can take place.”⁶⁸ However, Myanmar law does not mention the UN Declaration on the Rights of Indigenous People or Free, Prior and Informed Consent.⁶⁹

3.2. Actual human rights situation

Under the international human rights system, governments have the duty, or obligation to uphold human rights. Governments have this obligation in three ways, namely by not passing laws or take actions that violate human rights, by protecting people’s rights from violations by other people, and by passing laws and take actions ensuring that people are able to enjoy their human rights.

Human rights and their violations in Myanmar are consistently being documented by numerous international and local organisations, including Human Rights Watch, Physicians for Human Rights (PHR), Amnesty International (AI), The Lutheran World Federation, The Border Consortium (TBC), the Network for Human Rights Documentation – Burma (ND-Burma), Burma Environmental Working Group (BEWG), Karen Human Rights Group (KHRG), Shan Human Rights Foundation, (SHRF), and the Kachin Women’s Association Thailand (KWAT). Since the 1990s, multiple United Nations organs have also documented and condemned human rights abuses committed under the military regime. These include the UN General Assembly, the Commission on Human Rights, the Human Rights Council, numerous Special Rapporteurs on the Situation of Human Rights in Myanmar [Burma], the International Labour Organization (ILO), and the Committee on the Elimination of Discrimination against Women (CEDAW).

Generally, these watchdogs observe that Myanmar has seen significant political and economic change after a quasi-civilian government was introduced in 2011, accompanied with significant improvements in the human rights situation. However, in the approach to the elections the reform process regressed. Also since after the elections, restrictions on freedom of religion and freedom of expression, association, and assembly persist. In Parliament, MPs have been asked by NLD leadership to stop asking tough questions that would make the government look bad, and have received instructions to maintain the official party line.⁷⁰ Arrests under Section 66(d) of the Telecommunications Law, prohibiting certain types of speech online with a penalty of up to three years in prison, is still regularly utilized to silence critical voices. And overall the space for human rights defenders to operate effectively and without fear of reprisal remains limited.⁷¹

Land issues

In Myanmar, 70% of the population of 50+ million lives in rural areas, where they depend on

⁶⁸ Myanmar Centre for Responsible Business, 2016, “Briefing Paper: Indigenous People’s Rights and Business in Myanmar”, p. 16-17

⁶⁹ FPIC has been mentioned in the context of a few other government documents, often those copied or drafted on the basis of other sources such as those relating to REDD+ and extractives.

⁷⁰ See The Irrawaddy, October 5, 2016, <http://www.irrawaddy.com/news/burma/nld-leadership-instructs-lawmakers-to-avoid-questions-that-could-harm-the-govt.html>, Myanmar Times, October 7, 2016, <http://www.mmmtimes.com/index.php/national-news/nay-pyi-taw/22959-don-t-ask-tough-questions-checks-on-power-out-the-window-as-nld-exerts-its-majority.html>,

⁷¹ See <https://www.hrw.org/asia/burma> and <https://www.civilrightsdefenders.org/country-reports/human-rights-in-myanmar/>

land for their survival and livelihood. The majority are smallholder farmers. The issue of land rights has gained increased prominence since 2011 when the government initiated reforms and started attracting foreign investment in order to expand the economy and reduce poverty. Since then, land seizures have become increasingly common. An October 2016 report found that land conflicts in Myanmar have escalated in recent years.⁷²

Transnational Institute (TNI) has identified three types of issues with land rights in Myanmar.⁷³ The first situation involves people who previously had land but have been pushed off due to civil war, armed conflict or natural disaster. These IDPs and refugees want to return to their original place, which is their right under international human rights law and international humanitarian law (the Pinheiro Principles). This right to return is also supported by the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security which Myanmar has endorsed, and supported by Myanmar's NLUP adopted in January 2016. In practice however, few IDPs and refugees are successful in getting back their land.

The second situation involves rural working people who have been able to hold onto their land so far but are in a weak position and vulnerable to land grabbing. This vulnerability has become only more so by the two 2012 land laws, namely the Farmland Law and the Vacant, Fallow & Virgin Land Law. While providing for certificates of ownership and the selling of rights to land, the Farmland Law requires prospective land owners to register at local Farmland Management Committees. These committees are appointed by the government with no representation from farmers, leaving them vulnerable to corruption and commercial interests. Also Section 29 of the Farmland Law allows the government to confiscate land on the basis of national interest. The Vacant, Fallow & Virgin Land Law allows the government to declare land unused and assign it to foreign investors or designate it for other uses.⁷⁴ Another problem is the lack of full entitlement and guaranteed respect for land ownership regulated under customary tenure systems.

The third situation involves rural working people who for one reason or another have little or no land on which to build a viable and dignified livelihood. Amongst others, this is the situation of family members excluded from ownership/inheritance such as women, in areas where land concentration⁷⁵ has been taking place, or amongst migrants.

Landless households in Myanmar comprise an estimated 35 to 53 percent of the national rural population (lowlands). A study found that 44 percent of households were landless; those with land had an average holding of 3.6 acres, less than the 5-acre minimum required to sustain a household.⁷⁶

Food security/food sovereignty

The right to food is closely linked to the concept of food security. Food security in Myanmar is a challenge, both at the household and national level. Hunger, undernourishment and

⁷² Lutheran World Federation, see <https://myanmar.lutheranworld.org/content/upr-fuller-report-2>

⁷³ See <https://www.tni.org/en/article/the-right-to-land-at-crossroads-in-myanmar>

⁷⁴ The agriculture ministry's 30-year Master Plan for the country's agriculture sector (2000-01 to 2030-31), for example, aims to convert 10 million acres of 'wasteland' - a term signifying 'modernity' where the only 'good' land is 'productive' and 'efficient' - for private commercial agricultural production.

⁷⁵ Meaning concentration of land in fewer, larger farms/agribusinesses.

⁷⁶ 2007 study of remote MASRIS, 2004, "Agriculture Sector Review Investment Strategy." Vol. 1. Sector Review. Food and Agriculture Organization (FAO). 2007. "Identification and Assessment of the Poor, Food Insecure and Vulnerable in the Union of Myanmar." GCP/INT/952/EC-MYA. EC/FAO Cooperative Program.

malnutrition affect large segments of the Myanmar's population and it is a serious problem among the poor. It is estimated that approximately 15% of Myanmar's population were undernourished in 2016.⁷⁷ Food poverty is higher in rural areas than in urban areas. Food insecurity is the highest in Chin State.

There are key natural and human-induced reasons for food insecurity in Myanmar. Unstable climate conditions have made agricultural production difficult to sustain, as well as natural disasters. On the human side, fragmentation of land holdings and landlessness due to mining, agribusiness and construction projects make it difficult for people to fulfill their daily needs. Extraction of resources with little concern for ecological impact has caused further devastation. The presence of the Myanmar military, ethnic militias and land mines has also limited border communities' access to land and forests.

At present, 70% of Myanmar's population relies on smallholder farming. In many ways, at present a material struggle over land is taking shape to convert subsistence agricultural landscapes and localized food production into modern, mechanized industrial agro-food regimes.⁷⁸ Farmers, meanwhile, suffering from this change, are starting to develop their visions for food sovereignty.⁷⁹ However, food sovereignty as a word is still a relatively new concept in Myanmar. Few people know of the concepts, and less than a handful of organisations approach food security through a rights-based lens.⁸⁰

Adequate housing

The fact that the government has obligations to realize the right to adequate housing does not mean that they need to build a good house for everyone. Their obligation is to create the conditions, through law and policy, so that in the future everyone will have access to adequate housing. Particularly due to conflict, many people in Myanmar lack adequate housing. Forced evictions, due to conflict, militarization, natural resource exploitation, and infrastructure development are also common. In case of many of these evictions, government duties before, during and after eviction are not being followed, such as adequate information sharing about the eviction, consultation, and adequate compensation and/or relocation.

Self-determination

Myanmar's ethnic minorities make up about 30 to 40 per cent of the population. As mentioned in the previous section, non-'indigenous' ethnic groups, such as the Burmese Chinese, Nepali and Indian ethnic minorities and Muslim Rohingya, hold either limited or no citizenship at all.

Minority rights (e.g. the 1992 UN Minorities Declaration) in situations of multi-nation states where there are multiple national minorities such as in Myanmar are increasingly interpreted as requiring states to act to make it possible for minorities to maintain their distinct cultures, languages and religions, which may be achieved through the provision of autonomy under certain circumstances.

In Myanmar, this desire for self-determination was long seen as an act of rebellion. In recent

⁷⁷ See <https://knoema.com/atlas/Myanmar/Food-deficit-of-undernourished-population>

⁷⁸ Kevin Woods, 2015, "Food Sovereignty: a Critical Dialogue. The politics of the emerging agro-industrial complex in Asia's 'final frontier': the war on food sovereignty in Burma", p. 1

⁷⁹ Food sovereignty is also explained as the right of everyone to determine their own agricultural and food policy and to produce food ecologically, socially and locally.

⁸⁰ Interviews with CSO representatives, February 2017

years, this has been changing to some extent, and particularly in the education sector some reforms have taken place including a degree of decentralisation. It is now largely acknowledged that peace can only be achieved when ethnic nationalities will have more control over their territories, and discussions about a more federal constitution are now openly held. In the meantime, ethnic or indigenous people continue to face problems of land confiscation in relation to infrastructure projects such as dams, pipelines and mines, displacement, and lack of environmental impact assessments and free, prior and informed consent.⁸¹

3.3. The IPA's potential impact on land rights, particularly the right to food and its fair distribution, the right to adequate housing and the right to self-determination including rights of indigenous people.

As mentioned at the beginning of the previous section, governments have an obligation to protect people's rights from violations by other people, including by business enterprises⁸², and to regulate under human rights law. However, investment agreements such as the pending EU-Myanmar IPA may affect the exact contours of the States' ability to do so. This section primarily focuses on the obligation to protect people's rights from violations by other people, while the next chapter looks at the obligation to regulate under human rights law.

Key when analysing whether the IPA may lead to negative results for land related human rights, particularly the right to food and its fair distribution, the right to adequate housing, and the right to self-determination including the rights of indigenous people is to look at the implications of the various provisions. At the same time one should look at whether there are sufficient provisions in the IPA to counteract these risks – thereby enabling the government to maintain its duty to respect, protect and enact human rights. Such provisions can include specific clauses or remedies for human rights violations and effective enforcement and grievance mechanisms for affected communities.

Overall, the EU's Sustainability Impact Assessment suggests there are 5 human rights potentially affected by the EU-Myanmar investment agreement, namely right to property⁸³, right to due process, freedom of opinion and expression, indigenous people and adequate standard of living. The IPA is expected to have definitive positive direct impact on the freedom of expression and assembly and the right to due process.⁸⁴ There is little explanation or justification of why these rights are primarily affected and not other rights such as the right to food. Moreover, the provided analysis provides little insight in the likelihood and severity of the risks suggested.

FIDH suggests adding the right to peaceful assembly, to non-discrimination, the right to equal

⁸¹ See the submission to the Universal Periodic Review by the Coalition of Indigenous People's in Myanmar/Burma (CIPM) of 21 July 2015, http://www.burmalibrary.org/docs21/NEED-Coalition_of_IPs_in_Myanmar-2015-03-Submission_to_UPR-en-red.pdf. CIPM is a group representing 24 indigenous rights organisations in Myanmar.

⁸² Also see the United Nations Office of the High Commissioners Guiding Principles on Human Rights and Business

⁸³ It should be noted that the right to adequate housing is not the same as the right to property. As stated in Reference note 21 from UN Habitat and Office of the United Nations High Commissioner for Human Rights: "The right to adequate housing is broader than the right to own property as it addresses rights not related to ownership and is intended to ensure that *everyone* has a safe and secure place to live in peace and dignity, including non-owners of property. Security of tenure, the cornerstone of the right to adequate housing, can take a variety of forms, including rental accommodation, cooperative housing, lease, owner-occupation, emergency housing or informal settlements. As such, it is not limited to the conferral of formal legal titles."

⁸⁴ Development Solutions, 2016, Sustainability Impact Assessment in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, p. 156

treatment before law, prohibition of arbitrary arrest, to be protected against excessive use of force, right to health, right to food and the right not to be subjected to forced resettlement.⁸⁵ However, FIDH also does not substantiate why these rights ought to be added.

This paper argues that there are significant risks for land rights, including for the related human rights of the right to food and its fair distribution, the right to adequate housing, and the right to self-determination including the rights of indigenous people.

Land rights

In general, more investment – whether from the EU or any other investor - in places with weak land tenure and frequent land-grabbing is likely to lead to further violations of land related human rights.

The Land Acquisition Act entitles the government to land acquisitions for a company when the acquisition is likely to prove useful to the public. “Useful to the public” is however not further defined. The law does provide for compensation but with limited safeguards. The Farmland Law allows the government to take over farmland in the interests of the state or the public with no further procedural or substantive restrictions. There is a provision for compensation but little or no compensation is normally paid.⁸⁶ The Vacant, Fallow & Virgin Law gives the government the right to repossess lands regarded as ‘vacant, fallow & virgin’ for the implementation of infrastructure projects or special projects required in the interest of the state. As the International Trade Union Confederation notes: “the Vacant, Fallow & Virgin laws and rules means that the government has wide discretion to use the land in the way it wishes for public interests, without possibility of effective administrative or judicial review of land confiscation and resettlement.”⁸⁷

Regarding foreign ownership of land, the 1987 Transfer of Immoveable Property Restriction Act prohibits any sale, transfer or exchange of land to any foreigner or foreign company. Officially Non-Myanmar nationals and companies are only allowed to lease land for a term of less than one year. However, the act allows exemptions from these prohibitions if granted by relevant government ministries when extended to foreign governments, diplomatic missions or other organisations. For the purpose of foreign investment, such exemptions are secured through a Myanmar Investment Commission (MIC) Permit under the Myanmar Foreign Investment Law or through a Special Economic Zone (SEZ) Permit under the SEZ Law, both of which allow foreign investors to lease land for at least 50 years.

With the increase in the level of economic activity, as foreign companies investing in Myanmar access more land, either acquiring or using it, the trend of land grabs has accelerated. Even when companies attempt to follow due process, their business partners may be investing in land that is a product of illegal land grabbing and forceful eviction. Consequently, issues of land ownership may arise, resulting in a situation of uncertainty whether the land belongs to the government or the local community. Companies may have to withdraw or vacate.

⁸⁵ FIDH, 7 December 2015, “Open letter; EU-Myanmar/Burma Investment agreement and its sustainability impact assessment – concerns on the way human rights are taken into account, p. 8

⁸⁶ International Trade Union Confederation, 2015, “Foreign Direct Investment in Myanmar: What Impacts on Human Rights”, p. 20

⁸⁷ International Trade Union Confederation, 2015, “Foreign Direct Investment in Myanmar: What Impacts on Human Rights”, p. 20

Particular attention should be paid to customary tenure and communal land use.⁸⁸ Additional issues arise regarding in land conflict-affected areas not included in national cadastres or considered vacant.⁸⁹

The IPA provisions of expropriation, both direct and indirect, and compensation at fair market value pose direct risk to land rights. Such provisions may encourage investors, including those who are aware that land is an issue in Myanmar, to invest anyway as the risk will no longer be theirs. As noted by several respondents, land is the single big issue that is and should discourage investors from coming in at this moment in time. Myanmar's land governance framework is archaic and allows for extensive land grabs at the expense of communities, including those who have papers.⁹⁰ As noted by one respondent during this research: "At present, there are no land concessions in this country that are not ambiguous."⁹¹

Moreover, in a country like Myanmar, where a lot of land given to investors was taken from communities whose rights were not (yet) adequately protected, it may well be that under possible future land governance systems land will be redistributed to communities. However, the provisions for indirect expropriation may lead to regulatory chill for the Myanmar government, if it is afraid that redistribution and or reform will lead to expensive litigation claims against it (this will be further elaborated in the next chapter).

Right to food

Claims that new investment will alleviate poverty are undermined by reports of widespread grabbing of farmlands and forestlands on which people depend for their livelihoods.⁹² In addition to agribusiness, hydropower, extractives, and economic zones, activities in the oil and gas sector have impacted livelihoods of populations fishing and farming, particularly small-scale subsistence fisheries and farmers exploiting these resources. Myanmar Centre for Responsible Business (MCRB) points to a high vulnerability of local rural and coastal populations to social and environmental impacts due to their overwhelming dependence on land-based subsistence agriculture or local fishing.⁹³

Mining and extractive industrial activities have also led to deforestation, resulting in soil erosion and landslides, thus impacting the quality of forest and farmland and communities' access to food and livelihoods.

According to a December 2015 study by the FSWG, the most vulnerable to food insecurity are the landless (estimated at nearly 50% of rural households at the national level), smallholder farmers, Ethnic minorities, women, children, the elderly and the disabled, and the poorest and the displaced.⁹⁴ As argued in the section above, more investment particularly in

⁸⁸ The lack of legal recognition of customary land tenure and the fact that rural communities often lacked formal land titles, exposes those communities, especially in ethnic minority areas, to land expropriation, according to a 2013 report by Forest Peoples Programme.

⁸⁹ ITUC also reports use of force by the military against local residents to promote business projects and cautions that 'the level of collusion, and the accompanying violations of land tenure and human rights, should be of serious concern to investors'. See International Trade Union Confederation, 2015, "Foreign Direct Investment in Myanmar: What Impacts on Human Rights", p. 22

⁹⁰ Namati. 2017, "Evidence is not sufficient to secure land rights in Myanmar: Impartial and Transparent procedures are critical.

⁹¹ Interview with CSO representative, January 2017

⁹² In 2013, about three quarters of the population depended on farmland and forests for their livelihood, according to the Forest Peoples Programme.

⁹³ Myanmar Centre for Responsible Business, 2014, "Myanmar Oil & Gas Sector Wide Impact Assessment", p. 74

⁹⁴ Food Security Working Group, 2015, "Food Security Related Policy Analysis Myanmar", p. 12-13

agribusiness, hydropower, extractives and economic zones is likely to lead to more land grabbing, increasing landlessness and therefore food insecurity.

More investment in the agricultural sector is also expected to lead to further pressure on the livelihoods of smallholder farmers. In a recent paper, Oxfam details two paths of investment, namely 1) land concessions used for rubber and palm oil plantations, and to a smaller extent corn, sugarcane, biofuels, fruits and other crops, and 2) contract farming agreements with small and medium scale local farmers. Both of these paths carry risks for smallholders and communities who rely on land for their livelihoods. FSWG therefore emphasizes the need for investments that will add value to agricultural products, saying that investments should target biodiversity, value addition and food processing rather than food production.⁹⁵ Regarding contract farming, while it has the potential to increase the income of smallholders as well as provide direct connections to markets, as Oxfam notes “it often fails small-scale farmers because there is inadequate legislative and policy architecture in place to ensure that they get a good deal out of their agreement with the private investor.”⁹⁶ Although data is limited, contract farming is thought to be on the rise in Myanmar.⁹⁷

Another issue is the seed policy and law. Myanmar has enacted a Seed Law in 2011, and has developed a National Seed Policy and a Seed Sector Roadmap 2017-2020 (still to be adopted by the Parliament).⁹⁸ The Seed Law includes the rules and regulations of the seed sector related to government, seed laboratories and seed businesses. Since the increased protection for commercial seed businesses, the hybrid seed industry is quickly developing in Myanmar led by maize, with activity also in cotton and vegetables, and future prospects for hybrid rice. This is leading to a loss of local seeds, as genetically modified organisms (GMOs) destroy and contaminate existing seed systems. National and international legal frameworks protecting intellectual property rights (IPR), including the provisions for IPR in the draft IPA, are further threats to peasant’s seeds. IPR protection regimes such as the International Union for the Protection of New Varieties of Plants (UPOV) were largely devised to protect the interests of the seed and breeder industry. They severely impair access to seeds outside of UPOV by restricting peasant practices and seed management systems, as such threatening traditional systems. At the same time, the new Seed Sector Roadmap explicitly respects/promotes the use of informal, intermediate and formal seed systems.

The “Protecting Rights and Enhancing Economic Welfare of Farmer’s Law” was intended to address some of the challenges to the livelihoods of rural farmers. Provisions include the inclusion of the protection of farmer’s rights, and specific mention of meeting the needs of small-hold farmers and the issue of land rights. However, concerns remain over ambiguity in the definition of farmers and inputs amongst other issues.

Right to adequate housing

Like threats to the right to food, threats to the right to adequate housing are largely related to land grabbing. More investment in the context of Myanmar’s weak tenure situation and frequent land grabbing is likely to result in more frequent eviction and inadequate

⁹⁵ Interview with CSO representative, February 2017

⁹⁶ Oxfam, 2016, “Whose Crops, at What Price. Agricultural Investment in Myanmar”, p. 14

⁹⁷ Ibid

⁹⁸ The Seed Law was formulated by the Ministry of Agriculture and Irrigation, with no participation from the private sector and from the local individual farmers. The National Seed Policy was written with the assistance of the FAO and has been developed through a participatory process, including major public and private sector stakeholders of Myanmar’s seed industry. Ideally, the Seed Policy would have preceded the Seed law. See FSWG, 2015, “Report on the Policy Analysis of the Myanmar Seed Law and Seed Policy”, p. 4

compensation.

Governments and companies may need to resettle communities as part of a land acquisition process to acquire land for a business project. This involves acquiring their land, building new housing for them in a new location, relocating them to the new location and helping them to reestablish their livelihood activities. Resettlement can be voluntary or involuntary. Involuntary resettlement (also known as forced relocation) of communities can only be conducted by government and in accordance with national law and international human rights protections. It must be for a public purpose to promote national security, economic development, or protect the health of the population. It should be a last resort and feasible alternatives should be explored with affected communities.

In Myanmar however, the Land Acquisition Act provides no provisions concerning resettlement. Forced eviction is common, without due process or compensation. As with land-grabbing, an IPA would legitimize land obtained from the government and protect investors from possible future corrections.

Right to self-determination

Stakeholders including TNI and ACT Alliance have raised concerns that the implementation of the IPA could negatively impact the rights of Myanmar's ethnic nations. Overall, the ITUC recommends that companies should not invest in large-scale development projects in Myanmar's conflict areas until durable peace agreements are established.⁹⁹ Also, the need to avoid constraining the policy options of Myanmar's sub-central levels of government - particularly those in conflict and transitional regions - was underscored. As a respondent noted during interviews, the largest concern around the IPA relates to the rights of indigenous peoples and future plans/reforms for their governance.¹⁰⁰

A partial remedy to the risk identified by TNI might be found in the form of a provision such as Article 7 of the Japan-Myanmar BIT that states that non-conforming measures as designated in Self-Administered Divisions and Self-Administered Zones in Myanmar are exempt from the coverage of the IPA. But this would still exclude many parts of Myanmar that are under mixed or ethnic administration without the designation of Self-Administered Division or Zone. Moreover, unlike the Japan-Myanmar BIT, the EU-Myanmar IPA covers only the post-establishment phase, meaning that investors will have to meet the requirements of applicable domestic law when they establish their activity in the host country.¹⁰¹

3.4. Expected directions of EU investment and related impacts

The severity of some of the risks elaborated above will depend on the direction of EU investment in Myanmar. As the EU's Sustainability Impact Assessment states: "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."¹⁰²

⁹⁹ International Trade Union Confederation, 2015, "Foreign Direct Investment in Myanmar: What Impacts on Human Rights", p. 20

¹⁰⁰ Interview with CSO representative, January 2017

¹⁰¹ Post establishment means the IPA only refers to investments that are already established or admitted. Pre establishment also refers to the free entry of investments and investors of a Party.

¹⁰² Development Solutions, 2016, Sustainability Impact Assessment in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, p.

In some sectors the risks of serious human rights concerns are higher, due to which the chance that more EU investment, if directed there, could lead to a worsening of the current human rights situation is much higher.

According to data collected by the Euro Chamber, European Companies are currently most active in transportation and storage (21.4%), followed by manufacturing (12.5%) and construction (10.7%).¹⁰³

When talking with private sector representatives about the future, most new investment is anticipated for the energy sector, followed by agribusiness. As stated in the 2016 Business Confidence Survey, “Untapped potential in the energy sector – particularly hydropower, oil reserves, together with a low electrification rate, provides foreign investors with an early mover advantage.”¹⁰⁴ While agribusiness is a long-term investment with slow profitability, more investment is also expected in this sector. Finally, manufacturing and construction are expected to continue to grow.¹⁰⁵

Given the land-intensiveness of both the energy and agribusiness sector, negative impacts on human rights are therefore rather likely.

¹⁰³ Business Confidence Survey 2016, 2016. p. 15 See http://eurocham-myanmar.org/uploads/38a17-eurocham_business-confidence-survey.pdf. For this survey 103 European companies active in Myanmar were contacted and 56 responded, giving the survey a completion rate of 57.7%.

¹⁰⁴ Business Confidence Survey 2016, 2016. p. 21 See http://eurocham-myanmar.org/uploads/38a17-eurocham_business-confidence-survey.pdf.

¹⁰⁵ Interview with private sector representative, January 2017

Chapter 4: Implications for Future Legal Reform

One of the, if not the most controversial provision in the draft EU-Myanmar IPA is the provision for investor-to-state dispute settlement (ISDS) as an alternative to Myanmar's national judicial system. Such an ISDS clause, which forms a standard part of many investment agreements, enables foreign investors to bypass national courts and take a complaint to an international tribunal consisting of three commercial investment lawyers. These lawyers then decide whether the accused government measures are legitimate or proportionate to their objective.

While to some extent it is understandable that Europe wants to keep its companies out of Myanmar's courts, as Myanmar's judiciary continues to be rather under-resourced, under-resourced, politically influenced and lacking in independence¹⁰⁶, the alternative of commercial investment lawyers is problematic too. These for-profit lawyers may award compensation that may run into many hundreds of millions or even billions of dollars. Such awards are enforceable and must be paid out of public budgets, reducing the funds that are available for public policies.¹⁰⁷ Notable cases are the lawsuits of Swedish Energy company Vattenfall against Germany for adopting nuclear-phase out legislation as a response to the Fukushima disaster in Japan, and Canadian oil and gas company Lone Pine suing against a fracking moratorium in the State of Quebec.

ISDS has 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, and costly and lengthy procedures with limited or no transparency. Moreover, these courts are only accessible to investors, while communities often have to rely on underdeveloped national legal systems that do not provide adequate access to justice. Evidence shows that many of the 608 arbitration awards that have become known globally, have overridden national law and hindered States in the sovereign determination of fiscal and budgetary policy, labour, health and environmental regulation, and have had adverse human rights impacts, also on third parties, including a "chilling effect" with regard to the exercise of democratic governance.¹⁰⁸

As such, there is growing opposition to such far-reaching investment protection. ISDS was an important reason for European opposition against the Transatlantic Trade and Investment Partnership (TTIP), and the Comprehensive Economic and Trade Agreement (CETA) with Canada. In Asia, recently 316 CSOs presented a joint letter to the Regional Comprehensive Economic Partnership (RCEP)¹⁰⁹ governments urging them to exclude (ISDS) provisions from the deal and demanding instead a new trade model that helps to develop sustainable societies, by supporting local economies, workers' rights, and food sovereignty.

In response to criticisms, in 2016 the European Commission proposed a new system for resolving disputes between investors and states, namely the Investment Court System. The new court system would include a First Instance Tribunal and an Appeal Tribunal, would consist of publicly appointed judges comparable to those in the International Court of Justice

¹⁰⁶ OECD, 2014, Investment Policy Reviews: Myanmar, p. 27

¹⁰⁷ TNI, 2016, "Investment protection treaties endanger democratic reform and peace initiatives in Myanmar"

¹⁰⁸ Statement of Mr. Alfred-Maurice de Zayas Independent Expert on the promotion of a democratic and equitable international order at the Human Rights Council 30th Session, Geneva, 16 September 2015

¹⁰⁹ Proposed free trade agreement between the ten member states of ASEAN and Australia, China, India, Japan, South Korea and New Zealand

and the WTO, and would enshrine government's right to regulate.¹¹⁰ However, INGOs such as TNI have criticised that under the new system some of the old controversial cases could still be launched.¹¹¹

Politicians have started to look into the issue more carefully. In the political debate surrounding the signing of the CETA agreement between the EU and Canada, the Parliament of the Belgian region of Wallonia requested and obtained the concession that the compatibility of ICS with the European Treaties should be judged by the European Court of Justice. Subsequently, in November 2016 civil society from Myanmar and the EU called for the suspension of negotiations until the European Court of Justice has ruled on the compatibility of ICS with the EU Treaties.¹¹²

Generally, 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. Policy space for the Myanmar government and people, meaning freedom to legislate is essential to raise standards of social, environmental and human rights protection. As such, the agreement needs to avoid placing restraints on Myanmar's government on the basis of for example the threat of indirect expropriation. The threat of foreign investors having recourse to ISDS or even ICS might restrain Myanmar's government from implementing domestic policy measures to promote social inclusion, labour rights or environmental protection, if the domestic measures envisaged may pose a risk to the value of a foreign investment and therefore provide ground for litigation.¹¹³

4.1. Land governance reform

Land-related policies and laws including those currently under revision, pending approval or recently passed

- 2008 Constitution Article 37: "The Government is the ultimate owner of all land"
- Land Acquisition Act (1894 – new version being drafted)
- Farmland Law (2012)
- Vacant, Fallow & Virgin Land Law (2012)
- National Land Use (2016)
- Forest Policy and Forest Law (awaiting new version)
- National Environmental Policy (draft from December 2016)
- Foreign Investment Law (2016, investment rules pending)

At present, Myanmar lacks an overarching piece of legislation governing land ownership and land use. Instead, there is a patchwork of laws related to different types of land, from forest, farmland, fallow land and industrial land. In total more than 30 laws govern land management, some of them dating from the 19th century British colonial period.

Since last year, Myanmar is at the beginning of what could potentially be a large overhaul of its land governance system. The new NLUP adopted in January 2016 aims to harmonise

¹¹⁰ See http://europa.eu/rapid/press-release_IP-15-5651_en.htm

¹¹¹ See TNI, 2016, Investment Court System put to the test: New EU proposal will perpetuate investor's attacks on health and environment

¹¹² See <https://www.tni.org/en/article/suspend-negotiations-for-an-investment-protection-agreement-between-the-eu-and-myanmar>

¹¹³ A private sector representative stated that European companies are not likely to sue a government for raising environmental standards because of reputational risk. While that may be true, the possibility that they would may still cause regulatory chill.

existing laws and guide development of a new land law. As stated by a key commentator “The NLUP uses rights-based language in its basic principles. It refers directly to human rights standards in chapters related to land acquisition, the land use rights of ethnic minorities and is framed with explicit reference to the equality of men and women.”¹¹⁴ On the basis of these rights, the NLUP proposes some changes for Myanmar’s land governance system. Some of the key new directions in this policy include:

- Recognition of customary land tenure including decision making power (discussed in core sections of the NLUP)
- Explicit recognition and protection of land under rotating and shifting cultivation and customary cultivation practices.’ It could be argued that the provision on recognition and protection of ‘natural resources and ecological system[s] that provide shared livelihood and socio-economic development benefits to the surrounding communities’ (paragraph 29e) provides further recognition and protection of those surrounding communities and their access and control of said natural resources and local ecosystems¹¹⁵
- References to a need for participatory, transparent and accountable processes and dispute resolution
- It promises to avoid the loss of land use along with the protection of the environment. Pledges to develop new procedures and ensure environmental and social impact assessments are reallocated
- When the relocation of communities is claimed to be necessary for an overriding public purpose, the NLUP calls for public consultation, negotiation and participatory decision-making, with preference given to local stakeholders

For these provisions to become effective, they will have to be turned into law. At present, it is unclear what shape a potential new Land Law might take. In fact, mid November, the Commission for the Assessment of Legal Affairs and Special Issues headed by Shwe Mann wrote a memo to Parliament and the President’s Office outlining five components of the policy that it advises cancelling and six components for revision. The elements suggested for deletion include; the establishment of a land information management body; new special courts and independent arbitration mechanisms for land disputes; explicit mention of ethnic land rights and customary land tenure practices; and an entire section on gender equality.¹¹⁶ This action makes it even more unclear what will happen with the new NLUP and whether or how it will be translated into law.

One change that is ongoing, is an amendment to the 1894 Land Acquisition Act, which has allowed for a lot of bad practices of land acquisition. As commented: “Although it stipulates procedures for preliminary investigations, notification, and objections – which would help mitigate land-related human rights abuses – in practice they have rarely been followed. Inadequate compensation is a common complaint as people rarely get market value for their land. At the same time, the courts have proven reluctant to address politically and economically sensitive cases.”¹¹⁷ While some people have seen first drafts, the process has not been very open and consultative so far.

¹¹⁴ Article in Frontier by Daniel Aguirre, 19 February 2016, see <http://frontiermyanmar.net/en/sound-basis-land-reform>

¹¹⁵ See <https://www.tni.org/en/article/the-right-to-land-at-crossroads-in-myanmar>

¹¹⁶ See <http://country.eiu.com/article.aspx?articleid=364951420&Country=Myanmar&topic=Politics&subtopic=Forecast#>

¹¹⁷ Article in Frontier by Daniel Aguirre, 19 February 2016, see <http://frontiermyanmar.net/en/sound-basis-land-reform>

There has been an on-going process of government engagement with civil society to revise the Farmland Law and Vacant, Fallow & Virgin Land Law – particularly with regard to increasing the representation of these groups in Farmland Administration Bodies and potentially also other decision-making committees. Largely, the demand for reforms of the two land laws has so far been subsumed by other priorities.¹¹⁸ Recently however, there were new strong calls to look into these laws¹¹⁹ and the government has also recently indicated it wants to amend these laws.¹²⁰

End of 2015, the OneMap Myanmar project was initiated. OneMap Myanmar will combine all the spatial data of government departments and development organisations by 2020. Access to and use of land use information of the whole country will be publically available through open web platform in transparent manner. Amongst others, the work also aims to lead to data on average prices companies are paying for concessions, which overall are known to be very low. It is expected that the government, once confronted with the very low price of land, may decide to call for a moratorium.¹²¹

A number of organisations has already called for a large-scale land concession moratorium for other reasons, particularly in relation to agribusiness. In May 2016, Fauna & Flora International called for oil palm moratorium to protect Myanmar's rainforest.¹²² In August 2016 Oxfam recommended the Government of Myanmar to cease granting large-scale concessions until the new NLUP is being effectively implemented and a Land Law is passed.¹²³ Early 2017, FSWG "recommended to put a hold on awarding further concessions until a more transparent, equitable process is put in place, and the backlog of conflicts and ambiguities of existing contracts has been cleared."¹²⁴ Several (ethnic) groups have also called for a moratorium on hydropower, including TNI¹²⁵ and KESAN¹²⁶. At present the International Finance Corporation together with the Ministry of Electric Power and the Ministry of Natural Resources and Environmental Conservation also launched Myanmar's first ever Strategic Environmental Assessment for Myanmar's hydropower sector.

There are also other new upcoming policies and laws that will be shaped, ostensibly under the guidance of the new NLUP. The current Forest Law and Forest Policy date from 1992 and 1995, and both are expected to be updated.¹²⁷ Drafts of the new Forest Law have already circulated and changes include more effective and efficient procedures concerned with forest management and conservation.¹²⁸ There are also rumors the environmental conservation law might change.¹²⁹

¹¹⁸ Interview with CSO representative, January 2017

¹¹⁹ See <http://www.mmtimes.com/index.php/national-news/yangon/24585-report-urges-review-of-land-laws-to-protect-small-scale-farmers.html>

¹²⁰ See <http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/24943-two-laws-to-be-amended-to-solve-land-disputes.html>

¹²¹ Interview with CSO representative, January 2017

¹²² See <http://www.fauna-flora.org/news/fauna-flora-international-calls-for-oil-palm-moratorium-to-protect-myanmars-rainforest/>

¹²³ Oxfam, 2016, "Whose Crops, at What Price. Agricultural Investment in Myanmar", p. 6

¹²⁴ Food Security Working Group, 2017, Investments in Agribusiness, p. 9

¹²⁵ Nang Shining for the Transnational Institute, see <https://www.tni.org/en/article/hydropower-in-myanmar-for-whose-benefit>

¹²⁶ See http://www.greengrowthdialogue.org/sites/greengrowthdialogue.org/files/publication_docs/KESAN_Hydropower_GreenLotus_Oct18_2014_0.pdf

¹²⁷ Interview with CSO representative, January 2017

¹²⁸ Kevin Woods and Kerstin Canby, 2012, "Forest Certification in Myanmar", p. 2. Also see <https://news.mongabay.com/2016/09/myanmars-forests-face-myrriad-problems-as-logging-ban-continues/>

¹²⁹ Interview with CSO representative, January 2017

Altogether, the need for land reform is the key motivation for opposition to the EU-Myanmar IPA. Even if the right to regulate is strongly included in the agreement, civil society argues there are risks. As one respondent noted:

“If Myanmar already had a decent land governance system in place, an IPA could be okay. But given the fundamental issues with land issues, it is simply not the time to attract more investment and provide these investors with protections. The country must have leeway to deal with land concessions. It is not unthinkable that in the future there will be regulation granting communities more ownership over land in their villages. If companies are already operating on those lands, the government will then either have to force villagers to accept that, or the government would have to pay compensation.”¹³⁰

4.2. Investment law reform

Investment and related laws currently under revision, pending approval or recently passed¹³¹

- 2016 Myanmar Investment Law and forthcoming investment rules
- National Environmental Policy (draft from December 2016)
- Banks and Financial Institutions Law (2016)
- Pesticides Law (1990), Fertilizer Law (2002) (under revision)
- Farmer Protection Act (2013)
- Copyright Law, Patent Law, Trademarks Law, Industrial Design Law (draft)
- Intellectual Property Law (draft)
- EIA rules (2016)
- Climate Change Strategy (2016-2030) (nearly finished)
- Hotels and Tourism Law (new draft)
- Myanmar Companies Act (has been revised, expected to be passed in coming months)
- Special Economic Zone Law (2014)
- Arbitration Law (2016)
- New Plant Varieties Protection Law

Foreigners can invest in Myanmar under the foreign investment framework provided under the Myanmar Companies Act, the Myanmar Foreign Investment Law and the SEZ Law. Through these laws, foreign investors can establish a foreign branch office in Myanmar, incorporate a private limited company, apply for and secure an investment permit from the MIC, or apply for and secure an investment permit from the relevant Myanmar SEZ Management Committee (SEZ permit).

Similar to land governance, one of the most pressing problems of the current investment regulatory framework is its complexity, with half a dozen laws regulating the entry of investors, depending on the sector and location of the investment and on whether or not the investor is foreign. The approval process is equally complex, with foreign investors sometimes requiring overlapping approvals and facing detailed and often opaque criteria for scrutinising

¹³⁰ Also note that the draft EU-Myanmar IPA grants protections to ‘investments existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter, meaning it limits the space for the government to address injustices of the previous military government.

¹³¹ For a more complete overview see the OECD 2014 Myanmar Investment Policy Review, p. 26

individual projects.¹³²

At present, both the Myanmar Companies Act and the Myanmar Investment Law (MIL) and the related Investment Rules are being overhauled. These processes will likely be complete before the potential passing of an EU-Myanmar IPA. The MIL has already been passed and will come into force with full effect in April 2017. The second draft of the Myanmar Investment Rules were released on 4 February 2017 and are expected to be finalised by the end of March.¹³³ For both the new MIL and related rules, the government has been working closely with the World Bank's group International Finance Corporation.

This means that some of the risks raised in relation to a potential IPA, are either already created by or addressed in the new MIL. It also means that no further major legislative reforms in the area of investment are to be expected for the coming years.

The objective of the updated MIL is explained in the law's preamble:

This Law replaces and consolidates the Foreign Investment Law (Law No. Pyidaungsu Htluttaw Law No. 21, 2012, 2 November 2012) and the Myanmar Citizens Investment Law (Law No. Pyidaungsu Htluttaw Law No. 18 of 29 July 2013). The objective of the Law is to promote environmentally and socially sustainable economic growth and diversification of the productive sector of the Union. The Law also intends to provide investors, both domestic and foreign with a set of fundamental and enforceable legal rights and guarantees. The Law also upholds the principle of transparency, fairness and the rule of law, in accordance with accepted international standards and practice.

Of relevance to land rights, is that the new Law seeks to reduce barriers to the lease of land for long term investment uses by both domestic and international group. This has the potential to severely affect those whose tenure on the land they are using is not recognised, as well as those whose financial situation is weakening. The relevant passage from the Law is shown below (Government of the Republic of the Union of Myanmar, 2015):

All Investors have the right to lease land either from private land-holders or from Government Entities in the case of State land, based on the category of usage including industrial, agricultural, livestock breeding and other forms of investment for a period to be agreed between the investor and the lessor. For Foreign Investors the right to lease land up to a maximum period of 50 years is guaranteed with an extension of 10 years and for a further 10 years thereafter.¹³⁴

When used in conjunction with other pieces of legislation such as the Virgin, Fallow & Vacant Act of 2012 or the 1894 Land Acquisition Act, there is strong potential for this provision to negatively affect landholders in favour of investors.

Key provisions also provided by the MIL include Most Favoured Nation, Fair and Equitable Treatment and the Right to Regulate. With regards to the regulate, the ICJ has commented that the MIL includes key provisions protecting the government's 'right to regulate' in favour of human rights and the environment.¹³⁵

¹³² See OECD 2014 Myanmar Investment Policy Review, p. 26

¹³³ see http://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/mir_-_draft_rules_tranche_1_to_3_557979_singapore_33378_0.pdf, also presentation by Aung Naing Oo at the Myanmar Social Impact Forum on 28 February.

¹³⁴ Section 13

¹³⁵ See <https://www.icj.org/myanmar-public-consultation-improves-new-draft-investment-law/>

To the government's credit, it organised a number of consultation meetings for the MIL and accepted extensive civil society input. First drafts of the new Investment Law included ISDS, but following severe civil society criticism, this was eventually taken out. The final version of the MIL requires that a separate arbitration agreement is already in existence, which will then be enforced.¹³⁶ Myanmar has recently acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which would allow Myanmar's courts to recognise arbitral awards made in jurisdictions party to the same convention. The country's government also recently enacted the 2016 Arbitration Law that is intended to provide a framework capable of supporting the recognition and enforcement of foreign arbitral awards by Myanmar courts.

Some respondents to this research stated that due to civil society's focus on getting ISDS taken out, less lobby efforts could be made regarding other elements of the law.¹³⁷

Also, as per a commentary on the second draft Myanmar Investment Rules by EarthRights International, Oxfam, the International Commission of Jurists (ICJ) and MCRB, "the Draft Rules do not address the problematic timing issue that exists between the MIC process for investments that require a Permit and investors' responsibility to obtain an Environmental Compliance Certificate as per the EIA Procedures."¹³⁸

Overall, it appears that with the new MIL and investment rules, Myanmar has made steps towards better regulation of responsible business conduct in its national laws¹³⁹, while several concerns also remain, particularly in relation to land rights and environmental concerns. These are also not being solved with the EU-Myanmar IPA.

4.3. Other reform processes

Another, more general key point of tension between a potential EU-Myanmar IPA and domestic legislative reform sits in relation to the peace process Myanmar is currently going through, and which according to the NLD's 12 point economic policy is a national priority.¹⁴⁰ Given the discussions about federalism, it may well be that in the future Myanmar will change for example revenue arrangements governing an investment, following decisions on revenue sharing with States and Regions. Another example is ownership of companies, which subnational governments may want to limit. Or that in the future ethnic states will be allowed to adopt their own subnational policies and regulations, for example around land governance, as is well hoped by most ethnic actors.¹⁴¹ Who will then be responsible for the potential negative impacts these may have on investors with investments in Ethnic States? The EU-Myanmar IPA does not require any further scrutiny of investments in conflict and border areas, or consider the role of other non-government actors, including Ethnic Armed Organizations that may be operating in proposed investment areas. This risks allowing investments in conflict and border areas that may exacerbate and fuel conflict in these areas and jeopardize the peace process. As also raised in relation to the new Investment Rules, there should be more discussion about the type of scrutiny the MIC should give to investments

¹³⁶ Section 85(b)

¹³⁷ Interviews with CSO and INGO representatives, January 2017

¹³⁸ See Joint submission by EarthRights International, Oxfam, ICJ and MCRB, <http://www.myanmar-responsiblebusiness.org/pdf/2017-02-07-Investment-Rules-Commentary-Tranche.pdf>

¹³⁹ During interviews, a respondent noted that the new MIL affords enough protection to foreign investors, including the EU.

¹⁴⁰ See <http://www.mmmtimes.com/index.php/business/21664-nld-12-point-economic-policy-announcement.html>

¹⁴¹ Interview with CSO representative, February 2017

undertaken in Border areas, as “This is an area of democratic governance in Myanmar that is of utmost importance - and should be subject to national debate and participatory reform as part of the comprehensive peace process currently underway.”¹⁴²

4.4. The right to regulate

The “right to regulate” refers to the state's ability to legislate and adopt administrative acts without running the risk of having to pay damages as the result of a dispute based on an IPA. For provisions in the ‘right to regulate’ clause to be strong enough to allow the Myanmar government to enact legitimate legislation without facing law suits, they need to be strongly formulated. Overall, the dispute resolution mechanism should be clearly confined to investment protection obligations, excluding legitimate policy actions, especially those taken for protection of human rights, labour rights or environmental protection.¹⁴³ Given the latest text is not public, it is unclear whether the right to regulate is duly formulated.

On the basis of the draft text from May 2015, FIDH argues the right to regulate is not duly formulated:

“CETA and TTIP’s innovations show just how much of a need there is for caution and to avoid rushing to conclude problematic agreements. Compared to other investment agreements, the CETA offers a more precise formulation of some provisions (such as on expropriation) and offers some innovation regarding ISDS (mainly the possibility to agree later on an appeal mechanism and code of conduct for arbitrators, the possibility for the parties to agree on specific interpretation and transparency rules in ISDS). However, those proposals, despite some positive improvements, only provide a partial answer to human rights challenges. Improvements have been qualified as positive, but largely insufficient and mainly cosmetic. Facing strong opposition, the Commission suspended the negotiation of TTIP and promised reforms. The new model provided for TTIP proposes notably a new clause on the right to regulate, a professionalised ISDS Court (instead of the ad hoc arbitral tribunals), an appeal mechanism, and provides additional elements that may help to preserve the autonomy of the EU legal order. Once again, those innovations are interesting, but do not appear to address human rights concerns. In that regard, and noting that the disproportionate effects on human rights shown in table 9 of the SIA incentive report remain unchanged, other options need to be framed.”¹⁴⁴

However, during interviews a respondent noted that it appears that in later drafts of the EU-Myanmar IPA the right to regulate is now adequately formulated.¹⁴⁵

¹⁴² See Joint submission by EarthRights International, Oxfam, ICJ and MCRB, <http://www.myanmar-responsiblebusiness.org/pdf/2017-02-07-Investment-Rules-Commentary-Tranche.pdf>, p. 2

¹⁴³ Development Solutions, 2016, Sustainability Impact Assessment in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, p. 154

¹⁴⁴ FIDH, 7 December 2015, “Open letter; EU-Myanmar/Burma Investment agreement and its sustainability impact assessment – concerns on the way human rights are taken into account, p. 10

¹⁴⁵ Interview with CSO representative, January 2017

Chapter 5: Potential Positive Implications

5.1. Will an IPA lead to more investment?

The key argument used by proponents of the IPA is that Myanmar needs more investment, and that an IPA will lead to more investment. Both representatives of the European private sector as well as the Directorate of Investment and Company Administration (DICA) emphasized that the Myanmar needs more investment in order to reduce poverty and achieve its development goals.¹⁴⁶

Looking at the context, there has been a decline in foreign investment in 2016. Between April and December 2016, the value of approved FDI decreased 28% from the same period in 2015 to USD 3,5 billion. Total FDI in the last fiscal year was down with USD 1 billion from the previous year. Generally, this is attributed to foreign firms waiting to see what is becoming of new laws and regulations by the new government. The coming into effect of the New MIL in April this year is expected to boost FDI.¹⁴⁷

Given that Myanmar has already concluded 12 BITs¹⁴⁸, and that there are the investment protection provisions agreed to in the framework of ASEAN, the EU-Myanmar IPA would ensure a level playing field for EU investors, and combined with more overall regulatory clarity this is expected to boost the amount of European FDI.

Looking at international research, evidence that international investment agreements deliver on their stated purpose is inconclusive. Most research studies carried out by the academic community have failed to find a direct correlation between IIAs and attraction for FDI.¹⁴⁹

In related vein, this research found relatively limited interest amongst European companies already present in Myanmar. While respondents said the agreement would probably be welcomed, they noted there had been little questions about or interest in it from both companies already operating¹⁵⁰ as well as countries exploring investing in Myanmar. Partially, this may be due to the fact that large operating companies have already negotiated protections in Production Sharing Contracts (oil and gas), License Agreements (telecommunications) or can access protection by investing via Singapore and benefitting from the ASEAN Comprehensive Investment Agreement. Another likely reason is that there are other more pressing concerns.

Discussing key barriers to investment, one global risk and strategic consulting firm stated: "Clients (companies, NGOs, international organisations) are mainly concerned about: lack of

¹⁴⁶ Interviews with private sector representatives.

¹⁴⁷ See <http://www.mizzima.com/business-domestic/telecom-sector-attracts-most-foreign-investment-myanmar-2016>

¹⁴⁸ With Israel, the Republic of Korea, the US, Indonesia, Japan, India, Thailand, Kuwait, Laos, China, Vietnam and the Philippines

¹⁴⁹ As also referred to by TNI (<https://www.tni.org/en/article/suspend-negotiations-for-an-investment-protection-agreement-between-the-eu-and-myanmar>), in 2010 the European Commission interviewed 300 European Companies about the relevance of treaties, and found out that only 10% had a working knowledge of investment treaties, 40% had some general awareness, and 50% had no knowledge at all (European Commission, "2010 Survey of the Attitudes of the European Business Community to International Investment Rules", TN Sofres Consulting on behalf of the European Commission DG Trade). Also see J. Yackee, 2011, "Do Bilateral Investment Treaties Promote Foreign Direct Investment?", 51 Virginia Journal of International Law, p. 429.

¹⁵⁰ A number of large European companies have already invested in Myanmar in the absence of an investment treaty, e.g. TOTAL, Shell, ENI, BP, Unilever, Carlsberg, Heineken, BAT, De Heus, Lafarge, Ericsson.

infrastructure, unavailability of skilled local labour (both items adding to operating cost) and the weak regulatory landscape (weak and unclear laws and regulations, weak and sometimes selective/erratic enforcement).¹⁵¹

5.2. Will an IPA lead to better investment?

Another argument in favour of the IPA is that an IPA will lead to better, European investment. Specifically, investment from the EU is said to come with a positive impact on jobs, growth and poverty alleviation, and raise standards of responsible business. EU investment would bring jobs and growth, technology transfer, higher standards of safety, social and environmental protection.

An IPA could in theory support Myanmar's policy reform process. 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, and 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.¹⁵²

However, as FIDH also notes, it remains to be seen how effective the mechanisms initiated in the agreements regarding responsible investment and sustainable development are.¹⁵³

Chapter IV, Article 6 of the agreement reads:

1. "The Parties recognise that Corporate Social Responsibility (CSR) and responsible business conduct strengthen the contribution of investment to a sustainable growth as well as to the achievement and maintenance of high levels of environmental, social and labour protection, and contribute to the objectives of this Agreement. The Parties further recognise that CSR, by its voluntary nature, supplements domestic laws in these areas.
2. The Parties agree to promote CSR, responsible business conduct and accountability, including concerning adherence, implementation, follow-up and dissemination of internationally agreed guidelines and principles. They agree to encourage the uptake of responsible business conduct in line with international guidelines and principles, by companies, investors and governments, including through exchange of information and best practices. In this regard, the Parties shall refer and adhere to internationally recognised guidelines and principles on CSR and responsible business conduct, such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, ISO 26000, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.
3. Accordingly, the Parties commit to cooperating to foster adherence, implementation, follow-up, and dissemination of internationally recognised guidelines and principles on CSR and responsible business conduct."¹⁵⁴

¹⁵¹ E-mail exchange with a private sector representative, February 2017

¹⁵² Myanmar Centre for Responsible Business, December 2015, Challenges of the proposed EU-Myanmar Investment Protection Agreement

¹⁵³ SIA p, 44, FIDH, 7 December 2015, "Open letter; EU-Myanmar/Burma Investment agreement and its sustainability impact assessment – concerns on the way human rights are taken into account, p. 9

¹⁵⁴ EU-Myanmar IPA draft text 29 May 2015, p. 32

None of these provisions actually bind companies to good behavior. Some international standards are namechecked in paragraph 3 of the above quoted Article 6, such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights. However, this reference does not create binding requirements on either Party, but merely a shared ‘commitment to foster adherence.’¹⁵⁵ Mr De Zayas, Independent Expert on the promotion of a democratic and equitable international order appointed by the Human Rights Council of the UN, recommends that States should work towards a legally binding framework covering corporate social responsibilities.

The IPA also contains a commitment to transparency in law-making (Chapter 3 and Chapter 4 Article 8). Improvements in transparency would be highly desirable. However similar requirements in the Myanmar-Japan Investment Agreement (Article 8) have not resulted in more transparency in Myanmar law-making.¹⁵⁶

MCRB reports that the presence of European companies that have already invested in Myanmar such as TOTAL, Shell, ENI, BP, Unilever, Carlsberg, Heineken, BAT, De Heus, Lafarge and Ericsson have had a positive effect for Myanmar in terms of economic growth as well as because the environmental and social standards they follow are higher than companies traditionally investing in Myanmar. FIDH however argues that the EU has yet to give effect to their statements on upholding the highest standards of CSR in investing in Myanmar.¹⁵⁷ MCRB states that “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.”¹⁵⁸ In addition, the EU should consider a requirement for greater transparency by EU investors in Myanmar, as the US have done. Likewise, the 2014 OECD Myanmar Investment Policy Review recommended incorporating CSR obligations in investment treaties (e.g. US-Peru).¹⁵⁹ Both MCRB and the OECD underline the importance of a mandatory human rights due diligence for investors in Myanmar.¹⁶⁰

Overall, for local civil society it is difficult to accept the promise that the EU will indeed follow better social and environmental standards, while being unwilling to include binding standards and compliance mechanisms in the agreement.¹⁶¹

5.3. Will an EU-Myanmar IPA lead to better regulatory frameworks?

Myanmar’s interest in attracting FDI could be an incentive for Myanmar to improve domestic regulatory frameworks and dispute settlement systems. However, the fact that IPAs in fact create parallel agreements and systems such as ISDS means that in practice little needs to be done to improve these. Indeed, exhaustion of local remedies is not a condition for accessing ISDS in the EU-Myanmar IPA, taking away incentives for judicial reform. Efforts currently

¹⁵⁵ Also see Jonathan Bonnitcha, 2016, Trends in investment treaties and their interaction with other legal instruments: A Discussion Paper, p. 9.

¹⁵⁶ Myanmar Centre for Responsible Business, December 2015, Challenges of the proposed EU-Myanmar Investment Protection Agreement

¹⁵⁷ Development Solutions, 2016, Sustainability Impact Assessment in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, p. 110

¹⁵⁸ Myanmar Centre for Responsible Business, December 2015, Challenges of the proposed EU-Myanmar Investment Protection Agreement

¹⁵⁹ OECD, 2014, Investment Policy Reviews: Myanmar, p. 77

¹⁶⁰ Myanmar Centre for Responsible Business, December 2015, Challenges of the proposed EU-Myanmar Investment Protection Agreement

¹⁶¹ Interviews with CSO representatives, January 2017

underway to improve the efficiency and reliability of Myanmar's national court system raise questions about whether investment treaties should require foreign investors to make some attempt to resolve disputes in national courts before submitting claims to ISDS.¹⁶² Overall, IPAs may rather weaken the authority and improvement of domestic law and domestic courts.¹⁶³ It is for such reasons that some countries, like India, have included exhaustion of domestic remedies in their model BIT.

Another argument heard in favour of the IPA is that an exemplary EU-Myanmar IPA could serve as an example for future investment agreements. If both the process and the actual final agreement itself succeed in addressing all key concerns and satisfying all stakeholders, it may well set the standard much higher for future other agreements between Myanmar and countries with investment interests. At present, given the current content is unknown, it is difficult to make predictions about this possible positive effect. Moreover, the Most Favoured Nation clause is directly contradictory to this provision as it would entitle EU companies to actually make use of the same provisions as IPAs in place with other countries.

¹⁶² Jonathan Bonnitcha, 2016, Trends in investment treaties and their interaction with other legal instruments: A Discussion Paper, p. 8

¹⁶³ For this reason, amongst others the ICJ encouraged the Government of Myanmar to include a provision for the exhaustion of local remedies in the agreement. The EU refused the proposal, likely because of the weak judicial system in Myanmar.

Chapter 6: Conclusions and Recommendations for Lobby and Advocacy

6.1. Conclusions

Widespread land conflicts and pending land governance reform, also in relation to the larger ongoing peace process, form the key reason for opposition to the pending EU-Myanmar IPA. As previously explained, land rights are not well established and populations living or working on land acquired for large-scale investment projects have protested over forced evictions, loss of livelihoods, inadequate consultation and compensation. Land governance reform is expected and wanted, as well as larger governance reform in the context of the peace process, although the breadth and depth of these remain unknown.

In addition to the need for protection of land-related human rights, and the need for policy space, Myanmar at present has limited institutional capacity to implement stringent commitments, due to which it may fail to effectively enforce IPA measures. There is limited intra-government information sharing and coordination, which could unintentionally expose the country to expensive litigation risks. Combined with the umbrella clause included in the agreement, this may increase the vulnerability of host states to litigation under investment treaties.

Ultimately, a lot of the discussion around investment protection comes down to a political discussion about development trajectories. Like one respondent also noted, “This IPA will be fine for Myanmar as long as it wants to continue what starts to look more and more as a neoliberal development policy. If they stay within the neoliberal paradigm, there will not be problems. But if one day they want to adopt massive land reform, they will run into trouble.”¹⁶⁴ This also explains the position of some of the private stakeholders consulted, who emphasize Myanmar simply needs more investment if it wants to reduce poverty, and that this larger picture may sometimes have to overrule smaller issues. In short, different people have different visions for Myanmar’s future.

However, given the NLD Economic Policy vision of the government is supposedly “*people-centred, and aims to achieve inclusive and continuous development, and that it aims to establish an economic framework that supports national reconciliation, based on the just balancing of sustainable natural resource mobilization and allocation across the States and Region*”¹⁶⁵, there may indeed be issues with specific IPA provisions in the future, for which intensified lobby at this stage is warranted.

6.2. Recommendations

This study recommends the following recommendations for lobby and advocacy activities at the national and EU level. While the report focused on the text rather than the process, some recommendations to influence the process are also being made.

¹⁶⁴ Interview with INGO representative, January 2017

¹⁶⁵ See <http://www.mmmtimes.com/index.php/business/21664-nld-12-point-economic-policy-announcement.html>

6.2.1. Lobby & advocacy towards national level

For these recommendations, INGOs can play a role in convening, encouraging and training local CSOs towards carrying out these activities, offering support where needed:

- **Lobby DICA for more transparency and consultation.** The absence of transparency and public consultations has made it near impossible for Myanmar civil society as well as international commentators to reflect on the agreement and provide suggestions for improvements. While the EU may prefer to keep the negotiations private, Myanmar in this period of crucial reform can insist on an open process. In general, Myanmar can be encouraged to initiate fully transparent and systematic consultation on policies, laws and secondary regulation, in which anyone has the ability to comment.
- **Lobby the Parliament for a more nationally owned process.** The IPA process is entirely driven by senior levels of DICA, the President's Office and State Councillor Aung San Suu Kyi.¹⁶⁶ Few others in government are aware of the process and understand the consequences. This is likely to remain the same, as the agreement will not have to go through Parliament, but can be signed into effect by the President. MPs can be made more aware of the issue, and they can insist on debates in Parliament.
- **Lobby DICA for a slow down of the process, and a full review of implications before signing.** It appears the Government of Myanmar is rushing into an agreement of which many in government have limited understanding. Lobby activities could focus on slowing down the government, and on encouraging the undertake of larger assessments of the implications of the IPA and of business and human rights in general.¹⁶⁷ The Myanmar government should be encouraged to undertake a cross-government assessment of the risk of litigation and regulatory posed by an EU-Myanmar IPA.
- **Lobby DICA to develop a common position that can guide all investment treaty negotiations,** rather than negotiating treaties on an ad hoc basis.
- **Clarify the importance of other more urgent improvements to the investment climate.** It can be made clear that there are many other things the government could do that are much more likely to result in more investment without the risks of an IPA (e.g. labour law reform, better interdepartmental coordination and speeding up of process across government, more consistent law and decision making, and improved communication and transparency).¹⁶⁸
- **Campaign for changes to one or two key provisions only.** Given the divisions between Myanmar civil society, and the limited understanding of investment protection, a campaign is most likely to succeed if it is focused on one relatively easy to understand issue.¹⁶⁹ Suggestions for relevant campaign targets could be:

¹⁶⁶ Comments from CSO representatives, February 2017

¹⁶⁷ A good starting point could be Jonathan Bonnitcha, 2016, Trends in investment treaties and their interaction with other legal instruments: A Discussion Paper, p. 9. Also see the United Nations Office of the High Commissioner's Guiding Principles on Business and Human Rights

¹⁶⁸ Myanmar Centre for Responsible Business, December 2015, Challenges of the proposed EU-Myanmar Investment Protection Agreement

¹⁶⁹ Interview with CSO representative, January 2017

- Removal of the Most Favoured Nation clause allowing for the companies to claim that MFN status to use the same provisions as IPAs in place with other countries.¹⁷⁰
- Allowing for Performance Requirements
- Removal of all agribusiness protection or protection for land-intensive investments in general
- Removal of all protection for investments in Ethnic States
- Inclusion of exceptions for all land-related reforms
- Access to remedy for human rights violations
- Enforceable CSR/responsible business requirements¹⁷¹

6.2.2. Lobby and advocacy towards the EU

Through its channels in Brussels, INGOs can also engage in the following activities:

- **Lobby DG Trade for more transparency and consultation.**
- **Lobby the EU Parliament to commit to its own guidelines.** Over the summer of 2015, the EU adopted new guidelines to enhance the quality of its human rights impact assessments. In October 2015 the EU released its new strategy “trade for all, towards a more responsible trade and investment policy”. This new strategy commits to “enhance the analysis of the impact of trade policy on human rights both in impact assessments and in ex post evaluations based on the recently developed guidelines” and to implement the EU 2015-2018 human rights action plan which commits the EU to “continue to develop a robust and methodologically sound approach to the analysis of human rights impacts of trade and investment agreements, in ex-ante impact assessments, sustainability impact assessments and ex-post evaluations.
- **Lobby DG Trade to undertake a more extensive human rights assessment.** As recommended by Special Rapporteur on the Right to Food Olivier de Schutter, all States should prepare human rights impact assessments prior to the conclusion of trade and investment agreements, which will help them fulfill their obligations under the human rights treaties.¹⁷²
- **Lobby DG Trade for a series of changes to the agreement** (see the above list under campaigning in the domestic space – towards the EU lobby should include all points)
- **Lobby DG Trade to insist on regular monitoring in relation to the agreement**, including assessments of human rights, health and environmental impacts after the conclusion of the agreement.

¹⁷⁰ As also stated by the SIA, “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 should be included. 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).” See Development Solutions, 2016, Sustainability Impact Assessment in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, p. 12

¹⁷¹ Also see the United Nations Office of the High Commissioner’s Guiding Principles, Article 15

¹⁷² De Schutter provides extensive guidance for such Human Rights Impact Assessments in the following note: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf

- **Lobby DG Trade for the introduction of specific EU reporting requirements for EU investment in Myanmar**

6.2.3. Other possible actions

In addition, a few other more general actions are recommended for INGOs.

- **More in-depth review of the EU-Vietnam IPA¹⁷³**
- **Capacity building for CSOs on investment regulations, including cross-regional exchanges and collaborations**
- **Capacity building for CSOs on tools and guidelines** including the United Nations Global Compact, the Guidelines on Human Rights and Business, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, Free Prior and Informed Consent, Investing the Right Way and the Interlaken Guide on Respecting Land and Forest Rights.
- **Capacity building for MPs on investment regulation**
- **More research on the private sector and their priorities**
- **More research on perspectives of EU member states**
- **More research on possible litigation risks, for example through consulting law firms in Yangon**
- **More independent research and documentation of investment-related human rights violations, especially in the land sector**

¹⁷³ The question is to which extent does the EU's new approach to investment as illustrated by the Vietnam deal improve prospects for human rights, especially land rights? And what initial proposal for a more development-orientated model or provisions can be made. For the text of the Investment Chapter and the Trade and Sustainable Development Chapter, see

http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf;

http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154229.pdf.

Annex 1: List of Respondents

CSOs:

- Dawei Development Association (DDA)
- EcoDev/ALARM
- Food Security Working Group (FSWG)
- Karen Environmental and Social Action Network (KESAN)
- Karen Human Rights Group (KHRG)
- Land Core Group (LCG)
- Myanmar Centre for Responsible Business (MCRB)
- Metta Foundation
- Myanmar People Alliance (MPA)
- Paung Ku

INGOs:

- Alternative Asean Network on Burma (ALTSEAN-Burma)
- Business & Human Rights Resource Centre
- International Federation for Human Rights (FIDH)
- International Commission for Jurists (ICJ)
- Oxfam
- Transnational Institute (TNI)

Private sector:

- EU Chamber of Commerce
- German Chamber of Commerce
- Strohal Lawyers
- Control Risk