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COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Report on the EU-Myanmar/Burma Investment Relations

Accompanying the document

Recommendation for a Council Decision

**authorising the opening of negotiations on an agreement between the European Union
and Myanmar/Burma on investment protection**

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Lead: DG Trade

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Executive Summary Sheet	
Impact assessment on the EU-Myanmar/Burma Investment relations	
A. Need for action	
Why? What is the problem being addressed?	
<p>The economic management by the Myanmar/Burma government over the past decades has left the country with an underdeveloped regulatory framework and fragile rule of law. There is no multilateral investment framework under the World Trade Organisation rules regarding investment protection and no Bilateral Investment Treaty (BIT) between Myanmar/Burma and any EU Member State. Existing Free Trade Agreements (FTA) and BITs between Myanmar/Burma and its Asian partners disadvantage EU investors who do not enjoy the same level of protection.</p> <p>The current investment framework in Myanmar/Burma is unpredictable and insecure and there is a lack of a level playing field for EU investors in this country.</p>	
What is this initiative expected to achieve?	
<p>The EU's main objectives are the following:</p> <ul style="list-style-type: none"> ▪ Improving legal certainty regarding treatment of EU investors in Myanmar/Burma; ▪ Improving the protection of EU investments in Myanmar/Burma through, among other things, easier access to investor-to-state dispute settlement; ▪ Ensuring EU investors are not discriminated against in Myanmar/Burma; ▪ Supporting sustainable development by encouraging responsible investment while promoting environmental protection and core labour/human rights. <p>Overall, these targeted results are very difficult to quantify. Commitments in agreement, business survey results and changes in legislation will constitute indicators of progress towards meeting objectives.</p>	
What is the value added of action at the EU level?	
<p>This initiative falls within the scope of the Common Commercial Policy. The Lisbon Treaty provides for the European Union to contribute to the progressive abolition of restrictions on foreign direct investment. Articles 3(1)(e), 206 and 207 of the Treaty on the Functioning of the European Union confer exclusive competence to the European Union in the field of foreign direct investment.</p>	
B. Solutions	
What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?	
<p>Considering that Myanmar/Burma's authorities have clearly stated that they are not ready to negotiate on market access (i.e. investment liberalisation) with any foreign partner at current stage, three policy options can be envisaged.</p> <ul style="list-style-type: none"> - A first policy option would be to continue discussions on EU-Myanmar/Burma investment related issues under the newly established framework of bilateral policy dialogue and existing multilateral commitments. - A second policy option, Regulation (EU) No 1219/2012 of 12 December 2012, allows the Commission to empower Member States – under certain conditions – to negotiate bilateral investment agreements with countries not immediately scheduled for EU-wide investment negotiations. Under option 2, interested Member States could request authorisation to negotiate with Myanmar/Burma. - The third policy option would be to negotiate a standalone investment protection agreement between the EU and Myanmar/Burma. This is the preferred option as it is the only one that can address all the objectives of both parties. It goes further than option 2 in increasing legal certainty under investment protection for <u>all</u> EU investors. 	
Who supports which option?	
<p>In the framework of the on-line public consultation on the EU-Myanmar/Burma future investment relationship conducted from 23 April until 15 July 2013, a clear majority of respondents including private companies, trade associations representing business, international trade unions and NGOs, indicated their support to option 3, namely negotiation of an investment agreement at EU level.</p>	

C. Impacts of the preferred option

What are the benefits of the preferred option (if any, otherwise main ones)?

Overall, the increase of FDI flows from the EU in Myanmar/Burma would have neutral to positive impacts on the environment, employment, social, labour and human rights.

The evaluation of an impact of an investment protection agreement is essentially qualitative, hence the difficulty to provide quantitative estimates. Policy option 3 is expected to trigger an increase in EU-Myanmar/Burma investment flows and stocks. Available information sources stress the positive impact of an EU FDI increase notably in Myanmar/Burma's services sectors.

The potential impact on the environment resulting from an increase of FDI flows would be potentially positive in both the hydropower and agriculture sectors.

Concerning overall employment levels in the EU, there is no evidence that increases in EU outward FDI have led to significant losses of jobs in the EU. Increased FDI in labour-intensive sector would be likely to generate a positive impact in terms of employment for Myanmar/Burma population, and combined with improved labour standards under the aegis of the ILO, it could contribute to poverty reduction and development.

What are the costs of the preferred option (if any, otherwise main ones)?

Extensive foreign direct investment in mono-plantations such as rubber, teak or other commercial timber species happens might have a potential negative impact as they may affect local forest biodiversity, conservation, food security and access to resources for the local population. Deforestation in order to clear land for agriculture might also be a matter for concern.

Myanmar/Burma remains a Least Developed Country with limited administrative capacity and potential negative impacts may result from weak institutions and poor environmental regulation.

How will businesses, SMEs and micro-enterprises be affected?

Micro and SMEs are fully covered by the preferred option. It can reasonably be expected that an EU-Myanmar/Burma investment agreement will promote trade between the EU and Myanmar/Burma and will stimulate EU FDI in selected sectors in Myanmar/Burma's economy. To that view, not only EU large companies but also SMEs active in services sectors such as logistics, construction, tourism, but also in more traditional sectors like textile/clothing will benefit from a standalone investment protection agreement.

Will there be significant impacts on national budgets and administrations?

Policy option 3 might trigger marginal budgetary and administrative burdens for the EU and EU Member States due to managing investor-to-state dispute settlement (ISDS), legal fees and award payments. However, on the basis of the currently available evidence and experience, the likelihood of investor-state disputes arising under an EU-Myanmar/Burma investment protection agreement appears very small.

Will there be other significant impacts?

No other significant impacts are foreseen.

D. Follow up

When will the policy be reviewed?

In line with the commitments made in the 2010 Communication on Trade, Growth and World Affairs, there will be an ex-post evaluation of the effects of any investment agreement concluded with Myanmar/Burma five years after its implementation.

1. BACKGROUND

1.1. A new comprehensive European investment policy

The Lisbon Treaty provides for the European Union to contribute to the progressive abolition of restrictions on foreign direct investment (FDI). Articles 3(1)(e), 206 and 207 of the Treaty on the Functioning of the European Union confer exclusive competence to the European Union in the field of foreign direct investment.

The Commission Communication¹ of 3 March 2010 "A strategy for smart, sustainable and inclusive growth – Europe 2020" emphasises the need to build strategic relationships with emerging economies. Trade and investment are a crucial component of the triple growth objective of the Europe 2020 Strategy. The Commission Communication² of 7 July 2010 "Towards a comprehensive European international investment policy" sets out the main elements of this new policy.

Since then, the Commission has recommended the opening of Free Trade Agreement (FTA) negotiations with a wider number of partners. These negotiations include investment protection together with the usual FTA areas. The EU is currently negotiating FTAs which include an investment protection chapter with India, Canada, Singapore, Japan, Morocco and the US. Negotiating directives for a deep and comprehensive FTA, including investment, were also adopted by the Council in December 2011 for three other Euromed countries (Egypt, Jordan and Tunisia). On 23 May 2013, the European Commission made a proposal for a Council Decision authorising it to open negotiations on a stand-alone investment agreement with China covering both market access and investment protection. On 26 June 2013 the European Commission made a proposal to amend the current negotiating directives for ASEAN countries to include investment protection. Once authorisation is given by the Council, investment protection will also be part of the on-going FTA negotiations with Thailand, Malaysia and Vietnam.

While the relationship between FDI and economic growth and economic welfare is a complex one, on balance, both inward and outward investment have a positive impact on growth, competitiveness and employment.

The recent political and economic developments in Myanmar/Burma have prompted the EU to open a new chapter in its relations with the country. The Council Conclusions of 23 April 2012 on Myanmar/Burma set up the principles under which the Council planned to continue its engagement with Myanmar/Burma. The Council also recognised *"the vital contribution the private sector had to make to the development of Myanmar/Burma. It welcomed European companies exploring trade and investment opportunities, by promoting the practice of the highest standards of integrity and corporate social responsibility and working with the authorities, the private sector and the people of Myanmar/Burma to create the best possible regulatory environment"*. On 22 April 2013, the Council lifted all restrictive measures imposed on Myanmar/Burma, with the exception of the arms embargo, and reiterated its commitment to collaborate with Myanmar/Burma in assisting the reform process

¹ Commission (2010a).

² Commission (2010c).

and contributing to economic, political and social development. It further encouraged responsible trade and investment.

The EU Generalised System of Preferences (GSP) was reinstated on 19 July 2013 with retro-active application as from 13 June 2012, the day when the Conference of the International Labour Organisation (ILO) suspended its sanctions against Myanmar/Burma recognising progress towards eradication of forced labour. Myanmar/Burma, due to its economic status as a Least Developed Country (LDC), is allowed to benefit from duty-free quota-free access to the EU market (the “Everything But Arms” arrangement).

At present there is no Bilateral Investment Treaty between Myanmar/Burma and any EU Member State and no full-fledged free trade agreement negotiations are foreseen in the near future. Against this background, negotiations of an investment agreement with the EU could both help Myanmar/Burma in its development strategy and its integration into the world economy and ensure that all EU investors are treated on an equal footing in Myanmar/Burma. On the occasion of the visit of Myanmar/Burma's President U Thein Sein in Brussels on 5 March 2013, the EU and Myanmar/Burma agreed to *explore the feasibility of an investment agreement*.

This assessment analyses the underlying problems in the current EU-Myanmar/Burma investment relationship, the different options to address these as well as their respective impacts. Because of the lack of data, the analysis made in the impact assessment is essentially qualitative.

2. PROCEDURE AND CONSULTATION

2.1. Procedural issues

An Impact Assessment Steering Group (IASG) chaired by DG Trade was set up in April 2013. The IASG met four times³ until the final report submission to the Impact Assessment Board (hereafter "the Board"). A wide range of DGs and services took part⁴.

EU Member States were informed of the preparation of the present impact assessment at the Trade Policy Committee (Full Members) meeting of 18 January 2013 and the Trade Policy Committee (Services and Investment) meeting of 24 April 2013. The European Parliament was regularly informed about the process in particular through a presentation by Trade Commissioner Karel De Gucht at the structured dialogue meeting with the International Trade Committee of 26 May 2013.

³ 8 April 2013; 26 June 2013; 10 September and 30 September 2013.

⁴ The IASG included DG Agriculture and Rural Development, DG Budget, DG Climate Action, DG Competition, DG Development and Cooperation, DG Economic and Financial Affairs, DG Education and Culture, DG Employment, Social Affairs and Inclusion, DG Energy, DG Enterprise and Industry, DG Environment, DG Health and Consumers, DG Home Affairs, DG Information Society and Media, DG Internal Market and DG Justice, DG Maritime Affairs and Fisheries, DG Mobility and Transport, DG Research and Innovation, DG Taxation and Customs Union, Eurostat, the Legal Service, the Secretariat-General and the European External Action Service.

Data and studies on Myanmar/Burma are limited. The analysis therefore had to rely a great deal on data (some of which provisional) provided by the Myanmar/Burma's Ministry of National Planning and Economic Development, the draft Report from the OECD Secretariat of 26 September 2013 on the Investment Policy Review of Myanmar/Burma and a comprehensive special report from the Economist Intelligence Unit's Asia Custom Research Team published in April 2012. Where no data was available, the impact assessment relied on a thorough qualitative analysis.

2.2. Consultation with stakeholders

In order to ensure that interested parties could contribute to the policy decision making process and to complement the responses to the public consultation, numerous interviews with civil society stakeholders and experts took place between May and early August 2013.

2.2.1. Public Consultation

A public consultation on the EU-Myanmar/Burma future investment relationship was conducted from 23 April 2013 until 15 July 2013⁵. An online questionnaire, directed at all stakeholders, was posted on DG TRADE's website, and advertised on the "Your voice in Europe" website as well as on DG ENTR's European Small Business Portal. Despite the wide advertisement of the online public consultation, the number of replies received was relatively small. However opinions from various different categories of stakeholders were reflected. 36 usable answers were received including 21 from private companies, 4 from trade associations representing business, 1 from an international trade union, 1 from a governmental authority, 7 from Non-Governmental Organisations, and 2 from other sources. To reinforce the representativeness of the stakeholders' consultation, the online survey was complemented by bilateral interviews (see 2.2.2).

The consultation showed that companies and trade associations representing business expect Myanmar/Burma to improve as an investment destination within ten years. Respondents reported of general difficulties when trying to invest in Myanmar/Burma such as weak technical infrastructure, under-developed financial services and lack of independent judiciary. More specifically, prohibition to invest/limited scope of business, excessive capital requirements and burdensome licensing requirement were indicated as the top three investment barriers. Moreover, despite recent reforms to attract foreign investors, respondents questioned the scope of these reforms and the ability of Myanmar/Burma to implement the reforms due to the lack of the appropriate legal and institutional framework.

Concerning sustainable development, 24 out of the 36 respondents indicated that an EU-Myanmar/Burma investment agreement could have a positive impact on the environment in Myanmar/Burma, and 29 respondents thought that it could have a positive impact on human rights in Myanmar/Burma. Notably, 16 out of the 36 respondents indicated that employment in the EU, both in number and quality of jobs, could be positively affected as a result of the EU-Myanmar/Burma investment agreement, and a large majority (31 out of 36 respondents) underlined that this agreement could positively impact employment in Myanmar/Burma.

⁵ All documents on the public consultation: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=176

The consultation further asked stakeholders whether there was a need for the EU to facilitate European investment in Myanmar/Burma through a bilateral investment agreement. A clear majority of respondents indicated their support for an EU bilateral investment agreement.

2.2.2. Targeted consultation

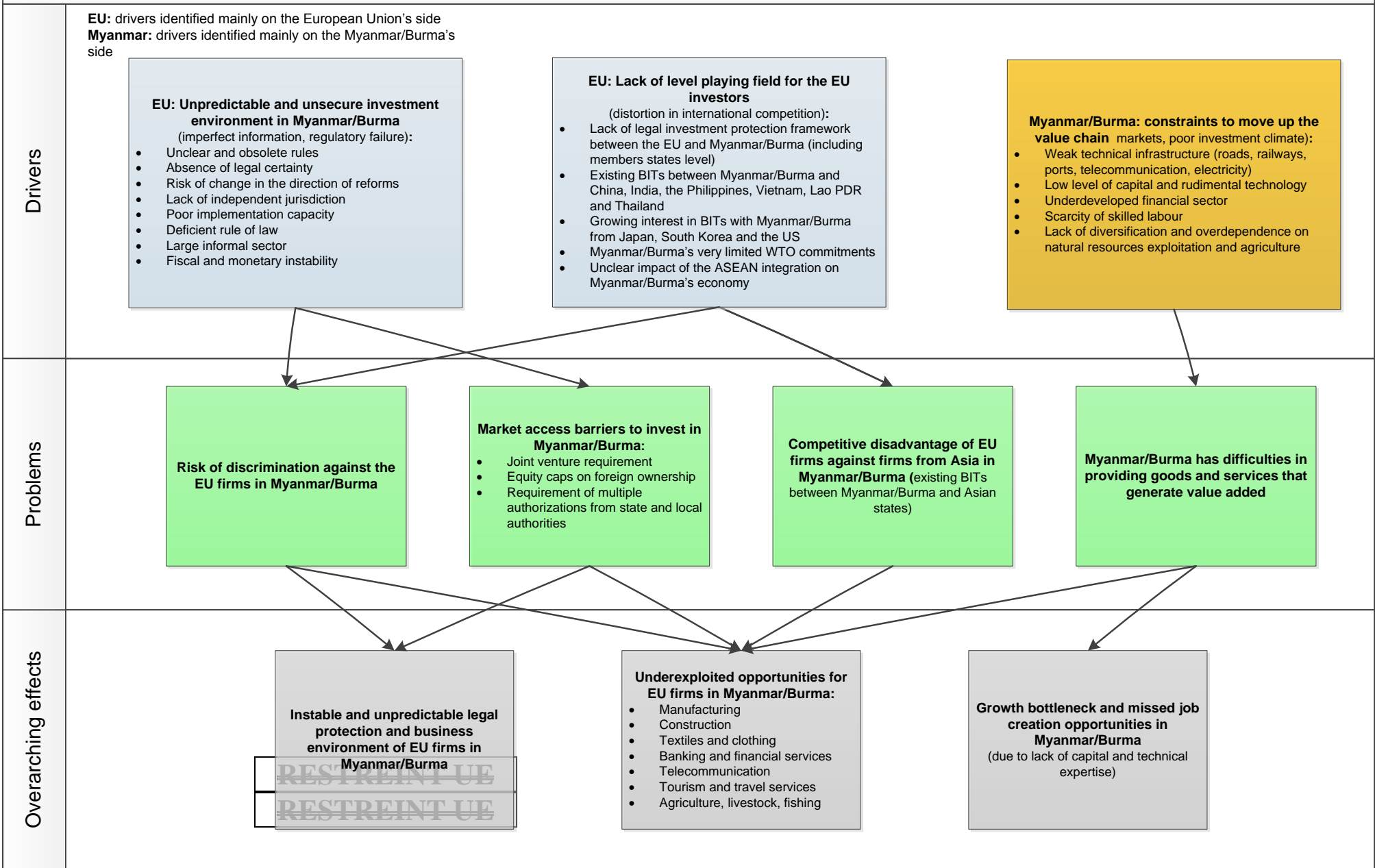
To complement the public consultation, a series of sixteen bilateral meetings were also conducted. These bilateral meetings/interviews took place with companies, trade associations representing business, international organisations representing trade unions and employers and Non-Governmental Organisations (NGOs) active on labour/human right or environment protection whether in Europe, in Thailand or in Myanmar/Burma (See list of bilateral interviews in annex 1).

2.2.3. The opinion of the Impact Assessment Board

The report incorporates changes following the recommendations by the IAB in its opinion of 22 November. This includes strengthening in the baseline scenario the outlook for legal certainty, protection from discrimination for EU investors and compliance with labour standards in Myanmar/Burma, given the recent policy initiatives in these areas. As a result, the reference to the new Foreign Investment Law and the Convention on Recognition & Enforcement of Foreign Arbitral Awards has been reinforced. The report also provides more information on the content of the proposed standalone investment agreement and a deeper assessment of all feasible options considered, including option 2. Key standards of investment protection that would be included in the negotiation under option 3 have been introduced and the difference between the impacts of options 2 and 3 is better explained. Finally, monitoring and evaluation plans have been elaborated by indicating possible data sources.

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Problem tree for the EU-Myanmar/Burma investment agreement



3. Problem Definition

3.1. Context: Myanmar/Burma's economic and legal investment climate

Myanmar/Burma, which is one of the 13 least developed countries (LDCs) in Asia and the Pacific, is rich in natural resources, has a young workforce, and is geographically situated close to some of the world's most dynamic trading economies, including China and India. With an appropriate policy mix, improved business environment and a stable, but reformed political system, the country could fulfil its considerable potential and move ahead with economic development. Following the political and economic reform since 2011 the country is in the process of rebuilding its trade and investment links with the region and reintegrating into both the regional and the global economy.

3.1.1. Economic sanctions until 2013

Burma (as it was called officially until 1989) became independent on 4 January 1948. It established a bicameral parliament (one representing the different ethnic and minority groups) and held multiparty elections every four years.

In 1962 Ne Win's Government nationalized the economy and pursued a policy of "autarky", which isolated the country from the world leading to a progressive deterioration of the economy. In 1988, unrest over economic mismanagement and political oppression by the government led to widespread pro-democracy demonstrations throughout the country known as the 8888 Uprising. In May 1990, the government held free elections and the National League for Democracy (NLD), the party of Daw Aung San Suu Kyi, won 392 out of 489 seats. However, the military junta refused to cede power and continued to rule the nation as the State Peace and Development Council.

In 1997, based on the outcome of an investigation by the European Commission, the EU temporarily withdrew the benefits from the Generalised System of Tariff Preferences (GSP) from Myanmar/Burma for serious and systematic violations of core labour rights (forced labour).

In 1999 and 2000, the International Labour Organisation (ILO) imposed restrictions on Myanmar/Burma after it failed to act on recommendations of an ILO Commission of Inquiry, which had been set up to examine the country's compliance with the Forced Labour Convention (n°29). The Committee found "abundant evidence" that the Myanmar authorities made "pervasive use" of forced labour.

The EU, together with many countries (the United States, Canada, Australia, etc.) adopted a series of restrictive measures which were reinforced over time. The EU sanctions included targeted sectoral import bans on goods crucial for Myanmar/Burma's economy (such as timber, gems, minerals and precious metals) but also export bans on equipment used in the target industries. There was also a sectoral investment ban against Burmese State-owned enterprises, enterprises that were owned or controlled by the regime and enterprises that were engaged in industries targeted by the import and export bans. Moreover, in 2008 the catalogue

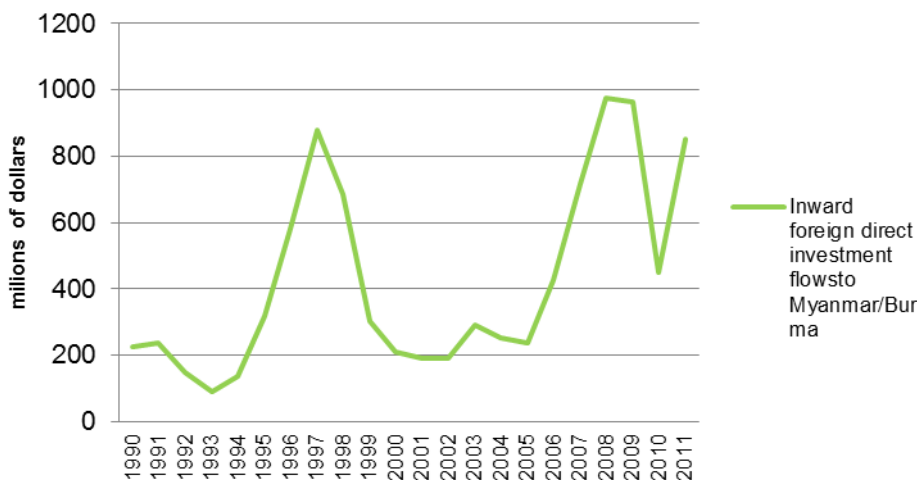
of sanctions was further extended to a ban on certain investments, a ban on the provision of financial services, technical assistance, aid and development programmes⁶.

3.1.2. Consequences of sanctions

After the introduction of sanctions and the exit from Myanmar/Burma of Western companies, trade and investment patterns changed significantly in terms of partners and structure. In 2000 the major importers of Myanmar/Burma's goods were the United States, but by 2012 this had shifted to Thailand, China and India⁷. Moreover, in 2000 Myanmar/Burma's main export products were apparel, clothing, wood and wood products accounting for 64% of total exports. The same figures from 2012 reflect a substantial shift in the structure of exports: the top three categories in 2012 were mineral fuels, wood/wood products and edible vegetables.⁸

Economic sanctions resulted in multinational corporations (MNCs) pulling out investments from Myanmar/Burma. Between 1996 and 1997, mainly as a result of the US and the EU sanctions and public pressure, Carlsberg, Kodak, Apple, Walt Disney, PepsiCo and Motorola completely withdrew from the market⁹ while two EU companies, Heineken and Adidas, shut down their production plants, and stopped sourcing intermediaries and materials from Myanmar/Burma. After 1997, Myanmar/Burma experienced an almost continuous decline in FDI inflows until 2006. In the late 2000s Thai and Chinese enterprises became a major FDI source in Myanmar/Burma, filling the void created after the withdrawal of the EU, US and Canadian companies.

Figure 1. Inward foreign direct investment flows to Myanmar/Burma.
(US Dollars at current prices and current exchange rates in millions)



Source: UNCTADStat, www.unctadstat.unctad.org

In the wake of the global economic crisis, the country experienced a new slowdown in FDI in 2009 and 2010. This contraction could also be attributed to the sanctions on FDI imposed by Canada, the US and the European Union.

⁶ COUNCIL REGULATION (EC) No 194/2008 of 25 February 2008 renewing and strengthening the restrictive measures in respect of Burma/Myanmar/Burma and repealing Regulation (EC) No 817/2006. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:066:0001:0087:EN:PDF>

⁷ Witada Anukoonwattaka, Mia Mikic, Martina Francesca Ferracane, Joana Maria Tacke, Myanmar/Burma: Opening Up to Its Trade and Foreign Direct Investment Potential, Trade and Investment Division, Staff Working Paper 01/12, Economic and Social Commission for Asia and Pacific, <http://www.unescap.org/tid/publication/swp112.pdf>, p. 3

⁸ Ibid., p. 2

⁹ Case Studies in Sanctions and Terrorism, US/EU/Japan v. Burma (1988: Human rights, democracy, narcotics), The Peterson Institute for International Economics, <http://www.iie.com/research/topics/sanctions/myanmar.cfm>

3.1.3. Reform process and lifting of EU sanctions

In 2011, with the swearing-in of Myanmar/Burma's elected president U Thein Sein, the new government began a wave of reform, opening up the economy to the outside for the first time in five decades. In recognition of this, the Council expressed, in its conclusions of 23 April 2012, *"its willingness to gradually open a new chapter in its relations with Myanmar/Burma and set up the principles under which the closer engagement with the country as a whole should be promoted"*. The Council also highlighted the *"vital contribution the private sector should make to the development of Myanmar/Burma and encouraged European companies to explore trade and investment opportunities, while promoting the practice of the highest standards of integrity and corporate social responsibility. The EU expressed its commitment to working with the authorities, the private sector and the people of Myanmar/Burma to create the best possible regulatory environment"*. All sanctions against Myanmar/Burma were suspended except for the arms embargo.

On 13 June 2012, the Conference of the International Labour Organisation (ILO) suspended some of its restrictions on Myanmar/Burma.

On 22 April 2013, the Council lifted all restrictive measures imposed on Myanmar/Burma, with the exception of the arms embargo, and reiterated its commitment to collaborate with Myanmar/Burma in assisting the reform process and contributing to economic, political and social development. It further encouraged responsible trade and investment.

On 14 June 2013, the International Labour Conference voted in favour of a resolution lifting all remaining ILO restrictions on Myanmar/Burma. The resolution invites the ILO Governing Body to review at its March sessions the situation in the country on issues related to ILO activities, including, freedom of association, and the impact of foreign direct investment on decent working conditions in Myanmar/Burma. It also requests the ILO and the Government of Myanmar/Burma to continue their commitment to work for the elimination of all forms of forced labour by 2015. The ILO Director-General will submit a report to the March Governing Body sessions until forced labour is eliminated from the country.

3.1.4. Current investment context

Recent data from Myanmar/Burma's Ministry of National Planning and Economic Development, which records the FDI inflows to the country up to August 2013, indicates that, over the last 20 years, the largest investor, based on cumulative amounts of investment, has been China (see Table 1).

As of 31 August 2013, and according to the Ministry of National Planning and Economic Development estimates, FDI from China has increased exponentially in recent years, reaching a peak and accounting for a 32.4% share, while Thailand accounted for 22.8%. The accumulated FDI in the country is currently strongly focused on the power and oil and gas sectors, jointly accounting for 77% of total FDI, followed by mining sector (6.5%), manufacturing sector (7.8%), hotel and tourism sector (3.6%) and real estate sector (2.6%).

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Table 1. Cumulative FDI of enterprises holding permissions to invest in Myanmar/Burma as of 31 August 2013, by economy of origin

Investor	FDI value (€ million), 1989-2012	Share of total FDI	Number of projects
China	11 050.8	32.4	50
Thailand	7 772.1	22.8	57
Hong Kong, China	5 036.3	14.7	57
Republic of Korea	2 373.1	6.9	83
United Kingdom*	2 379.2	6.9	60
Singapore	1 903.2	5.5	93
Malaysia	1 270.1	3.7	46
France	366.4	1.1	2
Vietnam	399.2	1.1	6
United States of America	130.2	0.5	15
Others	1 315	4.5	122
Total	33 995.6	100.0	591

Source: Directorate on Foreign Investment, Local Investment and Company Registration, Ministry of National Planning and Development of Myanmar/Burma. Note *: United Kingdom includes enterprises incorporated in the British Virgin Islands, Bermuda Islands and Cayman Islands.

It is interesting to highlight the strong growth of FDI inflows since the new Government of Myanmar/Burma started the process of political and economic reforms. According to UNCTAD figures, FDI inflows into Myanmar/Burma amounted to €1.2 billion in 2010, primarily from neighbouring countries, as most of the sanctions by other countries were still in place. UNCTAD data for 2012 indicated FDI inflows reached €2.8 billion and created approximately 83,000 jobs according to Myanmar/Burma's government figures. As a matter of comparison, in 2012 FDI inflows reached €10.6 billion to Vietnam, €11 billion to Thailand but only €1.9 billion to Cambodia. Manufacturing saw a 50% jump in FDI to €513 million since the easing of Western trade sanctions, predominantly in the food processing and garment industries.

The government has prioritised export-based industries by offering investors greater legal clarity and wide-ranging incentives, including tax holidays and accelerated depreciation. This has attracted predominantly Asian investors, led by China, Hong Kong, Japan, South Korea and Singapore but also some European investors. For instance, on 13 May 2013, the Dutch beer maker Heineken stated that it had signed a joint venture agreement to brew and sell its beer in Myanmar/Burma. Amsterdam-based electronics giant Philips is looking to speed up its plan to expand into the consumer electronics, lighting and healthcare sectors in Myanmar/Burma after the European Union's decision to permanently lift sanctions on Myanmar/Burma. The company opened its first flagship consumer electronics store in April 2013 in Yangon and is planning two more stores in the near future.

3.1.5. Legal context

At the multilateral level, Myanmar/Burma is one of the twenty-three founding members of the General Agreement on Tariff and Trade (GATT) which entered into force on 1 January 1948. Myanmar/Burma's sectoral coverage is however extremely limited under the WTO General Agreement on Trade in Services ("GATS Agreement"), with commitments taken in some

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tourism and travel-related services and auxiliary transport services. As highlighted under 3.2.2, investment is not covered under the WTO agreements in a comprehensive manner.

At regional level, the ASEAN six original members, namely Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand signed an ASEAN Free Trade Area (AFTA) in January 1992. Vietnam joined in 1995, Lao PDR and Myanmar/Burma in 1997, and Cambodia in 1999. Unlike the EU, the AFTA does not apply a common external tariff on imported goods. Each ASEAN member may impose tariffs on goods entering from outside ASEAN based on its national schedules. However, for goods originating within ASEAN, ASEAN members will eventually apply a tariff rate of 0-5 % (the more recent members of Cambodia, Lao PDR, Myanmar/Burma and Vietnam, also known as CMLV countries, were given additional time to implement the reduced tariff rates). This is known as the Common Effective Preferential Tariff (CEPT) scheme and Myanmar/Burma committed itself to the CEPT and began tariff reductions, to be phased in by 2015. At present, tariffs range from zero to a maximum of 40%.

In 2009, all ASEAN member states including Myanmar/Burma signed the ASEAN Comprehensive Investment Agreement, which covers liberalization, protection, facilitation, and promotion of investment and pays tribute to the enormous importance of foreign direct investment (FDI) in the region. Myanmar/Burma ratified this Agreement in May 2011. Many of the provisions in this Agreement provide staple protections for investors in the ASEAN Member States, as commonly encountered in bilateral and multilateral investment treaties. These include the assurances of national treatment, most-favoured-nation treatment, fair and equitable treatment, full protection and security and provision in respect of expropriation and compensation. The ASEAN Comprehensive Investment Agreement provides that investor-state disputes are to be resolved by arbitration, either before the International Centre for Settlement of Investment Disputes ("ICSID") or by *ad hoc* arbitration.

With regard to the national legal framework, Myanmar/Burma launched the Framework for Economic and Social Reform (FESR) in January 2013 outlining the country's policy priorities until 2015 in line with the 20 year long-term goals of the National Comprehensive Development Plan (2011-2030 NCDP). The Framework emphasises the importance of moving towards a market-driven economy. Ten priorities areas are outlined under the FESR: fiscal and tax reform, monetary and financial sector reform, liberalisation of trade and foreign direct investment, development of private sector, health and education reform, food security and agriculture, governance and transparency, telecoms and ICT and development of basic infrastructure.

For investment, the new legislative framework adopted by Myanmar/Burma¹⁰ marks a shift from a restrictive investment policy, with a government adverse to foreign investment, to a more open and liberal investment legislation, identified by the government as suitable for its new economic strategy.

¹⁰ The New Foreign Investment Law, enacted in November 2012, and the Foreign Investment Implementing Rules (Notification 11/2013 of 31 January 2013 of the Ministry of National Planning and Economic Development and Notification 1/2013 of the Myanmar/Burma Investment Commission) offer improvements over the 1988 FIL.

Finally, at bilateral level, EU-Myanmar/Burma relations are governed by successive Council conclusions and the newly established framework of bilateral policy dialogue on trade and investment that was launched at the first EU-Myanmar/Burma Forum and related Working Group on Trade and Investment meeting held in Nay Pyi Taw on 17-18 June 2013. To note that there is no Partnership and Cooperation Agreement in place to structure dialogue.

3.2. Risk of discrimination against the EU firms in Myanmar/Burma

As a result of the space occupied by Asian companies during the period of the sanctions as well as the more recent open and liberal investment legislation leading to increased investment from foreign firms in Myanmar/Burma, EU companies face risks of discrimination from two drivers, namely the still unpredictable and insecure investment environment in Myanmar/Burma (3.2.1) and the lack of a level playing field for the EU investors in Myanmar/Burma (3.2.2).

3.2.1. A still unpredictable and insecure investment environment in Myanmar/Burma

The poor economic management of the military regime over the past decades has left a legacy of major economic and legal woes. Apart from fiscal and monetary instability which an EU investment agreement with Myanmar/Burma cannot address, major problems include *deficient rule of law (i), and unclear and obsolete investment rules (ii)*.

i) Deficient rule of law

Despite recent reforms, underdeveloped legal and regulatory frameworks, as well as weak enforcement of property rights and fragile rule of law remain a problem. The public consultation highlighted that out of the 14 companies reporting difficulties when trying to invest in Myanmar/Burma, 10 highlighted problems in both work ethos and lack of independent and impartial judiciary system.

The public consultation further underlined that a deficient rule of law ranks high as an obstacle for investment, echoing international assessments, including the World Bank's Control of Corruption Indicator and Transparency International's Corruption Perceptions Index, that frequently cite Myanmar/Burma as one of the most corrupt countries in the world.

Concerning specifically the way EU investors deal with business and legal problems in Myanmar/Burma, 4 out of the 21 firms who answered the questionnaire indicated they did not have confidence in Myanmar/Burma's ability to protect investors' rights. In particular, a trade association emphasised the fact that the Burmese Arbitration Act was outdated and needed modernising in order to provide minimal reassurance for investors that their investments can be protected. For example, courts have the power to rule that an arbitration agreement ceases to have effect where a court has removed the arbitrators (effectively placing the ability to continue arbitration in the hands of the courts). The Arbitration Act imposes short time limits for the conduct of proceedings that are unlikely to be workable for complex disputes. Experience has shown that courts have had a worrying attitude towards arbitration and have even refused to acknowledge an arbitration agreement on the basis that it attempted to eliminate recourse to the courts. Domestic arbitration is therefore not an appealing prospect for foreign investors.

Myanmar/Burma's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 15 July 2013 gives investors greater certainty that foreign arbitral awards can be efficiently enforced within Myanmar/Burma's jurisdiction, however it will not ensure that an investor will be properly compensated if expropriated or that it will be treated in a fair, equitable, and not abusive manner when the New York Convention is applied or that it will have access to justice.

Bilateral interviews with EU companies active in Myanmar/Burma also confirmed that the absence of a functioning judiciary system was the current biggest area of concern for them. Various companies interviewed explained that in case of conflicts they preferred to discuss their issues with the authorities rather than take recourse to the judiciary. Some mentioned that they were preferred to use an amicable solution.

ii) Unclear and obsolete investment rules

It is expected that Myanmar/Burma's Parliament will pass new legislation, demonstrating strong political will and commitment to continue with economic reforms and the creation of a favourable investment climate. These laws will include:

- A new Telecommunications Law which is, notably, to set up an independent telecoms regulator and introduce private competition to the incumbent state-owned operator, Myanmar/Burma's Post and Telecommunication's monopoly by allowing both domestic and foreign investors to hold mobile telecom licenses;
- A new Intellectual Property Law which is to overhaul its intellectual property regime and align it towards the World Intellectual Property Organization (WIPO) rules;
- A new Mining Law replacing the existing 1994 mining law and aiming at attracting more foreign direct investment in Myanmar/Burma's mining industry;
- A new Special Economic Zone (SEZ) Law which is to offer more incentives to foreign investors than the 2011 version.

However, as highlighted by bilateral consultations, there seems to be a large number of pieces of legislation that affect, directly or indirectly, the business and investment environment. Many of those appear to contain provisions in contradiction with the new core investment protection laws (the 2012 Foreign Investment Law and its implementing rules) and other investment-related laws such as state-owned enterprises, labour, laws constituting the Myanmar Investment Commission, land ownership and registration, intellectual property rights, the expropriation law and access to justice/alternative dispute resolution in Myanmar/Burma. The broader legal framework for business activities, including the Companies Act (1914), the Contract Law (1872), the Sales of Goods Act (1930) and Arbitration Act (1944), are outdated and remain unchanged. Some respondents emphasized that, despite the adoption of a new foreign investment law, the reforms remained below international standards, implementation remained limited and inconsistent throughout the country and there was a lack of experience dealing with foreign investors.

A few interviewees also underlined the importance of a greater protection of intellectual property rights as counterfeiting was an issue and that an improvement of the legal framework in this respect was essential.

Finally, one respondent considered that Myanmar/Burma lacked the legal and institutional framework necessary to allow responsible investment.

3.2.2. Lack of level playing field for the EU investors

- **Lack of rules at multilateral level**

Investment is not covered under the WTO agreements in a comprehensive manner. Investment, one of the so-called "Singapore issues" was dropped off the multilateral trade negotiations of the WTO agenda at the 2003 Cancun Ministerial Conference. Since then, there have been no multilateral negotiations in the WTO or any other body on investment. Negotiations on a *Multilateral Agreement on Investment (MAI)* within the framework of the OECD stopped in the late 1990's and there are currently no proposals to re-initiate talks that could eventually lead to such an agreement.

Nevertheless there are investment disciplines, at multinational level, which vary from sector to sector and from country to country:

- ✓ The WTO General Agreement on Trade in Services ("GATS Agreement") covers establishment – that is the supply of services by a foreign company setting up an operation in a host country through foreign direct investment. However, Myanmar/Burma's sectoral coverage is extremely limited with commitments taken in some tourism and travel-related services and auxiliary transport services.
- ✓ Moreover, Myanmar/Burma has not taken any commitment under TRIMs (the Agreement on Trade-Related Investment Measures prohibiting certain trade-related investment measures that affect trade in goods, such as local content requirements).

Rules on investment also exist in the context of the OECD, but Myanmar/Burma is not a member of OECD and is not likely to adhere to the relevant OECD codes even though this would be possible also for a non-member.

- **Existing FTAs and BITs between Myanmar/Burma and its Asian partners disadvantage EU investors.**

ASEAN concluded plurilateral Free Trade Agreements with six of ASEAN's dialogue partners, notably China (entry into force: 2005), Korea (2007), Japan (2008), India (2010), as well as Australia and New Zealand (2010). Due to their plurilateral character, these ASEAN+1 FTAs also bind ASEAN member states *inter se*.

In early 2009, ASEAN consolidated and significantly expanded previous intra-regional investment accords by concluding the ASEAN Comprehensive Investment Agreement, which, as a modern state-of-the-art investment treaty, covers investment protection, liberalization, facilitation, promotion, and transparency of investment rules and regulations.

The conclusion of investment accords under the respective framework agreements with China and Korea followed promptly in the same year. Moreover, ASEAN, Australia, and New Zealand included a comprehensive investment chapter in their 2010 FTA. India and Japan, on the other hand, are still negotiating investment agreements with ASEAN

As a member of ASEAN, Myanmar/Burma is party to the ASEAN Comprehensive Investment Agreement (ACIA)¹¹, as well as to the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), the ASEAN-Korea Free Trade Agreement (AKFTA) and the China-ASEAN FTA (CAFTA), which all contain an investment chapter that provides protection standards to qualifying foreign investors. Consequently, all investors incorporated in these countries, as well as in any member of ASEAN, can benefit in Myanmar/Burma from the provisions of these agreements.

Myanmar/Burma has also signed **six Bilateral Investment Treaties (BITs)** with Asian and ASEAN countries including China, India, Philippines, Lao PDR, Thailand and Viet Nam. However, only BITs with *China, India and the Philippines* are in force. The investment protection clauses included in these ratified BITs ensure a good level of investment protection for their respective investors and investments¹². Basically, these BITs include substantive investment protection provisions the EU considers should be included in any agreement with its foreign partners. These provisions include definition of investments and investors, non-discrimination (national treatment and Most-Favoured Nation), fair and equitable treatment¹³, expropriation and compensation, compensation for damages and losses, free transfer, subrogation, dispute settlement¹⁴ (both state-to-state and investor-to-state). These BITs have supported the growth of Asian FDI in Myanmar/Burma not only in the oil and gas sectors but also in other economic sectors including telecoms and construction¹⁵.

On the contrary, no EU Member State has a Bilateral Investment Treaty with Myanmar/Burma. EU investors in Myanmar/Burma therefore do not benefit from the same real protection as the investors from countries who have signed such an agreement which might quickly enter in force (with Lao PDR, Thailand and Vietnam), **and are disadvantaged, in particular compared to investors from China, India and the Philippines which effectively benefit from the provisions of the respective BITs in force with Myanmar/Burma.**

¹¹ The ACIA binds the member countries to "progressively reduce or eliminate investment regulations and conditions, which may impede investment flows and the operation of investment projects in ASEAN".

¹² In addition to treaties covering investment matters to which Myanmar/Burma is a party, the country has also concluded bilateral Free Trade Agreements with Bangladesh, China, India, Israel, Korea, Lao PDR, Malaysia, Pakistan, Philippines, Sri Lanka, Thailand and Viet Nam, as well as an economic and trade agreement with Turkey.

¹³ Except for the BIT in force with the Philippines.

¹⁴ Except for the BIT in force with the Philippines.

¹⁵ Precise data and figures have not been found to illustrate the weight Asian BITs have played in expanding Asian FDI flows and stocks to/in Myanmar/Burma.

- **Growing interest in BITs with Myanmar/Burma from Japan, South Korea and the US may put EU investors at a further competitive disadvantage in the near future.**

Myanmar/Burma and Japan have just concluded a Bilateral Investment Treaty which should be signed by the end of 2013. Myanmar/Burma is also negotiating a Bilateral Investment Treaty with South Korea¹⁶.

On 21 May 2013, the US signed a Trade and Investment Framework Agreement with Myanmar/Burma, creating a platform for dialogue and cooperation on trade and investment issues between the two countries.

While Myanmar/Burma's authorities have stated they will not grant preferential access to the above-mentioned partners in the context of their investment agreements, such agreements could grant them more comprehensive protection standards and transparency, which would again put EU investors at a competitive disadvantage. The bilateral consultations conducted in the framework of the impact assessment highlighted EU investors' concern that missing the opportunity of an investment agreement with Myanmar/Burma including an investor-to-state dispute settlement mechanism will put them in a disadvantageous position compared to investors from countries which have already signed such bilateral agreements with Myanmar/Burma.

- **The EU's bilateral agreements and negotiations with third countries and its implications for EU investors in Myanmar/Burma**

The EU is currently negotiating FTAs which include an investment protection chapter with India, Canada, Singapore, Japan, Morocco and the US¹⁷. These six partner countries stand to be the first to benefit potentially from a uniform EU-wide standard of protection as well as further investment liberalisation. Negotiations on a standalone investment agreement with the People's Republic of China were launched at the EU-China Summit of 21 November 2013.

In April 2007, the Council authorized the Commission to start negotiations for a free trade agreement with ASEAN Member States on a regional basis. But given the difficulties to negotiate on a regional level, in December 2009 the Council authorised the Commission to pursue negotiations towards Free Trade Agreements (FTAs) with individual non-LDC ASEAN countries. Subsequently, negotiations with Singapore (including on investment protection), Malaysia, Vietnam and Thailand began in March 2010, October 2010, June 2012, and March 2013 respectively.

¹⁶ Myanmar/Burma's authorities are also considering negotiations with other foreign partners including Mongolia, Pakistan, Bangladesh, Russia and Iran.

¹⁷ In addition, with Ukraine, Moldova, Armenia and Georgia, the EU has negotiated or is currently negotiating Deep and Comprehensive FTAs (DCFTAs) which include negotiations on the liberalisation of direct investment flows (i.e. establishment). With Ukraine, the initialing of the DCFTA took place on 19th July 2012 and is to be signed by the Council when the conditions are met. DCFTA negotiations with Moldova started in February 2012 and the final round was successfully held on 27 June 2013. Equally, DCFTA negotiations with Armenia and Georgia were completed in July 2013.

On 18 October 2013 the Foreign Affairs Council Trade adopted a proposal modifying the current EU-ASEAN FTA negotiating directives to allow the European Commission to also negotiate on investment protection, thus making investment protection a component of the on-going FTA negotiations with Thailand, Malaysia and Vietnam.

In the absence of BITs with Myanmar/Burma, the ongoing negotiations with ASEAN countries, when concluded, may further reinforce their attractiveness for EU investors, to the detriment of EU investments in Myanmar/Burma.

3.3. Market access barriers and investor protection in Myanmar/Burma

The public consultation indicated that 56% of companies reported having experienced difficulties when trying to invest in Myanmar/Burma. When asked to list and rate the kind of barriers considered as most problematic for companies investing or trying to invest in Myanmar/Burma the following were named as the top five:

- prohibition to invest,
- limited scope of business,
- excessive capital requirements,
- burdensome licensing requirements,
- local partner requirement,
- national security control.

The new Foreign Investment Law (FIL) 21/2012, approved by President U Thein Sein in November 2012, intended to address these five barriers but the details remain vague leaving large scope for discretion from Myanmar/Burma's authorities (*see below for details*).

On 31 January 2013, the Ministry of National Planning and Economic Development (MNPED) issued a subsequent administrative law, MNPED's Notification 11/2013 or a so-called "Foreign Investment Implementing Rules" (FIR) providing further clarification and guidance on the scope and implementation of the FIL. The FIR was adopted together with the Myanmar Investment Commission (MIC)'s Notification 1/2013 outlining types of prohibited and restricted economic activities.

As highlighted by the OECD Secretariat in its draft report on the Investment Policy Review of Myanmar/Burma of 26 September 2013¹⁸, the enactment of the new Foreign Investment Law and its accompanying implementing rules marks a milestone towards a more open and secure legal environment for foreign investment in Myanmar/Burma. Improvements over the earlier 1988 Foreign Investment Law notably included the adoption of a negative list of restricted sectors rather than positive list/case-by-case approach, a broad definition of investment, the removal of both general minimum capital requirement and minimum foreign share in joint ventures.

¹⁸ Investment Policy Review of Myanmar, Draft Report by the OECD Secretariat of 26 September 2013, DAF/INV/WD (2013)13.

Nevertheless, the OECD considers that the FIL leaves many questions unanswered, notably with respect to investor protection and the procedures for admitting foreign investors and highlights three key problems:

1. Core investment protection standards remain absent from the new legal framework. The principle of non-discrimination has not been incorporated in the investment framework and foreign investors are subject to numerous restrictions including on the expropriation regime which is not aligned to internationally recognised standards;
2. Existing high discretion of the Myanmar Investment Commission (MIC), complex and multiple approval criteria, unclear necessity for a Joint Venture requirement in small restricted sectors, and possible capacity constraints to cope with rapid FDI growth;
3. The current regulatory framework is complex, 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 individual projects;

In addition, even though the implementing rules seem to provide more clarity on Myanmar/Burma's investment regime and give a significant degree of investor-friendly provisions, descriptions of restricted and prohibited activities as well as additional conditions in restricted sectors (i.e. not allowed to foreign direct investors) listed in category III are broad and sometimes inconsistent with the FIL and even with earlier rules such as the 1989 State-Owned Enterprise Law and specific law (e.g., mining law). The scope of activities classified as "prohibited" or "restricted" remains vague and is subject to discretionary decisions of the Myanmar Investment Commission which consults with relevant ministries before making its decision.

Overall, investment protection framework under the 2012 FIL remains below international standards. The fact that the Myanmar/Burma authorities envisage a revision of the 2013 Implementing rules less than a year after their publication is an indication that some shortcomings have been identified and need to be addressed to attract foreign investors.

3.4. Myanmar/Burma has difficulties in providing goods and services that generate value.

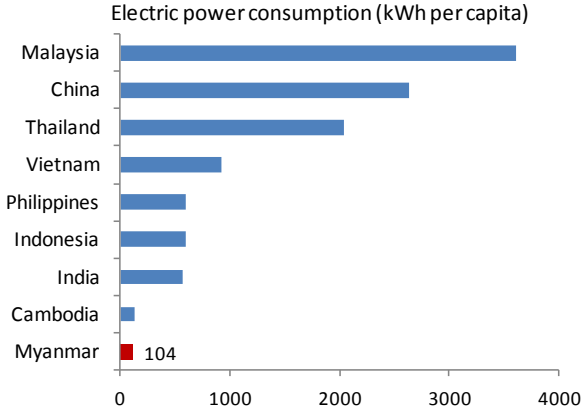
Foreign direct investments remain focused on the energy sector. Myanmar/Burma needs to diversify its economy away from agriculture and the energy sector, and to attract skilled labour in developing economic sectors.

3.4.1. Myanmar/Burma economy largely depends on energy and agriculture.

The share of agriculture in total value added in the Burmese economy has decreased over time but remains the highest among the countries in the region. According to data from the Asian Development Bank, agriculture (including forestry and fishing) accounted for 36% of nominal GDP in fiscal year 2009/2010 (April-March). An estimated 75% of the Myanmar/Burma population is engaged in the informal sector in agriculture or small scale rural enterprises. In general the abundance of low-skilled labour means that Myanmar/Burma has great potential

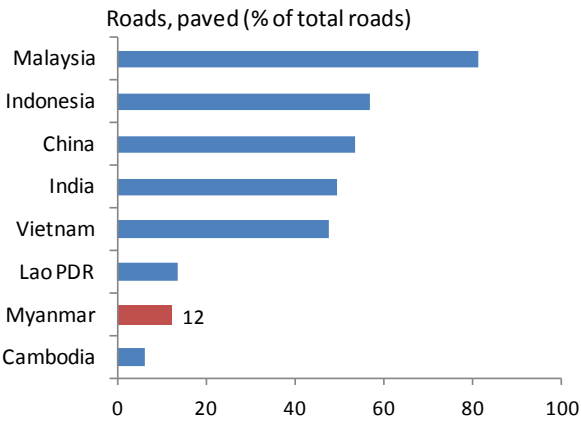
to expand labour-intensive export-manufacturing. However, while the natural resources sector including oil, gas and mining are likely to be important drivers of growth in coming years, these sectors do not tend to generate large scale employment. To achieve a more balanced and diversified growth that would benefit all citizens of Myanmar/Burma the government needs to put in place the right conditions for the successful development of the private sector investment in the non-resource sector.

Electricity



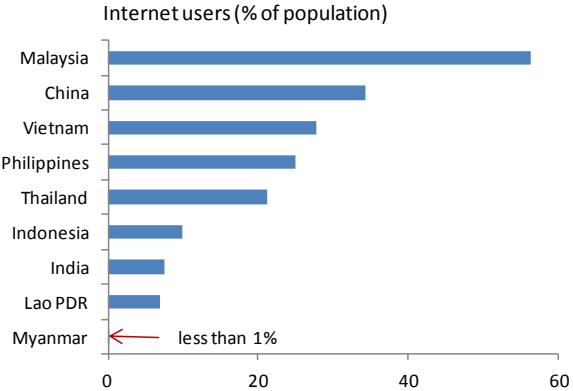
Source: World Development Indicators

Transport



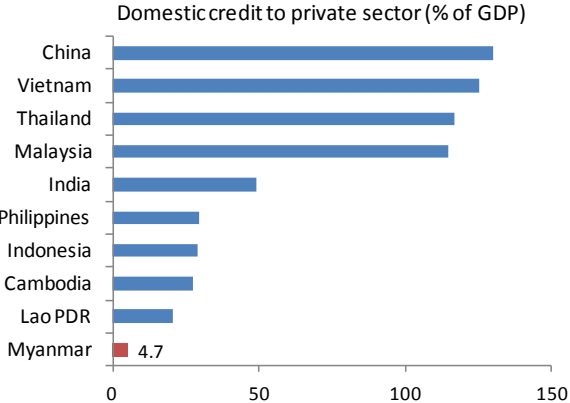
Source: World Development Indicators

Telecommunications



Source: World Development Indicators

Finance



Source: World Development Indicators

The special report from the Economist Intelligence Unit's Asia Custom Research Team released in April 2012 highlighted that *"a poorly developed and dysfunctional banking sector –or rather the absence of a properly functioning financial system- may turn out to be the most serious brake on Myanmar/Burma's economic development as it opens up after decades of socialism as well as economic and political isolation"*.

Myanmar/Burma's banking system is a poor source of domestic financing for the private sector, with limited market-based competition. There are four state-owned commercial banks, including the Myanmar Economic Bank (MEB) and the Myanmar Investment and Commercial Bank (MICB), and according to the IMF, they carry large non-performing loans

(NPLs) and are not run on a commercial basis. There are a number of private banks, but data on their performance is limited.

Foreign banks are allowed to open branches in Myanmar/Burma, but are not permitted to offer domestic banking services. In recent years, a number of foreign banks have closed their representative offices in Myanmar/Burma. Although, on paper, Myanmar/Burma has sound reporting and reserves requirements, monitoring and enforcement of these regulations by the Central Bank of Myanmar, which is not operationally independent, has been inadequate.

A major problem facing many smaller businesses, especially outside the major cities, is a lack of access to capital, and the opening of four new banks (in addition to the 14 that are already operating) is unlikely to change this. Meanwhile, trust in the banking sector remains low; during the banking crisis in 2003 a run on banks was followed by tight restrictions on the withdrawal of deposits. Many other financial services, such as savings vehicles, pensions and insurance, are limited or non-existent.

3.4.2. Myanmar/Burma's labour market notably suffers from skilled labour shortage¹⁹

Myanmar/Burma suffers from a significant shortage of skilled labour as much of the country's intellectual talent fled in 1988 after the army crushed a student-led revolt, while many of those who remained were eventually lured to Singapore, Malaysia and Thailand, where wages are higher.

The government allows the employment of foreigners by granting them stay permits, especially for foreign firms registered with the Myanmar Investment Commission (MIC). However, it is time consuming to seek a stay permit, which requires recommendations from both a Burmese embassy overseas and a government ministry. Moreover, the Union of Myanmar Foreign Investment Law (UMFIL), enacted in November 2012 limits the recourse to foreign workers.

Overall, a growth bottleneck and missed job creation opportunities are the consequences of the current structure of Myanmar's economy and labour market. Should the Union of Myanmar Foreign Investment Law limiting the recourse to foreign workers be repealed, a bilateral investment protection agreement would support Myanmar/Burma's capacity to maintain, develop as well as to attract EU skilled labour in the economic sectors its government seeks to develop.

3.5. No prospect for an EU-Myanmar/Burma Free Trade Agreement (FTA)

As explained under section 3.2.1.2., the EU is currently negotiating an FTA with some non-LDCs ASEAN Member States and these FTAs are seen as building blocks for a region-to-region FTA in the future, as indeed a regional FTA with all ASEAN Member States, including Myanmar/Burma, remains the EU ultimate objective.

¹⁹ This paragraph is essentially based on the findings from both the Economist Intelligence Unit's special report on Myanmar of April 2012 and the draft report from the OECD Secretariat on the Investment Review of Myanmar of 26 September 2013.

However, being a least developed country, Myanmar/Burma benefits from duty free and quota free access to the EU market under the Everything But Arms Arrangement, reinstated on 19 July 2013. Because of the access to the EU market provided by EBA, there is currently little incentive for Myanmar/Burma to negotiate a FTA with the EU in the short to medium term.

3.6. No readiness from Myanmar/Burma to negotiate market access in investment agreements

During first exploratory talks which took place during the DG Trade Deputy Director General's visit to Myanmar/Burma on 26-28 November 2012, Minister of Myanmar/Burma's President's Cabinet U Soe Thane, who is in charge of the economic reform, and Deputy Minister for National Planning and Economic Development Winston Set Aung stressed that, while favouring the negotiation of an investment agreement with the EU, Myanmar/Burma was not keen to include market access negotiations.

On 5 March 2013 in Brussels, at the occasion of Trade Commissioner Karel De Gucht meeting with Minister U Soe Thane, the latter stressed that *Myanmar/Burma is not ready to negotiate market access provisions with any of its foreign partners including the EU*. Minister U Soe Thane again confirmed this position at the occasion of DG Trade Director visit in Myanmar/Burma on 29-30 April 2013

4. OBJECTIVES

4.1. General objectives

The EU's general objective derives from the Treaty on the Functioning of the European Union, which in Articles 3(1) (e), establishes the EU's exclusive competence for the common commercial policy and through Article 206 provides that "the Unions shall contribute to progressive abolition of restrictions on (...) foreign direct investment". Article 207 (1) sets out the need for uniform principles including for FDI and liberalisation measures. It also states that the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action as set out in Article 21 of the Treaty on European Union²⁰ including on sustainable development.

4.2. Specific objectives

With respect to future EU-Myanmar/Burma investment relations, the EU's specific policy objectives translate into:

- Improving legal certainty regarding treatment of EU investors in Myanmar/Burma;

²⁰ Article 21 Para 1, The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement etc. and 2 (e) TEU: "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade".

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- Improving the protection of EU investments in Myanmar/Burma through easier access to arbitration and investor-to-state dispute settlement (ISDS);
- Ensuring EU investors are not discriminated against in Myanmar/Burma;
- Increasing bilateral FDI flows;
- Supporting sustainable development by encouraging responsible trade and investment while promoting transparency, environmental protection, core labour standards and human rights.

Myanmar/Burma's specific objective is mainly to reinforce the country's integration in the world economy, and to boost its internal economic reform agenda, including to bring responsible EU investments and to signal to other partners that its business environment is more predictable and stable.

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4.3. EU Operational objectives

In light of the overall objective regarding the EU-Myanmar/Burma investment relationship and considering the problems mapped out in sections 3.2 through 3.5, the operational objectives are as follows:

1. Provide EU investors effective non-discrimination for investments (i.e. after establishment);
2. Seek the highest possible level of uniform standards of legal protection and certainty for European investors in Myanmar/Burma;
3. Increase transparency in Myanmar/Burma business environment by e.g. ensuring consultations of stakeholders in advance of introduction of regulations which have an impact on investment; publication of such rules and transparency as regards the administration, implementation and application of regulations having an impact on investment;
4. Seek to achieve a level-playing field for EU companies investing in Myanmar/Burma against other foreign investors investing in Myanmar/Burma;
5. Ensure the right of the parties to take measures necessary to achieve legitimate public policy objectives (including e.g. environmental, social, labour and human rights objectives) on the basis of the level of protection that they deem appropriate;
6. Seek to ensure that domestic laws and policies provide for high levels of environmental principles and labour standards and that the parties shall not encourage foreign direct investment by weakening or reducing domestic environmental or labour legislation and standards, or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity including by failing to effectively enforce such legislation and standards;
7. Seek to commit contracting parties to promote Corporate Social Responsibility (CSR) and encourage investors to follow CSR practices in accordance with internationally-recognised guidelines and principles;

Ensure the enforcement of any agreed rules through adequate dispute settlement including access to Court arbitration.

4.4. Myanmar/Burma's operational objectives

The organisation of informal and formal bilateral meetings arranged both in Brussels, Yangon and Nay Pyi Taw as from November 2012 between Commission services and Myanmar/Burma's officials at both political and technical levels allowed a clear understanding of Myanmar/Burma's objectives for a possible negotiation of a standalone investment agreement at EU level.

Myanmar/Burma's President U Thein Sein has stated clearly and repeatedly in public speeches that what Myanmar needs most is responsible trade and investment²¹. So has opposition leader Aung San Suu Kyi.

²¹ <http://www.chathamhouse.org/sites/default/files/public/Meetings/Meeting%20Transcripts/150713Sein.pdf>

1. Seek to increase Myanmar/Burma's attractiveness as a destination for EU foreign direct investment,
2. Attract EU investments in labour intensive areas including clothing and tourism to diversify Myanmar/Burma's economy beyond natural resources and agriculture,
3. Encourage investors to promote CSR practices in accordance with internationally recognised guidelines and principles in Myanmar/Burma²².

4.5. Consistency of objectives with other relevant policy initiatives

The EU's objectives are consistent with the overall objectives established by the Treaty and in line with the Commission Communication "*A strategy for smart, sustainable and inclusive growth – Europe 2020*" which sets out the overall objectives for the decade to come and particularly emphasises the need to build strategic relationships with emerging economies. Trade and investment are a crucial component of the smart, sustainable and inclusive growth objectives of the Europe 2020 Strategy. The objectives are furthermore consistent with the Communication adopted on 7 July 2010 entitled "Towards a comprehensive European international investment policy", as well as with the Commission Communication of 25 October 2011 "A renewed EU strategy 2011-14 for Corporate Social Responsibility"²³, whereby the EU promotes CSR through its external policies. The EU actively pursues the question of CSR in its chapter on sustainable development in FTAs and intends to make reference to refers to internationally recognised CSR principles and guidelines, in particular the OECD Guidelines for Multilateral Enterprises²⁴ in future EU investment agreements.

This is also in line with the recurrent calls by the European Parliament in its most recent Resolutions on Myanmar/Burma²⁵, such as the [EP Resolution of 23 May 2013 on reinstatement of Myanmar/Burma's access to generalised tariff preferences](#) which acknowledged "*that responsible and sustainable trade and investment – including with and from the Union – can support Myanmar/Burma's efforts to fight poverty and to ensure that measures benefit broader sections of the population*". It also noted "*that this has to be done by promoting implementation of the highest standards of integrity and corporate social responsibility, as laid out in the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and the EU's own 'strategy 2011-14 for Corporate Social Responsibility.*" EP Resolution of 13 June 2013 on the situation of Rohingya Muslims also called "*on the Commission to assess in an effective and comprehensive manner the human rights impact of the envisaged bilateral investment agreement before formulating its proposal for negotiating directives, and in this process closely to consult Parliament and civil society*", which the Commission did through both the public consultation and targeted consultation, as attested by section 6.4 and Annex 2 on the impact on human rights.

²² http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_183340/lang--en/index.htm

²³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>

²⁴ <http://mneguidelines.oecd.org/text/>

²⁵ European Parliament Resolution of 20 April 2012 on the situation in Burma/Myanmar (2012/2604(RSP); European Parliament Resolution of 23 May 2013 on reinstatement of Myanmar/Burma's access to generalised tariff preferences (2012/2929(RSP); European Parliament Resolution of 13 June 2013 on the situation of Rohingya Muslims (2013/2669(RSP)

5. POLICY OPTIONS

As stressed in paragraph 3.5, there is currently no incentive for Myanmar/Burma to negotiate a Free Trade Agreement with the EU in the short to medium-term. Equally (see Para 3.6) Myanmar/Burma's authorities have clearly stated that Myanmar/Burma is not ready to negotiate on market access with any foreign partner and want all foreign investors to be subject to the new Foreign Investment Law. Therefore, negotiating on investment liberalisation cannot be envisaged at that stage.

Accordingly, three different policy options have been considered to achieve the objectives set out in Chapter 4.

Option 1	Baseline scenario: No agreement – continue with the status quo
Option 2	Authorising individual interested EU Member States to negotiate a bilateral investment agreement with Myanmar/Burma
Option 3	EU negotiating a standalone investment protection agreement

5.1. Option 1: No policy change: Baseline scenario

A first policy option would be to continue to operate under the newly established framework of bilateral policy dialogue and existing multilateral commitments. In that respect, a new bilateral policy dialogue on trade and investment was launched at the first EU-Myanmar Forum and related Working Group on Trade and Investment meeting held in Nay Pyi Taw on 17-18 June 2013 (see under section 3.1.5). Under this option, discussions on EU-Myanmar investment related issues could continue through this channel.

Indeed, as is customary under these Trade and Investment Working Groups established with the EU's various trade partners, all issues pertaining to trade and investment are addressed. As such, besides a regular overview of the trend in trade and investments flows, this Working Group would also address market access barriers encountered by the EU companies willing to enter the Myanmar/Burma market or already operating in the Myanmar/Burma market.

To this effect the expected establishment of a European Chamber of Commerce in Myanmar/Burma in the near future would contribute to gathering information on any problems encountered.

5.2. Option 2: Authorising individual interested EU Member States to negotiate a bilateral investment agreement with Myanmar/Burma

From 1st December 2009, the Lisbon Treaty brought investment policy within the sphere of policy areas developed at the European level. However, Regulation (EU) No 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between EU Member States and third countries established a mechanism for empowering Member States – under certain conditions – to negotiate bilateral investment agreements with countries not immediately scheduled for the EU-wide investment negotiations.

In application of Regulation N° 1219/2012, which entered into force on 9 January 2013, interested EU Member States would send to the Commission services a notification regarding

authorisation to start new negotiations of a Bilateral Investment Agreement with Myanmar/Burma (Art 8. of the Regulation). Bilateral investment negotiations by Member States, and corresponding investment agreements, **may be authorised if such negotiations or agreements:**

- a) are consistent with Union law;
- b) are not superfluous, because the European Commission submitted or decided to submit a recommendation to open negotiations with the same country;
- c) are consistent with the Union's principles and objectives for external action; or
- d) do not constitute a serious obstacle to the negotiation or conclusion of investment agreements by the Union.

The Regulation entered into force on 9 January 2013, and since its entry into force it is being actively implemented²⁶.

For instance, the Committee for Investment Agreements meeting of 28 November 2013 chaired by the European Commission adopted the decisions to allow:

- Greece to open formal negotiations to conclude a bilateral investment agreement with Oman, Qatar, Saudi Arabia and Nigeria;
- Lithuania to open formal negotiations to conclude a bilateral investment agreement with Algeria, Angola, Benin, Chile, Ghana, Iraq, Israel, Lebanon, Libya, Mexico, Nigeria, Oman, Pakistan, Qatar, Turkey, Saudi Arabia and United Arab Emirates.

In these examples, the European Commission highlighted that, as a matter of principle, if it has decided to negotiate with a certain third country, it would not authorise Member States to negotiate with the same country, as this is required by the criterion 9.1(b) of the Regulation, i.e. negotiations are not superfluous.

5.3 Option 3: An EU standalone investment protection agreement

The third policy option would be for the EU to negotiate a standalone investment protection agreement between the EU and Myanmar/Burma. This agreement would cover protection, i.e. treatment of investments once undertaken (post-establishment).

This proposed standalone investment protection agreement should provide for the highest possible level of legal protection and certainty for EU investors in Myanmar/Burma. As investment is a new EU competence, no similar agreement exists at an EU-level. However, it should build upon the Member States' experience of Bilateral Investment Treaties (over 1400 are in existence) and it includes best practice from bilateral investment agreements between Member States and countries similar to Myanmar/Burma.

²⁶ Until 18 November 2013, Member States submitted the following notifications pursuant to the Regulation: 126 notifications of Member States' intentions to negotiate bilateral investment agreements (or protocols to bilateral investment agreements) with third countries, of which 43 have been authorised by the European Commission.

Therefore, in line with Member States' practice and that of most of EU trading partners, the key standards of investment protection for the future EU investment agreement will include the guarantee of fair, equitable and non-discriminatory treatment, full protection and security, as well as guarantee of protection against unlawful expropriation and free transfer of funds. In order to ensure effective enforcement, the EU investment protection agreement should also feature investor-to-state dispute settlement, which permits an investor to take claim against a government directly to binding international arbitration.

Therefore although no commitment can be given, at this stage, as to the exact way these key standards of protection will be spelt out in the text of the agreement,, all these elements should be part of the negotiation (i.e. be included in the negotiating directives) and properly reflected in the final text of the agreement. Furthermore, under this option the EU would seek to include clauses regarding the non-derogation of labour and environmental standards and on corporate social responsibility.

Non-discrimination is an important principle for the EU. Therefore, the EU would want provisions ensuring that the EU will not be discriminated vis-à-vis third countries concerning investment matters in Myanmar/Burma's market.

6. ANALYSIS OF IMPACTS

6.1. Economic impacts of the different policy options

6.1.1. Policy Option 1: the baseline scenario

The baseline scenario assumes no changes in the current situation regarding investment policy vis-à-vis Myanmar/Burma and takes as a basis the status quo regarding openness and legal certainty of the EU's and Myanmar/Burma's respective investment environments.

Since 2011, Myanmar/Burma's government has brought in reforms both to attract export-based industries (see under section 3.1.4. on current investment context), and to open its investment policy to attract foreign direct investments (see under section 3.1.5. on legal context, as well as to strengthen compliance with labour standards (see under section 6.3.2. on impacts on labour rights and working conditions).

The newly established framework of bilateral policy dialogue on trade and investment was launched at the first EU-Myanmar Forum in Nay Pyi Taw on 17-18 June 2013. A Working Group on Trade and Investment and a Working Group on Cooperation, established on the occasion of the Forum, also met and reported to plenary. The Forum allowed both sides to discuss priorities for the future and will meet again in 2014. The Working Group is a useful platform to identify how the EU can support Myanmar's transition and further strengthen trade and investment relations in the future. It also allows for exchanges of views on legislative developments in the country as well as discussion on the potential investment agreement.

The recent reinstatement of zero-duty quota-free access to the EU market may encourage EU companies to invest in Myanmar in order to manufacture their products and export them to the EU under the preferential duties. However, neither of those recent steps is sufficient to address the problems highlighted under section 3. Notably, the existing FDI environment and

trends and the shortcomings outlined in sections 3.2 to 3.4, do not encourage EU FDI into Myanmar/Burma. In particular, while recent improvements to the overall investment and legal framework highlighted under section 3.3 relate to companies starting operating in Myanmar/Burma, they do not provide sufficient legal certainty and protection to investors once they have invested. First of all, national legislation can be changed at any time and without any limitations in the future. Secondly, none of these pieces of domestic legislation will ensure that an investor will be properly compensated if expropriated or that it will be treated in a fair, equitable and not abusive manner when these laws are applied or that it will have access to justice. The level of EU investment is, therefore, not expected to increase much further.

6.1.2. Policy Option 2: Impact of authorising interested EU Member States to negotiate bilateral investment agreements

As indicated under section 5.2., authorisation from the Commission for individual Member States to negotiate a bilateral investment agreement in Myanmar/Burma could be granted on a case by-case basis under Regulation (EU) N°1219/2012.

Member State BIT practice and content vary and, without knowing in advance which Member State(s) would request an authorisation to negotiate a BIT with Myanmar/Burma, it is not possible to assess the impact at this stage.

It is unlikely, however, that all Member States would request an authorisation to negotiate a BIT with Myanmar/Burma. First, there are no BITs between EU Member States and Myanmar/Burma. Second, EU investments in Myanmar/Burma currently originate from a very limited number of Member States (mainly the United Kingdom and France). Third, as Myanmar/Burma is among the Least Developed Countries and has only very recently opened up to foreign investors, it is unlikely to have the administrative capabilities to negotiate with several countries concurrently, in particular with those countries that do not yet represent, or have the potential to represent., significant investment flows. Even if several or all Member States were authorised to negotiate and conclude BITs with Myanmar/Burma, a patchwork of such bilateral investment agreements would lead to an unlevel playing field between investors from different Member States and Myanmar/Burma. **Accordingly, option 2 would create different treatments between EU investors depending on whether their respective country of origin has concluded or not a BIT with Myanmar/Burma.**

Overall, Policy Option 2 could have a positive but modest effect in only some European Member States and on Myanmar/Burma welfare, but also a modest negative effect on the investors from those Member States not having concluded a BIT with Myanmar.

6.1.3. Policy Option 3: Impact of an EU investment protection agreement.

The additional benefits of Option 3 as compared to the baseline scenario are twofold. Firstly, although the Foreign Investment Law of 2012 has brought more clarity to the legal framework with regard to access for foreign investors to the Myanmar/Burma market, it has left questions unanswered with respect to investor protection, as indeed core investment protection standards remain absent from Myanmar/Burma's current legal framework including on the protection against discrimination and expropriation. Secondly, subject to any policy change within the Government or change of Government, the Foreign Investment Law provisions or

any other legislation applicable to foreign investors can be amended any time by another law (which could be more restrictive). Therefore, the conclusion of an investment agreement would ensure more predictability and stability of investment rules for EU investors over and above the baseline scenario and will ensure that the obligations in the agreement can be enforced.

As section 3.2 outlines, the absence of any Bilateral Investment Treaty (BIT) between any EU Member State and Myanmar/Burma means that there is an unlevel playing field between investors from countries which already have a BIT with Myanmar/Burma and EU investors in Myanmar/Burma.

Overall, it appears that pure investment protection BITs are considered by investors as an important insurance policy which could provide recourse in cases of unfair and unjustified decisions by the host State. This, in itself, is an extremely important aspect of any future investment protection agreement²⁷ On the basis of studies done for other developing countries²⁸ we can expect that this increase in legal certainty and security would make Myanmar/Burma more attractive to EU investors.

6.1.3.1. Expected impact on FDI and trade

Policy Option 3 is expected to trigger an increase in EU-Myanmar/Burma investment flows and stocks. The investment protection and the increased EU-Myanmar/Burma investment flows and stocks should also lead to increase in trade activity, which will in turn have a positive impact on the economy at large.

Overall, the conclusion is that an improved legal framework for EU companies in Myanmar/Burma would allow them to expand their operations in Myanmar/Burma, increasing their turnover.

²⁷ See also the conclusions reached in the Impact Assessment Report on the EU-China Investment Relationship.

²⁸ Egger, P. and M. Pfaffermayr (2004) "The Impact of Bilateral Investment Treaties on Foreign Direct Investment." *Journal of Comparative Economics* 32:4 (December 2004) 788–804.; Hallward-Driemeier, Mary. 2003. "Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit. and They Could Bite." World Bank Policy Research Working Paper 3121, August 2003.

- **Expected impact on trade**

As highlighted in the Copenhagen Economics study (2012) conducted in the framework of the impact assessment of the EU-China standalone investment agreement, trade and FDI are complements, i.e. an increase in FDI activity can trigger an increase in trade flows. The available literature suggests that FDI stimulates exports of other goods or services either from the parent company (intra-firm trade) or from other companies (inter-firm trade). This effect seems to be more significant than the substitution of some exports by the additional FDI.

By correlation, and in line with the public consultation, it can be reasonably expected that an EU-Myanmar/Burma investment agreement will promote trade between the EU and Myanmar/Burma, by stimulating FDI between the two parties.

- **Impact in the EU of increased inward or outward investment**

Myanmar/Burma's current FDI into the EU is extremely low and is not expected to increase significantly even after the conclusion of an investment protection agreement.

Outward investment can substitute domestic with foreign production, reducing investment and employment in the home economy, thereby negatively affecting economic growth and jobs. However, according to the Copenhagen 2010 review²⁹ on the existing empirical literature on how EU outward FDI generally impacts on productivity, employment, wages and skill structures in EU firms it was found that:

- EU outward FDI has triggered significant productivity and hence competitiveness gains of EU firms. This effect of outward FDI is however less pronounced for investments in less developed countries;
- EU outward FDI has had no measurable impact on aggregate employment so far. Over time, there is no indication that employment in the parent company is put under pressure by low wages in the host country of the foreign affiliate. Short term employment losses because of the relocation of production are compensated by the positive effect on employment of increased productivity and scale effects.
- Outward FDI may have real re-distributive impacts where skilled workers gain relative to unskilled workers, though such an effect is less likely for investments in less developed countries.

SMEs are fully covered by the preferred option. It can reasonably be expected that an EU-Myanmar/Burma investment agreement will promote trade between the EU and Myanmar/Burma and will stimulate EU FDI in selected sectors in Myanmar/Burma's economy. As a result, large EU companies as well as SMEs active in services sectors such as logistics, construction, tourism, but also in more traditional sectors like textiles/clothing will benefit from a standalone investment protection agreement.

EU investment in Myanmar/Burma is limited, representing only 8.8% of total foreign investments stocks as of 31 August 2013³⁰ and will remain small as a percentage of total EU

²⁹ Copenhagen Economics (2010).

³⁰ Source: Myanmar/Burma's Ministry of National Planning and Economic Development.

outward investment. Overall, it is expected that Policy Option 3 will have a small but overall positive economic effect in the EU.

- **Impact in Myanmar/Burma**

Existing literature remains inconclusive on whether it is possible to measure the impact of pure investment protection agreements on the volume of FDI. However, since developing countries can face difficulties in making credible commitments, some scholars emphasise the positive impact of such agreements between developed and developing countries. They are expected to have a greater impact on the FDI flows than agreements signed between similar countries³¹. Because of the limited access to economic and social data it was impossible to run a fully-fledged economic analysis involving econometric modelling. The only data on the EU investments in Myanmar/Burma are from local authorities, which do not correspond with UNCTAD data. The unreliability of data on trade and investment has been explained by the United Nations by "*years of isolation imposed on Myanmar/Burma*"³². Should the investment agreement provide similar levels of confidence for investors as is the case in other ASEAN countries, EU investment and stock in Myanmar/Burma should significantly increase.

- **Impact on third countries**

As far as impacts of an investment agreement on other developing countries' investment in Myanmar/Burma is concerned, possible trade and investment diversion effects are likely to be limited to export-oriented production sectors – such as textiles and garments – where new EU investors could become competitors to developing countries' investors. These potential trade diversion effects would anyway take place as a result of the Everything But Arms (EBA) benefits reinstatement to Myanmar/Burma which will attract EU investors, interested to manufacture in Myanmar/Burma to then re-export duty-free quota-free to the EU. However, due to the huge investment needs in the country in all sectors of activity, risks of crowding out appear very limited.

6.1.3.2. Expected impact on specific key sectors

Available information sources including, in particular, the Economist Intelligence Unit's special report on Myanmar of April 2012 and the Draft Report by the OECD Secretariat of 26 September 2013 on the Investment Policy Review of Myanmar both stressed the possible impact of an EU FDI increase in selected sectors of Myanmar/Burma's economy.

EU companies in service sectors such as logistics, construction, and tourism, but also in more traditional sectors including fishery and textile/clothing are competitive on the world markets and hold key know-how in these areas. As highlighted by bilateral consultations with business which is already active in Myanmar/Burma or which intends to invest in the country in the near future, a bilateral investment protection agreement should support EU companies' decisions to start investing or increase their investments in these economic sectors.

³¹ Investment Policy Review Myanmar, OECD, Paris 2013, p. 40

³² United Nations Economic and Social Commission for Asia and the Pacific (2012) "Myanmar: opening up to its trade and foreign direct investment potential".

A recurrent point made by companies consulted during the bilateral interviews was that their entry into Myanmar/Burma would probably happen incrementally to allow them the political situation to be kept under observation. In the meantime, there were still important improvements needed to the business climate to bring more clarity to rules and regulations. Therefore, to manage these risks, a few of them mentioned that they would probably start first with a representative office, and then progressively move towards a joint venture with a local partner before developing into a full-fledged investment operation in the country.

There is potential for foreign investment in several key areas in Myanmar/Burma. **Infrastructure** is largely under-developed, both in terms of the quality of infrastructure (e.g. ports, railroads, roads, IT) and logistics services³³. Myanmar's **construction** sector, too, is under-developed and small. Local construction companies lack the technical expertise and experience to take on large and complex construction projects. The **information and communications** technology (ICT) sector is the most outdated in ASEAN. Mobile-phone penetration is below that of North Korea, and the cost of ICT services is prohibitively high for the average Burmese citizen. Two giant Chinese telecoms equipment manufacturers are major suppliers of network components and have a sizeable share of the local handset market³⁴. The telecom sector is being liberalised and for joint venture partnerships with state-owned enterprise are now possible. A new telecom law is replacing the old law dating back to 1885 and a fully independent regulator will be put in place for 2015.

Myanmar/Burma's recent opening up means that for the first time in more than 50 years foreigners can see the country for themselves. The most active sectors for foreign investments over the past 12 months have been the **manufacturing, hotel and tourism** sectors³⁵. Myanmar/Burma ranks among the top ten worldwide **fishery** producers with an annual production of nearly 4,000,000 tons. The marine fishery resources of Myanmar/Burma appear to be under-exploited and the processing sector could be substantially developed. In this context, an investment agreement providing the proper legal framework could provide an opportunity to develop the EU fishery processing sector in the region.

Another key area for investment could be **textiles and garments**. Prior to the US ban, Myanmar/Burma had an estimated 300 garment and textile factories in operation. With the lifting of sanctions from the EU, the US and Canada (*see section 3.1.3*) including the reinstatement of its EU GSP benefits in July 2013, Myanmar/Burma should attract foreign direct investments in its growing textile/clothing sector as highlighted by the ILO. A bilateral interview confirmed that, provided an investment agreement can sustain the development of the proper legal framework, Myanmar/Burma's textile/clothing sector will attract more EU investors in the near future. Initially this would be expected to be in the manufacturing segment, as Myanmar/Burma could compete with other Asian countries including Bangladesh and Vietnam.

6.2. Environmental impacts

³³ Source: Mc Kinsey Global Institute: *Myanmar's moment: Unique opportunities, major challenges*

³⁴ Source: Special report from the Economist Intelligence Unit, April 2012.

³⁵ Source: Investment Policy Review of Myanmar, Draft Report by the OECD Secretariat of 26 September 2013, DAF/INV/WD (2013)13.

Policy option 1 could entail some positive environmental impacts linked to recent steps that are not related to EU investment in Myanmar/Burma.

Since 2013, the Myanmar Investment Commission (MIC) has included a member of the Ministry of Environment, which should allow more prominence to be given to environmental issues and encourage more systematic Environmental Impact Assessment (EIA) for sensitive projects.

Concerning the extractive industry, Myanmar/Burma's President Thein Sein committed to implementing the Extractive Industry Transparency Initiative (EITI)³⁶. He referred to EITI as a “moral component” to the broader economic reforms in the country. For oil and gas projects, the Ministry of Energy has released new Standard Regulations (PSC/IPR) for interested bidders on oil and gas blocks in Myanmar/Burma which make Environmental Impact Assessment (EIA) and Social Impact Assessment (SIA) mandatory for investors. For the mining sector, in March 2012, the Ministry of Mines issued a decree banning mining within 100 meters of Myanmar/Burma’s four largest rivers.

However, as current investors are focusing on the energy sector, environmental conditions are not expected to improve much further.

Under option 2, the environmental impacts would be similar to those under **option 3** but to a lesser extent. It is all the more difficult to provide an indication of the order of magnitude of option 2 on the main environmental indicators as it is not possible to know in advance how many and which individual Member States would request authorisation from the European Commission to negotiate a bilateral investment agreement.

As a result of option 3, we expect that FDI will increase which will entail both positive and negative impacts on the environment.

As a Least Developed Country, Myanmar/Burma has limited administrative capacity and lacks resources to effectively enforce environmental legislation in place. As a result, it is important to underline the potential positive effect of provisions on the maintenance or improvement of environmental standards in any future agreement with the EU.

Myanmar/Burma is rich in natural resources. Myanmar/Burma’s water resources make investment in the hydropower sector highly attractive. The region’s growing demand for energy may act as a trigger for FDI increase in the hydropower generation sector. This could impact positively on the environment particularly since the electricity produced would not emit greenhouse gases. However, there are also some downsides to the construction of hydroelectric dams. In 2011, following pressure by the population, the new government of President U Thein Sein halted the construction of the big Chinese-funded Myitsone dam in the Kachin province of Myanmar/Burma because of the negative impact that flooding would have had onto the surrounding areas and population. The authorities may prefer the involvement of EU companies in this sector due to their more rigorous approach to ensuring environmental standards.

³⁶The Extractive Industries Transparency Initiative (EITI) is a globally developed standard that increases transparency over payments by companies from the oil and mining industries to governments and to government-linked entities, as well as transparency over revenues by those host country governments.

Agriculture is a key sector of Myanmar/Burma's economy and represents a vast potential for investments, particularly paddy production, which saw the country once labelled the 'rice bowl of Asia'³⁷. In the case of traditional farming, investments could aggravate the situation in terms of environmental impacts and the potential negative impacts would then have to be weighed against the benefits of increased production. However, FDI in agriculture also helps upgrade the quality of seeds, fertilizers and machinery (technological spill-overs) which in turn can have greening effects on the environment.

Weak institutions and poor environmental regulation in Myanmar/Burma may reduce any positive impacts. Large-scale infrastructure projects such as mega hydropower dams can lead to changes in the landscape, water pollution and eco-system damages (transformation upstream of the dam from a free-flowing river ecosystem to an artificial slack-water reservoir habitat, blocking fish migration notably). However, as mentioned above, the Myanmar Investment Commission is giving increasing prominence to environmental issues.

Extensive investment in mono-plantations such as rubber, teak or other commercial timber species may affect local forest biodiversity conservation, food security and access to resources for the local population. Deforestation in order to clear land for agriculture is a matter for concern. Illegal logging can also be directly responsible for floods, landslides and soil erosion³⁸. In July 2013, a workshop on the "European Union Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan: Challenges and Opportunities for the forest sector in Myanmar" was organized by the Ministry of Environmental Conservation and Forestry. The outputs from the workshop revealed a strong interest for the Voluntary Partnership Agreement process³⁹, as a mean to address challenges faced in the forestry sector, including loss of revenues, weak governance and illegality. They also revealed the need to fill gaps in terms of understanding, expertise and stakeholders participation, therefore calling for further activities at national level. A dialogue between the EU and the Government of Myanmar/Burma has been launched and the follow up options in relation to the European Union Forest Law Enforcement, Governance and Trade will be discussed in the coming months, including during the EU-Myanmar Task Force scheduled in November 2013.

As highlighted in the public consultation, if EU investors in Myanmar/Burma bring high CSR standards and codes of conduct, they will disseminate best practices and trigger positive spill-over effects on domestic companies, including on environmental aspects.

6.3. Social impacts of different policy options

As far as the baseline scenario is concerned, given the recently launched reform of the labour law in Myanmar/Burma, including adoption of legislative acts enabling *freedom of association* in conjunction with plans to prepare, with the ILO, legislation related to minimum conditions of work, occupational health and safety or social security, prospects exist for

³⁷ Myanmar's moment: Unique opportunities, major challenges, McKinsey Global Institute, June 2013

³⁸ Developing Disparity: Regional Investment in Burma's Borderlands, Transnational Institute Burma Centre Netherlands, February 2013.

³⁹ The Voluntary Partnership Agreement is a bilateral negotiation process between the EU and third countries which aims at building a timber traceability system (from forest to export point) that certifies legality.

improved working conditions in the country (see further under section 6.3.2. on impact on labour rights and working conditions in Myanmar/Burma).

Under policy option 2, the social impacts would be similar to those under option 3 but to a lesser extent. As explained under 6.2, it is difficult to provide an indication of the order of magnitude of the impact of option 2, as it would depend on the number and which member state would require the European Commission to negotiate an investment agreement.

Policy option 3: As explained in the previous section, existing literature remains inconclusive on whether it is possible to measure the impact of pure investment protection agreements on the volume of FDI. Because of the limited access to economic and social data it was impossible to run a fully-fledged economic analysis involving econometric modelling. Considering the circumstances, the analysis of social impacts of the EU-Myanmar/Burma Investment Agreement relies on the assumption of an increase of FDI flows between the parties.

As a Least Developed Country, Myanmar/Burma has limited administrative capacity and lacks resources to effectively enforce any social legislation in place; so it is important to underline the potential positive effect of provisions on the maintenance or improvement of social standards in any future agreement with the EU.

Such agreements could also stress the importance both parties attach to investors being in line with the principles of CSR.

The social impacts of increased FDI in Myanmar also depend on several factors including the regulatory framework, the extent of law enforcement, the types of investment, the economic sectors concerned as well as the conduct of investors. The reported weak rule of law, the authorities' weak administrative capacity, the weak social dialogue and a weak civil society in general, are issues of concern. With regard to labour rights, working conditions, employment and social and economic inclusion, the right policy mix would be required to maximise the positive impacts and prevent or mitigate any potential negative impacts.

6.3.1. Impact on employment under options 2 and 3

a) Impact on employment in Myanmar/Burma

Overall, the impact of an investment agreement between the EU and Myanmar/Burma on employment in Myanmar/Burma is likely to be positive though the actual impact will depend on the sectors. Compared with the present situation in other ASEAN countries, additional investment in Myanmar could potentially allow for a non-negligible increase in employees. The impact is expected to be largely positive in the manufacturing and services sectors, but negative in the primary sector.

While 75% of Myanmar/Burma's workforce is involved in agricultural activities, the sector's contribution to GDP is below 40%⁴⁰ due to low productivity. An increase in productivity in the sector will require major investments linked to land merger and mechanization. On-going land reforms and introduction of large-scale industrial agriculture is likely to increase the

⁴⁰ "Myanmar. Concept note on Investment Climate Assessment", World Bank, 2012, p. 1

productivity but drive down employment in the sector. However, interest from EU companies to invest in agriculture remains to be demonstrated.

The share of natural resources in the Myanmar/Burmese economy, mainly oil and natural gas, has increased over the last decade. While the share of gas in total exports was 9% in 2000, it reached 35% of total exports in 2009⁴¹. Natural resources exports are likely to remain a major growth driver in the coming years⁴². This might encourage international capital to invest in this sector in Myanmar/Burma. However, FDI in the extraction sectors is more capital intensive than labour intensive. Therefore, one can expect that the impact on employment of investments in the natural resource sector will be limited.

Myanmar/Burma has a large pool of low-cost labour which provides an incentive for investments in labour-intensive sectors. The recent World Investment report 2013 of UNCTAD 43 notes that as a lower-income country, Myanmar/Burma is an attractive FDI location for labour-intensive manufacturing. The garment sector, which used to be one of the primary sectors of employment-generation before Western countries' sanctions, has already started to benefit from increased investment.

In addition, the government is working on a long-term development strategy which involves the development of Special Economic Zones (SEZ) (reaching as many as 25 SEZ in the future) and provision of relevant investment incentive⁴⁴ such as infrastructure and communication. These preferential conditions for international investors combined with the investment protection provided by the EU-Myanmar/Burma investment agreement is likely to scale up investment in the manufacturing sectors. Hence, the impact of the investment agreement on the employment in manufacturing sector is expected to be positive.

Myanmar/Burma has a high potential for investment in the construction sector. Due to a country-wide modernization plan, massive infrastructure investments are expected. The main identified opportunities are construction of schools, shopping malls, hospitals, roads, bridges, dams, power plants, railroads and airports⁴⁵. Therefore, employment in the construction sector is expected to increase significantly.

Currently, the provision of services cannot keep up with growth in demand in Myanmar/Burma. This is mainly due to recent political changes which have led to the opening up of the country to the global market. Key sectors are under-developed such as banking and financial services, mobile telephony, telecoms infrastructure, travel and tourism⁴⁶. Therefore, Myanmar/Burma has a large and untapped potential for investment in services and an investment agreement is likely to drive employment in the services sector.

⁴¹ Myo Myint, Rajah Rasiah, "Foreign Capital and Garment Export from Myanmar: Implications for the Labour Process", *Institutions and Economies*, Vol. 4, No. 3, October 2012, p. 156

⁴² "Myanmar. Concept note on Investment Climate Assessment", p. 1-2

⁴³ http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf

⁴⁴ "Regional Investment in Burma's Borderlands", Transnational Institute, Amsterdam 2013, p. 30

⁴⁵ "Myanmar: White elephant or new tiger economy?", Executive summary, Economist Intelligence Unit 2012, p. 9; "Regional Investment in Burma's Borderlands"..., p. 32

⁴⁶ *Ibid.*

The increased involvement of, as well as the technical assistance provided by, the ILO with Myanmar/Burma authorities including its Decent Work programme, is likely to have a positive effect as far as sensitization to social and labour policies in the country is concerned.

b) Impact on employment and working conditions in the EU

Because of limited data, it is difficult to assess the impact on employment in the EU of an investment agreement with Myanmar/Burma. In the framework of the public consultation, the International Trade Union Confederation indicated that employment in the EU would be unlikely to be affected by Burmese investments or could see only very marginal positive gains, and did not foresee industry moving to Myanmar/Burma in the near future to the extent that it would cause a loss in employment in the EU. The overall employment effect in the EU of Option 3 should be neutral.

An increase of Myanmar/Burma's FDI into Europe under Option 3 would not have any impact on labour rights and working conditions since companies established in the EU need to comply with all relevant legislation in the EU.

6.3.2. Impact on labour rights and working conditions in Myanmar/Burma under options 1, 2 and 3

As far as Option 1 is concerned, compliance with labour standards has recently improved as outlined above in section 6.3 referring to the legislation on freedom of association and on-going work with ILO on labour law reform. Once drafted, adopted and implemented, these parts of the legislation will define the working conditions and should provide investors with a clearer legal framework in this regard. The new legislation should improve the working conditions and fill in legislative gaps which may exist now.

Currently, Myanmar/Burma is a signatory to only two out of the eight ILO fundamental conventions covering the core labour standards⁴⁷: the Forced Labour Convention and Freedom of Association and the Protection of the Right to Organise Convention. In September 2013, the government of Myanmar/Burma announced its intention to ratify ILO Convention 182 on the worst forms of child labour.

Options 2 and 3 are expected to have a positive impact on labour rights and working conditions. An investment agreement would bring additional benefits notably as the EU intends to include provisions ensuring that the parties will not encourage foreign direct investment by weakening and reducing labour legislation and standards.

The theoretical literature on labour rights and working conditions and trade and investment agreements does not present a conclusive picture. However, empirical studies tend to lend support to the view that multinational enterprises pay on average higher wages and provide better working conditions than local firms. As a consequence, increased EU investment in Myanmar/Burma should benefit Myanmar/Burma's workers to the extent of course that Myanmar/Burma enforces labour legislation and strives to improve its standards in areas where problems persist today, including with regard to a functioning social dialogue.

⁴⁷ <http://www.ilo.org/declaration/lang--en/index.htm>

The EU actively pursues the question of Corporate Social Responsibility in its chapter on sustainable development in FTAs and will refer to internationally recognised CSR principles and guidelines, in particular the OECD Guidelines for Multilateral Enterprises⁴⁸ in future EU investment agreements so as to recognise *inter alia* the need to respect human rights, the environment and good quality working conditions⁴⁹. Although Myanmar/Burma is not yet an adherent to the OECD Guidelines, it would be desirable to negotiate a CSR clause in an investment agreement as references to CSR principles would enable the parties to the agreement (Myanmar/Burma and the EU) to engage in cooperation and dialogue on CSR matters which also would have a bearing on labour rights and working conditions.

The contributions to the public consultation also stressed the fact that EU investors in Myanmar, bringing their CSR standards and codes of conduct, can contribute to improve the local working conditions and trigger spill-over effects on domestic companies. This positive spill-over effect was particularly emphasised by human rights-related association interviewed which expressed the hope that EU companies which most often abide by stringent codes of conduct would bring a new awareness of CSR practices and thus generate a new behaviour in the country that would hopefully encourage local and other foreign companies to adopt the same best practice.

In addition, some companies consulted in the context of the bilateral interviews noted that they adhered to the Ethical Trading Initiative (ETI), an alliance of companies, trade unions and voluntary organisations, working in partnership to improve the lives of poor and vulnerable workers across the globe, who make or grow consumer goods. Companies with a commitment to ethical trade adopt a code of labour practice that they expect all their suppliers to work towards. Such codes address issues like wages, hours of work, health and safety and the right to join free trade unions. In Myanmar/Burma, where laws designed to protect workers' rights are new and not yet adequately understood or enforced, this would have a positive impact.

Regarding freedom of association, various companies interviewed noted that as this was a new concept in Myanmar/Burma where trade unions were banned before, there was still a need for workers to better understand their rights.

6.3.3. Impact on labour mobility under options 2 and 3

The vast majority of the Myanmar/Burmese workforce is low-skilled. In addition, the urban population in Myanmar/Burma is one of the lowest in the world (32.6% in 2011⁵⁰). The inflow of investment and job creation catalysed by investments should boost migration from rural to urban areas. The low level of education might hamper the mobility of the workforce between sectors, especially from agriculture and manufacturing to the services sector. FDI might have a positive impact on skills development if the demand for skilled labour increases and if the supply side can match the demand, including through vocational education and

⁴⁸ <http://mneguidelines.oecd.org/text/>

⁴⁹ European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203 (INI)), para. 27-28.

⁵⁰ "Field listing: urbanization", The World Factbook, Central Intelligence Agency, www.cia.gov

training. Low-skilled labour might limit further potential benefits from FDI if the demand for more skilled labour is not met.

A few companies interviewed noted that as part of their CSR toolbox, they provided vocational education and training to their employees to improve their skills.

6.3.4. Impact on social inclusion: the impacts on gender equality, ethnic minorities, and local communities under options 2 and 3

Although the Myanmar/Burma government makes a visible effort to improve the situation of women in the country, gender inequality still remains an issue. The 2008 Constitution grants equal rights, opportunities and legal protection to all citizens and the country is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁵¹. However, female participation in the labour market is significantly lower than men's (63.1% and 85.1% respectively). To improve the situation of women the government is developing a National Strategic Plan for the Advancement of Women (NSPAW) 2012-2021⁵². The wave of investments expected under the investment agreement might bring new opportunities to women in both the manufacturing and services sector.

Myanmar/Burma is an ethnically diverse country. Ethnic minority groups make up between 30 to 40% of the entire population⁵³. Since independence in 1948, several ethnic groups rebelled against the central government. Some of them are still politically and geographically marginalized and they are not a part of the political decision making processes at both national and local level⁵⁴. The expected inflow of FDI agreements will bring opportunities and risks for ethnic minorities in the country. On one hand, there are documented cases showing that investments in agriculture and infrastructure have caused displacement of local communities and had a negative impact on their access to land⁵⁵. In Myanmar/Burma's rush for economic development, land grabbing issues may emerge, as experienced in other developing countries with negative impact on the populations. On the other hand, increased inflows of FDI will bring additional employment opportunities and might lead to social and economic inclusion of ethnic minorities provided they are given proper access to education and to the labour market.

The clothing sector is likely to re-emerge as an important labour-intensive sector as a result of the re-instatement of the EU's duty free and quota-free access to the EU market and the expected re-instatement of the US GSP (though granting less favourable terms on garments exports than the EU). The garment sector provides sizeable employment opportunities and empowerment in particular of women, but under poor working conditions, low wages and little exposure to training⁵⁶. Based on the example of the development of the textile/garment sectors in other Least Developed Countries in Asia such as Bangladesh, Cambodia or Laos, this industry in Myanmar/Burma is likely to provide sizeable employment opportunities and

⁵¹ "International Development Association and International Finance Corporation Interim Strategy Note for the Republic of the Union of Myanmar for the period FY13-14" ..., p. 7

⁵² "International Development Association and International Finance Corporation..." , p. 8

⁵³ "Regional Investment in Burma's Borderlands" ..., p. 14

⁵⁴ *Ibid.*, p. 15

⁵⁵ *Ibid.*, p. 29-34

⁵⁶ Myo Myint, Rajah Rasiah, "Foreign Capital and Garment Export from Myanmar..." , p. 168

in particular promote the employment and empowerment of women, who account for about 90% of the textile workforce in the three other countries.

6.4. Human rights impact

Policy option 1 – under the baseline scenario –positive impacts on human rights can be expected stemming from the recently launched reform of the labour law in Myanmar/Burma, including adoption of legislative acts enabling freedom of association.

In addition, a positive element with respect to responsible business conduct is that in May 2012, Myanmar/Burma adhered to the UN Global Compact, a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption. At its inception, 15 Myanmar/Burma companies adhered to the UN Global Compact, and the number is likely to increase.

As for **policy options 2 and 3**, the overall direct impact on human rights of an increase of EU FDI into Myanmar/Burma is expected to be neutral to positive. A standalone investment protection agreement should be aimed at strengthening the already existing protection of the right to property of investors and would not negatively impact on the rights of persons other than investors. Increased FDI could boost sustainable economic growth and development in Myanmar/Burma, which in a medium to longer term perspective could contribute to improving the human rights situation.

No impact on human rights is expected in the EU.

29 out of 36 respondents to the public consultation considered that an EU-Myanmar/Burma investment agreement could have a positive impact on human rights in Myanmar/Burma. Several stakeholders believed that an investment agreement is an opportunity to positively influence Myanmar human rights policies and their implementation. EU investors in Myanmar/Burma, bringing their corporate standards and governance principles, may also contribute to increase standards and cause spill-over effects for domestic companies.

One human rights organisation expressed a caveat that the race for the economic development of the country entailed the risk that some companies might wish to draw maximum profits from these new opportunities to the detriment of the respect of human/labour rights. EU companies were expected to bring in labour standards into the country that might be emulated among the newly created trade unions and have a positive impact.

A number of other issues in relation to potentially negative impacts on human rights have been pointed out in the context of investments in Myanmar/Burma, some of which relate to social and labour standards, respect of the due process of law and violations of land and housing rights.

Bilateral consultations also indicated a number of issues in relation to human rights and the potentially negative impacts of investments on these rights in Myanmar/Burma. Reports in 2012 of various forms of unpaid forced labour, including of children, conscripted primarily by

the military in Arakan State, Chin, Kachin, Karen and Shan States persist⁵⁷ although the Government seems to be making progress in addressing the matter⁵⁸.

In September 2013, as already mentioned, the Government announced its intention to ratify ILO Convention 182 on the Worst Forms of Child Labour. The Myanmar/Burmese authorities continue to restrict the right to assemble peacefully.

Investment protection agreements directly impact rights of investors and share a common heritage with international human rights law, which protects the rights of natural and legal persons against *undue* interference by States.⁵⁹ (protection of property⁶⁰, right to have made good any damages, right to effective legal remedy to enforce such rights). However, in general, investment protection agreements ensure that States can pursue and enforce human rights policies unaffected by the provisions of the investment agreement.

The fundamental standards of investment protection agreements are built on a balance between, on the one hand, the treatment of property and of the rights of investors, and, on the other hand, the protection of public policy objectives among which the human rights of the population in the country where the investment takes place. However it is important to confirm in EU investment agreements that arbitration tribunals have to take such public policy objectives into account.

In addition, the EU is committed to raising human rights issues through its newly established political dialogue with Myanmar/Burma including the envisaged human rights dialogue. As stipulated under Article 21 of the Treaty on the European Union, the external action of the EU and thus the common commercial policy has to be guided by the principles which it seeks to advance in the wider world including democracy, rules of law and the universality of human rights. A proposal for negotiating an EU-Myanmar/Burma investment agreement under policy Option 3 will have to be consistent with the EU's policies and due consideration will be given to maintaining the balance between investors' rights and human rights of the population affected in the respective countries as described above.

Possible impacts on Human Rights under the policy options 1-3			
Human Rights	Option 1	Option 2	Option 3

⁵⁷ See, e.g. International Labour Organisation, Report on the Committee on Application of Standards, Special sitting to examine developments concerning the question of the observance by the Government of Myanmar/Burma of the Forced Labour Convention, 1930 (No.29), June 2012; Human Rights Watch, *Untold Miseries: Wartime Abuses and Forced Displacement in Burma's Kachin State*, March 2012; the Chin Human Rights Organisation, *Forced Labour in Chin State and Sagaing region: 2011-2012*, August 27, 2012; Physicians for Human Rights, *Bitter Wounds and Lost Dreams: Human Rights Under Assault in Karen State, Burma*, August 2012; The Arakan Project, *Forced Labour Still Prevails: An Overview of Forced Labour Practices in North Arakan, Burma* (Nov. 2011-May 2012), June 2012.

⁵⁸ See conclusions of the ILO International Labour Conference, June 2013.

⁵⁹ Nelson, (2011), p.28; Jacob (2010), p 10.

⁶⁰ The right to property is for example expressly contained in the Charter of Fundamental Rights of the European Union: Article 17: The right to property: *1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.*

2. Intellectual property shall be protected.

Right to property and adequate legal remedies	0	+	+
Adequate standard of living	0	0/+	0/+
Peaceful assembly and freedom of associations, incl. trade unions	0	0/+	0/+
Non-discrimination, incl. gender, minorities	0	0/+	0/+

The above table summarises the possible impacts of the different policy options on the human rights touched upon in this section. For options 2 and 3, when impacts are indicated as neutral to positive, this reflects that actual impacts will depend on several factors, including the regulatory framework, the extent of law enforcement, the extent and types of investment, the economic sectors concerned, as well as the conduct of investors and other stakeholders. Possible impacts on human rights related to labour and working conditions are covered more in debt under social impacts.

6.5. The impact of investment protection under Option 2 and 3 on the right to regulate to pursue legitimate policy objectives (environmental, social, labour, human rights)

The question of a potential direct or indirect impact of an EU-Myanmar/Burma investment protection agreement on the right of states to pursue legitimate public policy objectives is an issue that cuts across the various impacts analysed so far. The European Parliament⁶¹ and a number of stakeholders have expressed concerns that investment protection clauses, in particular investor-to-state dispute settlement (ISDS), could hinder the right of governments to legislate to pursue legitimate public policy objectives in areas such as the environment, labour rules, social matters and human rights, (including their obligations under both national and international agreements on such matters).

A careful consideration of these concerns against existing practices and case law found that non-discriminatory regulation in the public interest is fully consistent with the standards contained in a protection agreement. Indeed, when the objective pursued by public intervention is of legitimate public policy interest, a tribunal must assess whether such a measure was proportionate; whether a restriction of the rights of an investor was justified or not; and whether (for example) a direct or indirect expropriation has occurred (in which case an investor would be entitled to compensation).⁶²

The right to pursue legitimate public policy objectives is currently reflected in the EU's practice regarding investment (establishment) in Free Trade Agreements and the WTO

⁶¹ See European Parliament (2011); Seattle to Brussels Network (2010), p.9.

⁶² Article 17: Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

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agreements through specific provisions. The negotiating directives for an EU-Myanmar/Burma investment protection agreement will follow the EU's FTA practice and include explicit provisions restating the right to regulate for legitimate public policy concerns.

As indicated above, there is no clear structural or legal impediment under investment protection agreements for States to pursue public policy objectives. In addition, the negotiating directives for an EU-Myanmar/Burma investment agreement would include specific language on the "right to regulate", and to pursue legitimate public policy objectives such as human rights, as well as a reference to corporate social responsibility in line with the EU FTA practice, and additional guidance to arbitration tribunals on the rules of interpretation of the agreement. The inclusion of such language in an investment agreement under Option 3 would preserve policy space on human rights in general and therefore help avoid potential negative impacts in this regard.

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6.6. Administrative and budgetary impacts

6.6.1. Administrative impact

The administrative impact can be defined as the costs incurred by enterprises and public authorities in meeting legal obligations to provide information on their action or production, either to public authorities or to private parties. The administrative efforts necessary for implementation are different for each of the policy options. The baseline scenario (**policy option 1**) does not require or assume any kind of additional administrative burden. **Policy Option 2** might mean additional administrative burden on Myanmar/Burma if several Member States were to negotiate BITs with the country. It would also mean an additional burden for the European Commission which would need have to empower each Member State individually, as well as a loss of economies of scale if several Member States were negotiating in parallel.

As regards administrative burden in the EU under **policy option 3**, the conclusion of an investment protection agreement will require a process of approval by Council and European Parliament and implementation.

6.6.2. Budgetary impact

Certain provisions on investment protection under policy Option 3 might have an incidence on the EU budget in the following areas:

- the management of investor-state disputes arising under the agreement, including arbitration costs and legal fees;
- the possible need to pay compensation for damages as a result of the breach of the investment protection agreement.

The European Council and the European Parliament are about to adopt a draft regulation on the allocation of financial responsibility for investor-to-state disputes arising under the EU agreements. The basic idea is that financial responsibility for the costs of settling investor-state disputes should be borne by the party which is responsible for the occurrence of the dispute. In other words, if the cause of the dispute lies exclusively in the laws and regulations of the Member State, then that Member State should be liable for the costs associated with the dispute settlement. Similarly, if the cause of the dispute derives from the policies and regulations of the institutions of the EU (including where the measure in question was adopted by a Member State but required by EU law), financial responsibility should be borne by the Union and thus be paid out of the EU budget.

The likelihood of an investor-to-state dispute settlement being brought by Myanmar/Burma's investors against EU Member States or the EU is extremely limited given the very low present and expected future volume of investment flows from Myanmar/Burma into the EU.

Investor-to-state dispute settlement mechanisms do exist in the BITs in force between Myanmar/Burma, respectively India and China, but none of them have led to claims originating from Burmese investors against these two Asian countries or vice-versa.

Accordingly, on the basis of the currently available evidence and experience, the likelihood of investor-state disputes arising under an EU-Myanmar/Burma investment protection agreement appears very small.

7. COMPARISON OF OPTIONS

This section compares the three options assessing how they would meet the objectives outlined in chapter 4 and whether they are politically feasible.

7.1. Overall evaluation of each Option

Baseline – the "do nothing" Option

The baseline option of "doing nothing" does not achieve any of the specific and operational objectives since it continues the status quo with no policy tools available to address the current difficulties in the EU-Myanmar/Burma investment relationship. No progress could be expected in terms of legal protection and certainty for European investors in Myanmar/Burma.

The impact of this option would be negative if the on-going bilateral negotiations between Myanmar/Burma and other third countries resulted in more favourable conditions for investors from these countries.

On 5 March 2013 in Brussels, the President of the European Council, Herman Van Rompuy, and the President of the European Commission José Manuel Barroso, and the President of Myanmar/Burma agreed to *explore the feasibility of a bilateral investment agreement to increase investment flows*.

Given the political understanding reached as well as the strong support received through the on-line public consultation to conclude an investment protection agreement with Myanmar/Burma, the "do nothing" scenario seems to be both economically undesirable, and politically unacceptable.

Baseline – "do nothing"

Overall suitability: Cannot achieve objectives – politically unacceptable given the stated aims of both parties

Option 2: Authorising individual interested EU Member States in negotiating a bilateral investment agreement with Myanmar/Burma

Option 2 presents two disadvantages. First, negotiating an investment protection agreement at individual Member State's level does not offer strong leverage compared to negotiation at the EU level. Second, and mentioned under paragraph 5.2., any EU Member State wishing to enter into negotiation of an investment protection agreement with Myanmar/Burma would have to request an authorisation to do so from the European Commission which is granted under certain conditions and on a case-by-case basis. It is not certain that all EU Member States would request authorisation to start negotiations with Myanmar/Burma nor that those that request authorisation would obtain it.

Therefore not all EU companies would be afforded the necessary investment protection in Myanmar/Burma and Burmese investors will only be protected in certain Member States of the EU. Moreover, given the human resources constraints of Myanmar/Burma, having parallel negotiations with several EU Member States will be difficult, if not impossible, to carry out, further delaying and complicating the required protection for EU investors.

Option 2
Impact: Mixed, as it ensures investment protection only for investors from Member States having concluded an investment protection agreement
Overall suitability: Can only very partially achieve objectives; politically feasible but does not satisfy key EU objectives, and difficult for Myanmar/Burma to implement in practice.

Option 3 – A stand-alone investment protection agreement

This policy option is the only one that can address all the objectives identified and attempt to improve the current EU-Myanmar/Burma investment relationship. It would go further than Option 2 in increasing legal certainty under investment protection for all investors.

The potential impacts on the environment resulting from an increase of FDI flows would be marginal, with a positive overall impact. Concerning employment, there is no evidence that increases in EU outward FDI have led to significant losses of jobs in the EU. Increased FDI in labour-intensive sectors would be likely to generate a positive impact in terms of labour for Myanmar/Burma population and combined with a solid labour rights policy under the aegis of the ILO, it could contribute to poverty reduction and development.

This Option would have the potential for a neutral to positive impact on questions relating to the right of states to regulate to pursue legitimate policy objectives in areas such as environment, employment, social rules and human rights.

Option 3
Impact: Positive
Overall suitability: Goes furthest to achieving the objectives of both parties

Table 7.1: Potential effects of Options in comparison with the operational objectives

Objectives	Option 1	Option 2	Option 3
Economic growth	0	Limited to Member States having signed a Bilateral Investment Treaty	++
Job creation and welfare	0	Limited to Member States having signed a Bilateral Investment Treaty	++
Competitiveness of the EU	0	Limited to Member States having signed a Bilateral Investment Treaty	++
Improving legal certainty regarding treatment of EU investors in Myanmar/Burma	0	+ but concerns only investors from Member States having signed a Bilateral Investment Treaty)	++ (Positive potential for post establishment)

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Improving the protection of EU investments in Myanmar/Burma	0	+ but concerns only investors from Member States having signed a Bilateral Investment Treaty	++
Increasing bilateral FDI flows	0	0 (very limited)	+ (positive potential)
Political feasibility	Feasible	Feasible	Feasibility high on both the EU and Myanmar/Burma side
Overall expected impact (Effectiveness)	Neutral	Limited	Positive impact on investment protection
Efficiency	Neutral	0	++
Coherence with overarching EU policy objectives	0	+ but limited as only some Member States would conclude an Bilateral Investment Treaty	++

Option 1 ("do nothing") included as baseline. Options 2 and 3 estimated against Option 1.

7.2. Identification of preferred option

The preferred Option for the EU would be to pursue a standalone investment protection agreement.

8. MONITORING AND EVALUATION

In line with the commitments made in the 2010 Communication on Trade, Growth and World Affairs, there will be an ex-post evaluation of the effects of any investment agreement concluded with Myanmar/Burma five years after its entry into force.

Monitoring and evaluation of the specific objectives will have to take various forms since not all objectives are equally measurable/quantifiable and some may depend on a qualitative evaluation based, for example, on feedback from stakeholders obtained through a survey. Some of the objectives will relate not only to the implementation of legislation and rules, but also to their formulation. In such cases, information can also be gathered from legal sources and feedback from the ground, as is currently the case when monitoring the investment environment and barriers in Myanmar/Burma.

Achievement of these objectives will depend on the outcome of the negotiations with Myanmar/Burma so it is only possible to present possible options for indicators and their data collection at this stage. Several types of monitoring arrangements are likely to be used. For instance, an investment committee, to will be set up under the agreement, could ensure regular exchange of statistical data and monitor some of the commitments made in the agreement. Myanmar's ranking on global surveys such as the World Bank Doing Business report can be used. ILO data will also be a source of information.

The main challenge will however be the improvement of the quality of Myanmar data collection so that the data can then be inserted in the databases published by the International Statistical Institutions such as the IMF, UN Statistical Office and Eurostat. This is not currently the case.

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In this context it is important to highlight that in order to collect data on FDI, the European Commission has already been supporting Myanmar/Burma's efforts to strengthen its statistical capacity through its assistance over the period 2009-2012 via its regional EU-ASEAN Statistical Capacity Building Programme (ESCAB) amounting to €6million over the period 2009-2012. This programme aimed at strengthening national statistical capacities and improving ASEAN wide statistics. A successor to this programme entitled Institutional Capacity Building for ASEAN Monitoring and Statistics (€7.5million) will build on the first project. As for all EU regional projects with ASEAN, this programme gives a special attention to least developed countries, such as Myanmar/Burma, to contribute to reduce their development gap. In addition, the Commission has just approved a €10million bilateral trade-related assistance programme for Myanmar/Burma, under which it is foreseen to support Myanmar/Burma in its trade policy formulation and implementation to include training in statistics to help the country improve its economic analysis and data analysis capacity.

Table 8.1: Overview of objectives and monitoring indicators

	General Objectives	Indicators of progress towards meeting objectives	Source of data
1	Economic growth	Relative and absolute percentage change of bilateral investment flows Percentage change in GDP & national income	IMF and Eurostat Balance of Payment Statistics when/if available. IMF
2	Competitiveness of the EU	Placement of EU MS in global competitiveness rankings	World Economic Forum Global competitiveness Report
Specific Objectives			
1	Improving legal certainty regarding treatment of EU investors in Myanmar/Burma	Changes in legislation Commitments in agreement Increase of transparency/availability of information Business survey results	Myanmar/Burmese Government data ILO/data Content of the investment agreement after negotiations Standard global surveys such as annual World Bank 'Doing Business' report, Asia Pacific Investment Climate Index
2	Improving the protection of EU investments in Myanmar/Burma	Changes in legislation Commitments in agreement Increase of transparency/availability of information Business survey results	Myanmar/Burmese Government data Content of the investment agreement after negotiations Standard surveys such as annual World Bank 'Doing Business' report, Asia Pacific Investment Climate Index
3	Increasing bilateral FDI flows	Relative and absolute percentage change of bilateral investment flows EU's share of total FDI	
Operational Objectives			
1	Seek highest level of uniform standards of protection for European investors in Myanmar/Burma	Changes in legislation relating to foreign investors Increase of transparency/availability of information	Myanmar/Burmese Government data ILO/OECD data

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2	Ensure right of the parties pursue legitimate public policy objectives	Commitments in agreement Monitoring of any disputes under the agreement	To be monitored by the investment committee
3	Provide for non-lowering of standards clause	Commitments in agreement Changes in legislation/practice Business survey results	To be monitored by the investment committee
4	Include a reference to Corporate Social Responsibility	Commitments in agreement Business and stakeholder surveys	To be monitored by the investment committee
5	Ensure enforcement through adequate dispute settlement including out of Court arbitration.	Commitments in agreement Monitoring of any disputes under the agreement Business surveys/complaints by EU companies	To be monitored by the investment committee Standard surveys such as annual World Bank 'Doing Business' report

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**ANNEXES TO THE IMPACT ASSESSMENT REPORT OF A COMMISSION
RECOMMENDATION FOR NEGOTIATING DIRECTIVES FOR AN EU-
MYANMAR/BURMA INVESTMENT PROTECTION AGREEMENT**

Annex 1: Minutes of the 4th Impact Assessment Steering Group Meeting

Annex 2: Summary of contributions to the European Commission's public consultation on the "the future investment relationship between the EU and Myanmar/Burma"

Annex 3: List of bilateral consultations held with civil society stakeholders

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Meeting Report

Impact Assessment 4th Steering Group on a future EU-Myanmar investment protection agreement 30 September 2013

Introduction

TRADE B2 (Lefort) detailed the calendar of next steps and explained that the last meeting of this Steering Group was intended to validate the draft final impact assessment (IA) report before its sending to Trade Cabinet and then to the IA Board. The IA Board will consider the IA report on 20 November. Should the Board issue a positive opinion on the IA report, DG Trade would then have to finalise the IA report in light of the Board's comments and recommendations, and launch, by early December, the Interservice consultation. The Interservice Consultation (ISC) will include both the IA documents (IA opinion, IA report, 10-page-executive summary, and 2-page executive summary sheet) and the draft negotiating directives for an EU-Myanmar investment protection agreement.

Tour de table

The **EEAS (Rossi)** made some drafting comments on human rights related issues and stressed the need to introduce a short conclusion indicating (i) to what extent the overall impact of policy options 2 and 3 on human rights in Myanmar is expected to be positive, and (ii) to mention possible follow up actions to be undertaken in this area.

TRADE B2 (Bermejo Acosta) underlined that one has to make a distinction between what issues can be improved through an investment agreement and those who cannot. To that view, the investment agreement cannot sort out all human/labour and environmental challenges to which Myanmar is currently faced with.

Responding to the EEAS request, **TRADE D1 (Olsson-Altansunar)** suggested to insert a table detailing possible impacts on human rights under each policy options to better capture the overall picture.

EMPL (Ruda) welcomed the new draft IA report which is now well substantiated including in particular on the impact of the future investment protection agreement on labour rights and working conditions. She then made comments on both format and substance of the draft IA report including on the need to move the reference to the EU-Myanmar bilateral policy dialogue on trade and investment earlier in the IA report to the current investment context part. Referring to the EEAS proposal to include a conclusion indicating follow up actions to be undertaken on human rights, she stressed the need to distinguish between actions which can be achieved through a bilateral investment agreement, policy measures to be taken by the government and actions carried out through bilateral dialogue.

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TRADE B2 indicated it would insert a more clear-cut conclusion on human rights impact into the revised version of the IA report.

Next steps

- On 4 October, DG Trade will send the draft final IA report to Trade Cabinet for comments;
- By 23 October, the IA documents (summary of public consultation, IA report, 10-page executive summary, and 2-page executive summary sheet) will be sent to the IA Board Chair.

Name of invited person	DG/Service	Unit & Responsibility	Attendance 30/09/2013
1. BERMEJO ACOSTA, Carlos	TRADE	B2 – Deputy Head of Unit	Attended
2. KALINAUCKAS, Josephine	TRADE	01 –Internal Audit and Evaluation	Attended
3. LEFORT Benoît	TRADE	B2 - Investment	Attended
4. COUTSOURADIS Maryse	TRADE	C2 – South and South East Asia	Attended
5. POIRIER Virginie	TRADE	01 –Internal Audit and Evaluation	Attended
6. OLSSON-ALTANSUNAR Charlotte	TRADE	D1 – Trade and Sustainable Development	Attended
7. CURTIS Michael	SG	F3 - External Institutional Relations	-
8. RUDA Magdalena	EMPL	A4 – External Relations	Attended
9. SIEBERN-THOMAS, Franck	EMPL		-
10. STAMATE Octavian	ENV	E1 – International Relations and Enlargement	-
11. RAVILLARD, Patrick	ENV	E2. Global Sustainability, Trade & Multilateral Agreements	-
12. SULYOK Gergely	MARKT	B4 - International Affairs	-
13. GONZALEZ SANCHEZ, Serafin	ENTR	A2 – International Affairs	-
14. ROSSI, Andrea	EEAS	VI. A2 - Deputy Head of Division	Attended
15. NEMETH, Eszter	EEAS	I.A3 - South and South East Asia	Attended
16. BEHRMANN, Christian	EEAS		-

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17. KING, Tobias	EEAS		-
18. NIELSEN Oluf	CNECT	D1 - International	Attended
19. PATERSON, George	CLIMA		-
20. HOSKINS, Ian	DEVCO		-
21. GUARDA, Sophie	DEVCO		-
22. DEMUR, Gaspard	JUST		-
23. LOURDAIS, Laurent	AGRI		-
24. MAGNUSSON, Lars Jorgen	BUDG		-
25. RIOS OLMEDO, Ana	MOVE		-
26. DE MEYER, Luc	TAXUD		-
27. DE LORENZO, Antonino	TAXUD		-
28. VIDAL PUIG, Ramon	SJ		-
29. ANDRE, Stéphane	SANCO		-
30. FOCQUET, Barbara	MARE		-
31. PEREZ de la FUENTE, Beatriz	ECFIN		-
32. GALAR, Malgorzata	ECFIN		-

Benoît LEFORT – Trade B2

CC: CURTIS Michael (SG); SULYOK Gergely (MARKT); STAMATE Octavian (ENV); SIEBERN-THOMAS Frank (EMPL); RUDA Magdalena (EMPL); RAVILLARD Patrick (ENV); GONZALEZ SANCHEZ Serafin (ENTR); PEREZ DE LA FUENTE Beatriz (ECFIN); ROSSI Andrea (EEAS), NEMET Eszter (EEAS); PATERSON George (CLIMA); HOSKINS Ian (DEVCO); CORREIA-NUNES Jenny (ECHO); DEMUR Gaspard (JUST); NIELSEN Oluf (CNECT); LOURDAIS Laurent (AGRI); ANDRE Stéphane (SANCO); MAGNUSSON Lars Jorgen (BUDG); FOCQUET Barbara (MARE); DE MEYER Luc (TAXUD); DE LA FUENTE Luis Antonio (ESTAT); VIDAL PUIG Ramon (SJ); MAGNUSSON Lars Jorgen (BUDG); AGUIAR MACHADO Joao (TRADE); SCHLEGELMICH Rupert (TRADE); PETRICCIONE MAURO (TRADE); RUBINACCI Leopoldo, BERMEJO ACOSTA Carlos, (TRADE B2); IRUARRIZAGA DIEZ Ignacio (TRADE); KONIG Helena (TRADE); SALLARD Delphine (TRADE); HENCSEY Monika (TRADE); CERNAT Lucian (TRADE); ACCONCIA Diana (TRADE); COUTSOURADIS Maryse (TRADE); TUCCI Alessandra

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(TRADE); OLSSON-ALTANSUNAR Charlotte (TRADE); NILSSON Lars (TRADE);
SUND Lena (TRADE); POIRIER Virginie (TRADE)

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ANNEX 2

EUROPEAN COMMISSION

DIRECTORATE GENERAL FOR TRADE

REPORT ON THE PUBLIC CONSULTATION

ON

THE FUTURE INVESTMENT RELATIONSHIP BETWEEN THE EU AND
MYANMAR/BURMA

Contributions from stakeholders

July 2013

Disclaimer:

This document does not present the official position of DG Trade or of the European Commission. It is designed to summarise the views of interested parties who gave comments on the future investment relationship between the EU and Myanmar/Burma. The suggestions in this document in no way prejudice either the nature or the form or content of any future action by the European Commission.

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**Summary of contributions to the European Commission's public consultation on the
"the future investment relationship between the EU and Myanmar/Burma"**

I) INTRODUCTION

The recent political and economic developments in Myanmar/Burma have prompted the EU to normalise its overall relations and open a new chapter in its relations with the country. The Council Conclusions of 23 April 2012 on Myanmar/Burma set up the principles under which the Council plans to continue its engagement with Myanmar/Burma. The Council also recognised the vital contribution the private sector has to make to the development of Myanmar/Burma and welcomed European companies exploring trade and investment opportunities, by promoting the practice of the highest standards of integrity and corporate social responsibility and working with the authorities, the private sector and the people of Myanmar/Burma to create the best possible regulatory environment.

II) THE PUBLIC CONSULTATION AND THE QUESTIONNAIRE

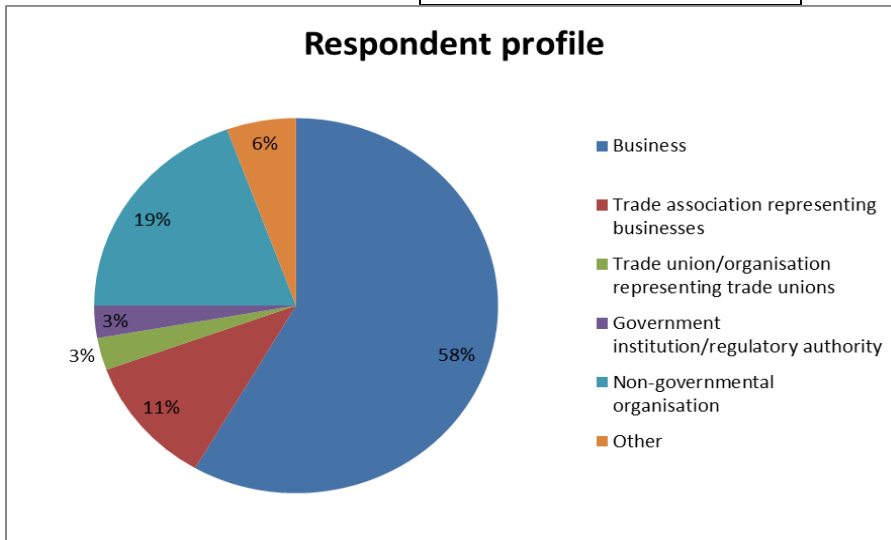
The public consultation ran from 24 April to 15 July 2013. The exercise was opened to all stakeholders both within the EU and in third countries.

An on-line questionnaire, hosted by the European Union's Your Voice in Europe's web site, was opened to all stakeholders interested. The questionnaire had 31 questions covering three main topics: investment environment in Myanmar/Burma, investment environment in the EU, and the potential impacts of an EU-Myanmar/Burma investment agreement. The written version of the on-line consultation is to be found at: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=176

In all, 36 answers were received from a wide range of respondents. Submissions came from private companies (21 contributions), trade associations (4), international trade union (1), governmental authority (1) and NGOs (7). 2 contributions could not be attributed to any of these categories.

Over 75% of the respondents in the business category are large companies (more than 250 employees) and 15% are micro or small enterprises. The business sectors represented were diverse, both in services and non-services, including among others manufacturing, automotive, pharmaceuticals, logistics and energy.

The full list of contributors is attached in the annex and links to those contributions where respondents agreed to have them published will be made available on DG Trade website. The on-line consultation exercise made clear that all contributions would be published unless respondents indicated that they did not wish their contribution to be made public.

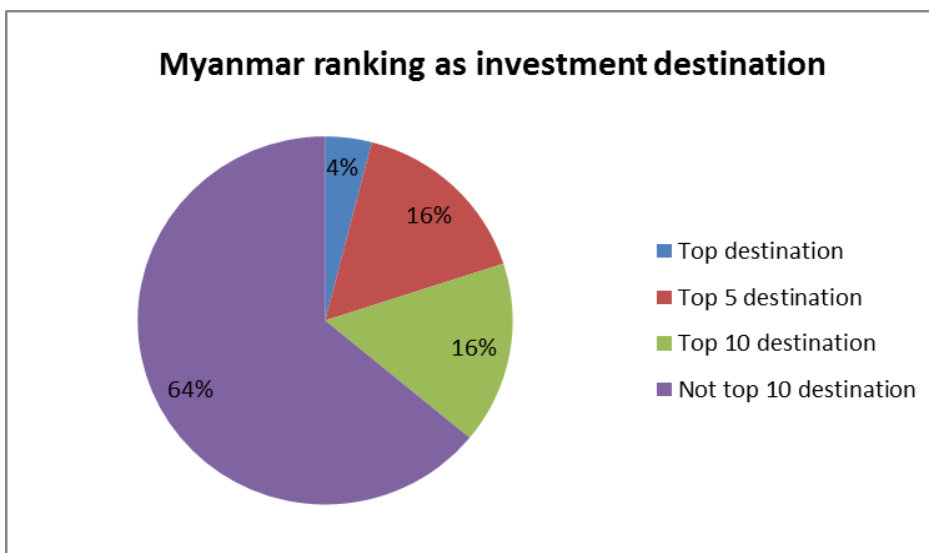


III) EXECUTIVE SUMMARY AND CONCLUSIONS

INVESTMENT ENVIRONMENT IN MYANMAR/BURMA

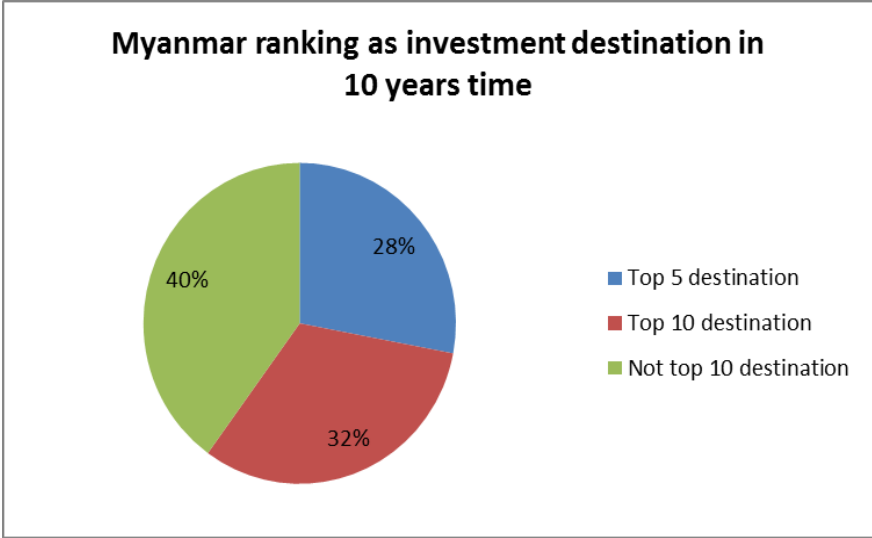
10 of the 36 respondents have invested in Myanmar/Burma: 5 more than 10 years ago, 1 between 2 and 10 years and 4 less than 2 years ago. Out of these 10 respondents, 8 entered Myanmar/Burma through Greenfield investments in wholly owned foreign enterprises and 2 through a merger/acquisition or investment into existing operations.

On a global basis, 64% of the 25 companies which took part in the consultation do not consider Myanmar/Burma as a top 10 destination for their investments, 16% as being in the top 10, 16% in the top 5 and 4% as a top investment destination.

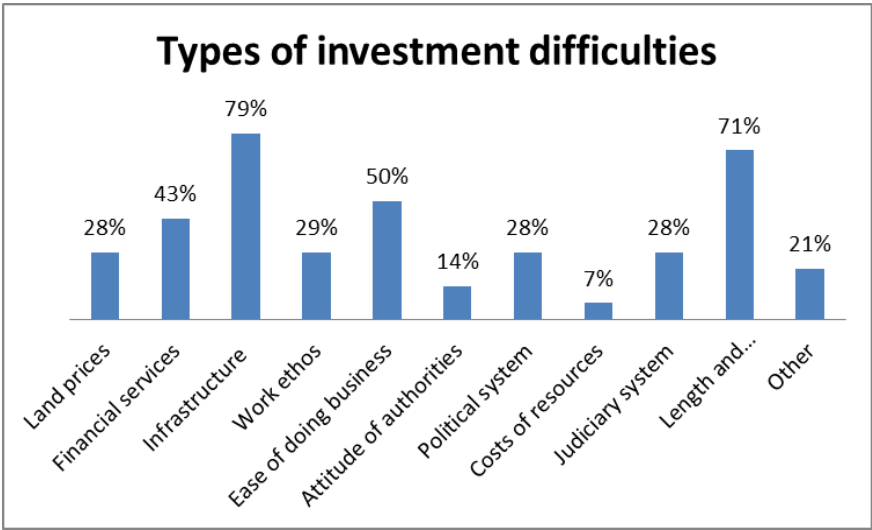


However, **companies and trade association representing businesses expect Myanmar/Burma ranking as a destination for investment to improve in 10 years' time.**

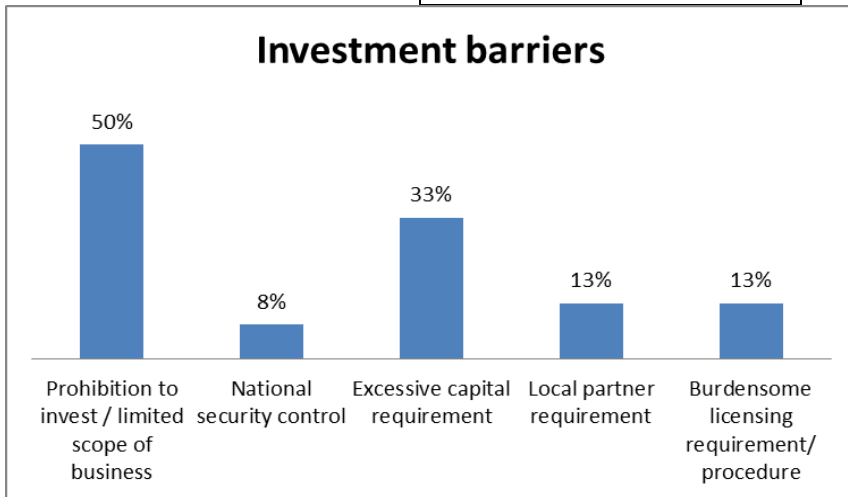
28% of them predict that Myanmar/Burma will become a top 5 investment destination, 32% a top 10 and 40% not a top 10 destination.



56% of companies report having experienced difficulties when trying to invest in Myanmar/Burma. These difficulties are related to infrastructure (79% of respondents), length and effectiveness of the procedure (71%), ease of doing business (50%), financial services (43%), work ethos (29%), land prices (28%), political system (28%) and judiciary system (28%). Three quarters of the respondents are experiencing such problems before and after the investment was made.



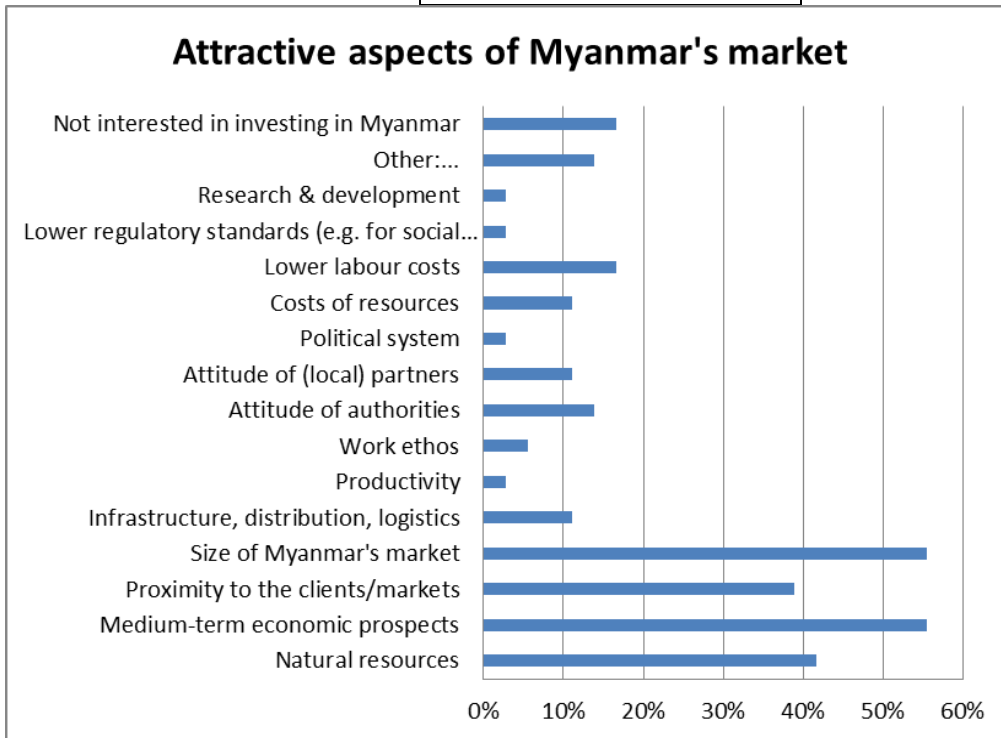
Over 70% of the total respondents evaluate positively the change of the investment climate in Myanmar/Burma in the past 2 years. However, a series of investment barriers are still problematic and makes it difficult to invest in Myanmar/Burma.



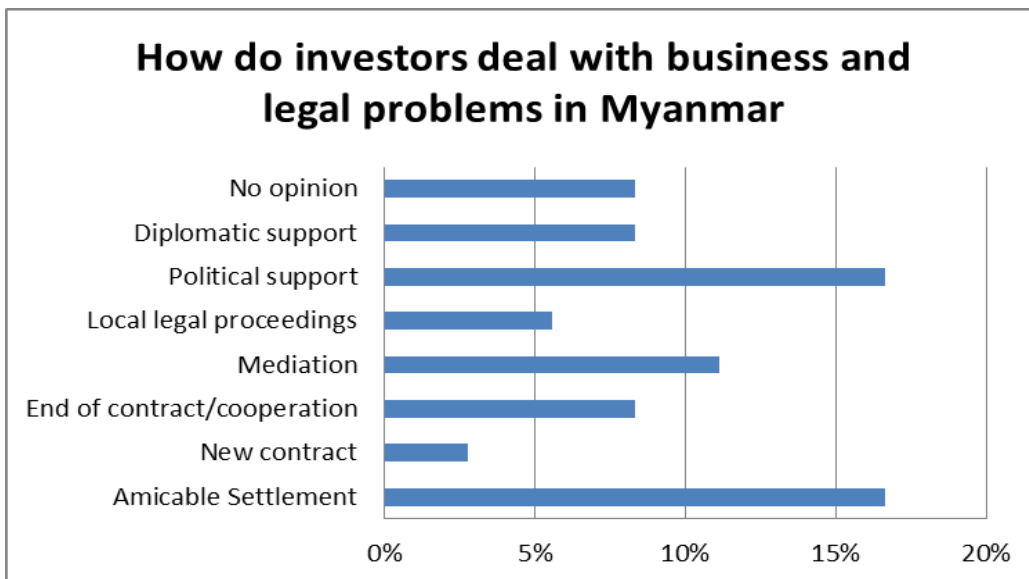
Depending on the sector under consideration, these barriers are more or less considered as an obstacle to invest. On the joint venture (JV) requirement, a respondent active in the container shipping and logistics business reports that foreign-owned ships are required to conduct business in JV with the national government. This is combined with strong bureaucracy, the State Shipping Agency Department being the only party having authority to ship containers in and out of Myanmar/Burma ports. In addition, the underdevelopment of the financial and banking system is hampering foreign investors to do business in Myanmar/Burma.

In light of the recent political changes and EU normalisation of relations with Myanmar/Burma, 65% of the total respondents declare planning to invest in Myanmar/Burma in the coming years. This figure includes companies which are already present in Myanmar/Burma through a JV but would like to set up a wholly foreign owned enterprise.

The Burmese market is attractive by many aspects. **Medium-term economic prospects, natural resources, size of Myanmar/Burma's market and proximity to clients and markets are among the drivers which rank highest behind a potential investment decision.** Lower labour costs, on the other hand, is not considered as a main trigger for investing in Myanmar/Burma.



Currently, in case of legal conflicts in Myanmar/Burma, investors can resort to amicable settlement, new contract or end of contract, mediation, local legal proceedings, diplomatic and political support.



4 respondents (2 trade associations, 1 company and 1 individual response) declare not trusting Myanmar/Burma's ability to protect investor's rights. A trade association emphasises the fact that the Burmese Arbitration Act is outdated and should be modernised in order to provide minimal reassurance for investors that their investments can be protected. For example, courts have the power to rule that an arbitration agreement ceases to have effect where a court has removed the arbitrators (effectively placing the ability to continue arbitration in the hands of the courts). The Arbitration Act imposes short time limits for the

conduct of proceedings that are unlikely to be workable for complex disputes. Experience has shown that courts have had a worrying attitude towards arbitration and have even refused to acknowledge an arbitration agreement on the basis that it attempted to eliminate recourse to the courts. Domestic arbitration is therefore not an appealing prospect for foreign investors. 7 out of 36 respondents declare that they would consider starting international arbitration proceedings against Myanmar/Burma on the basis of an investment treaty in the case of unfair and discriminatory treatment, or expropriation without compensation.

INVESTMENT ENVIRONMENT IN THE EU

It is expected that in the current post-sanction context, Myanmar/Burma's outward foreign investment is likely to be steady. An overwhelming majority of the total respondents do not see Burmese companies investing in their sector in the EU nor triggering specific issues linked with investments by state-owned companies.

POTENTIAL IMPACTS OF AN EU-MYANMAR/BURMA INVESTMENT AGREEMENT

Impacts on the investment climate

More than 70% of the total respondents feel that there is a need to facilitate EU investment agreement in Myanmar/Burma through a bilateral agreement. The former should address in priority the following issues: 1) investment protection from expropriation and nationalisation, 2) investor-to-state dispute settlement, 3) IPR protection.

60% of the total respondents also feel that the EU-Myanmar/Burma investment cooperation should help to facilitate investments of small and medium sized enterprises' in Myanmar/Burma. Currently, access to the Burmese market is very difficult for SME's because of the high resource commitment (necessity to set a well-resourced commercial team able to understand an opaque administrative system, expensive hotels) to begin to understand the opportunities in Myanmar/Burma.

Sustainable development aspects

A number of respondents mentioned in their contribution that the EU and Myanmar/Burma should **seek to better integrate sustainable development considerations in their investment discussions.** As a country coming out of decades of conflicts and military junta's control, Myanmar/Burma's legal framework is weak and the rule of law is poor. Myanmar/Burma's authorities do not have the capacity to effectively regulate foreign companies operating in Myanmar/Burma. 2 NGOs, EarthRights International and the Institute for Human Rights and Business, are quoting the example of the U.S. recently released "Responsible Investment Reporting Requirements", which oblige investors to publicly report on their policies and procedures to address human rights, labour, environment, land, corruption and security risks in Myanmar/Burma.

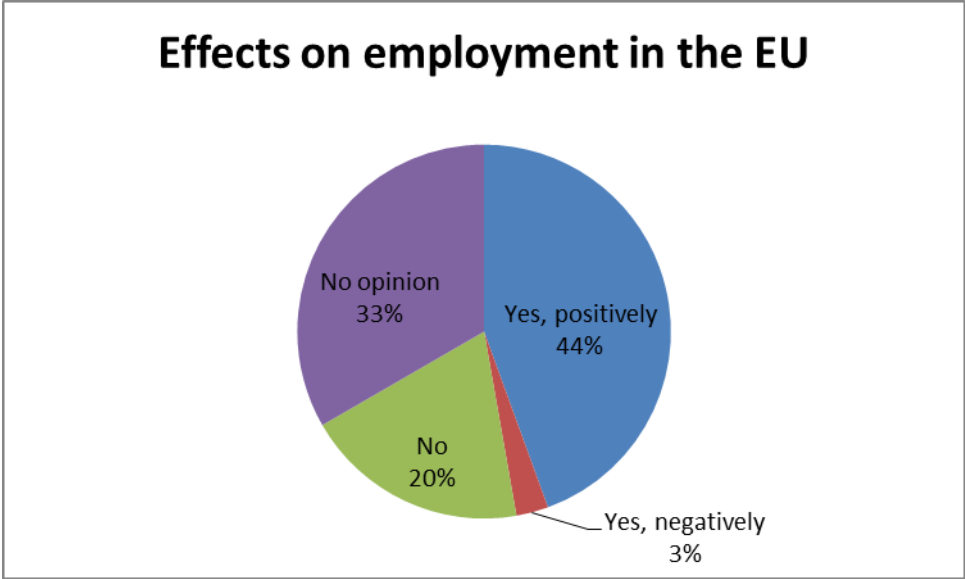
A respondent operating in the chemical industry also suggests the EU to consider raising sustainable development issues through its development facilities as well as possibly through a Partnership Cooperation Agreement. Strong investor-to-state dispute settlement clauses in

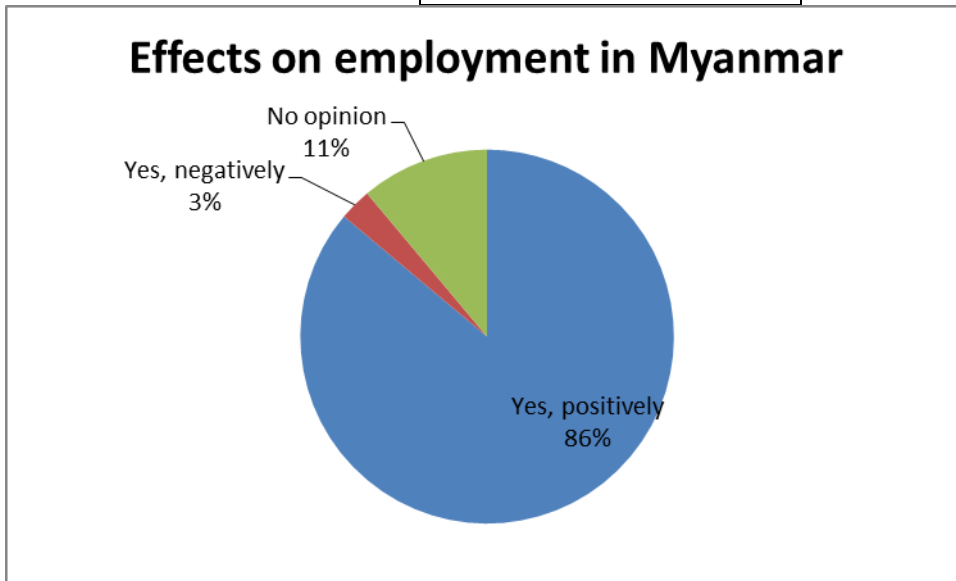
combination with voluntary investor compliance to the OECD CSR and the UN Global Compact standards should guarantee sustainability and investment.

A few respondents stressed that it is important that the EU supports existing internationally accepted standards such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles, these frameworks are voluntary and therefore not binding. Given the lack of transparency and risk of human rights abuse, corruption, environmental degradation and land-grabbing concerns, traditional CSR practices such as voluntary due diligence must be supplemented with accountability. Binding requirements setting out required standards for EU investment and corporate behaviour in Myanmar/Burma (for example, human rights due diligence, substantive environmental protection standards, and anti-corruption measures) are required and could be set forth in an EU-Myanmar/Burma investment agreement.

Social and labour aspects

44% of the total respondents think that employment in the EU, both in number and quality of jobs, could be positively affected as a result of the EU-Myanmar/Burma investment agreement. This figure rises to 86% when it comes to employment in Myanmar/Burma.





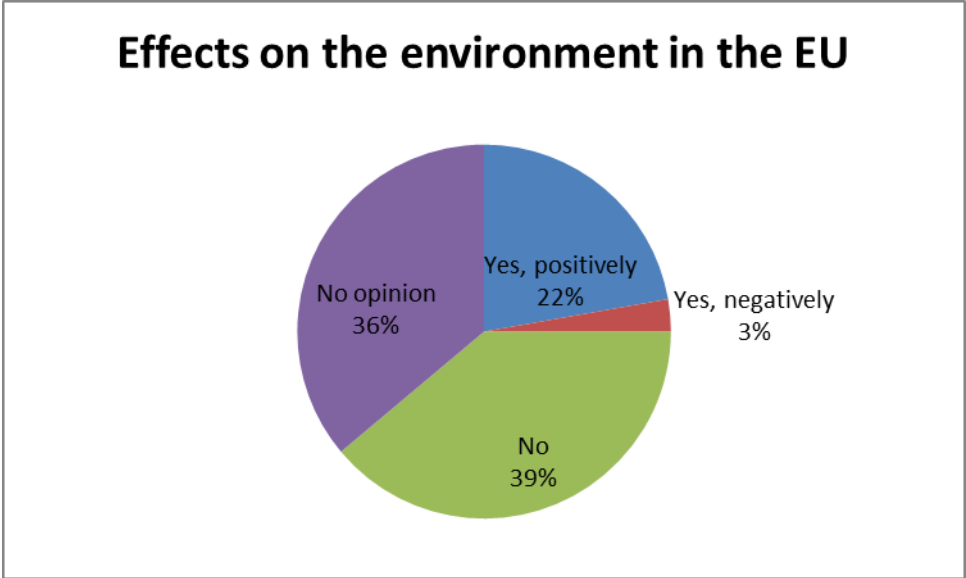
A NGO, EarthRights International, explains that **an EU-Myanmar/Burma investment agreement should contribute to improving the conditions of workers in Myanmar/Burma** and should secure fair conditions of employment. Workers in Myanmar/Burma are still facing serious challenges in asserting their rights. A new minimum wage law has been passed by the Parliament but the legislation’s regulatory provisions are still being drafted. As a result of the lack of rule of law in Myanmar/Burma, workers have few effective means to raise grievances. Those who do so often face retaliation, including dismissal and even arrest. EU investment has the potential to create a range of high- and low-skilled jobs. However, Myanmar/Burma should be allowed to require that local labour is used for both types of jobs if it is to benefit from these jobs’ creation. As a counter-example, it has been reported that low-skilled workers are being brought from China to work on large Chinese-owned projects. Local people have not benefited from development projects in their area, and the influx of large numbers of foreign workers has caused significant social divisions.

In the context of an EU-Myanmar/Burma investment agreement, a series of issues linked to social and labour standards require specific attention. A small group of respondents stated that in order to implement internationally recognized labour and social standards and to ensure a level playing field for all economic actors, the recognition of international conventions (e.g. only 2 out 8 ILO conventions were ratified by Myanmar/Burma) should be part of an EU-Myanmar/Burma agreement.

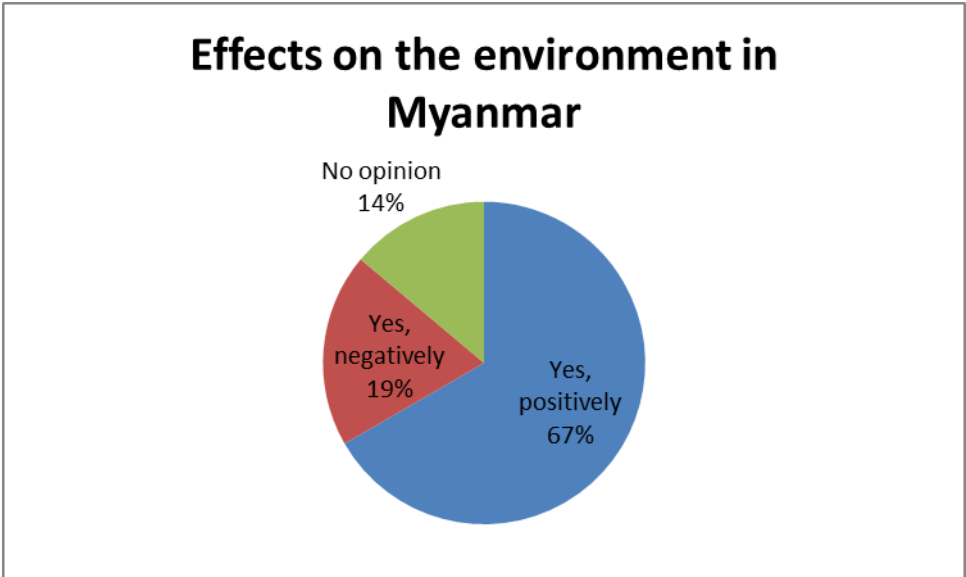
A respondent is quoting the recent building collapse in Bangladesh as an example of the working conditions that are often associated with the garment industry. Low labour costs in Myanmar/Burma may attract massive investments in that sector with potential social and labour issues. The respondent is requesting that an investment agreement includes provisions on due-diligence for companies that invest in or source from the garment industry in Myanmar/Burma.

Environmental aspects

22% of the total respondents thought that an EU-Myanmar/Burma investment agreement could have a positive impact on the environment in the EU. 39% of them believe that the agreement will not have an impact on the environment in the EU, 36% did not have an opinion on this issue.



67% of the total respondents thought that an EU-Myanmar/Burma investment agreement could have a positive impact on the environment in Myanmar/Burma. 19% of them believe that environment would be negatively affected in Myanmar/Burma, 14% did not have an opinion on this issue.



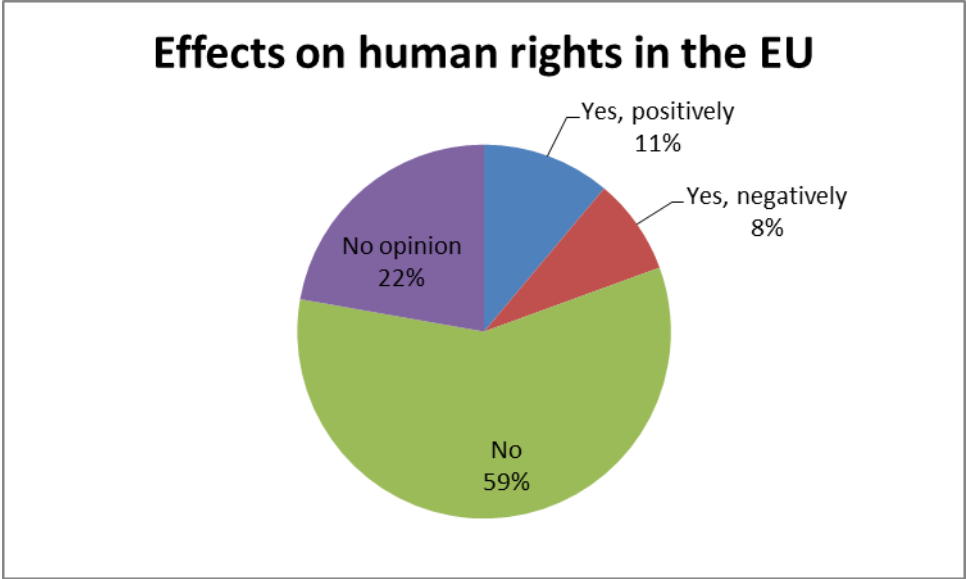
In terms of negative impacts, EarthRights International indicated that investments in Myanmar/Burma’s growth industries (e.g. mining, gas, plantation agriculture) have the potential to cause significant environmental harm if effective regulation is not in place. The current regulatory framework in Myanmar/Burma does not require environmental impact

assessment and little information about projects is made publicly available. Examples are given in the agri-business sector and the timber trade which are associated with large-scale deforestation and loss of biodiversity as well as, in the case of plantations, unregulated levels of pesticide and fertiliser usage.

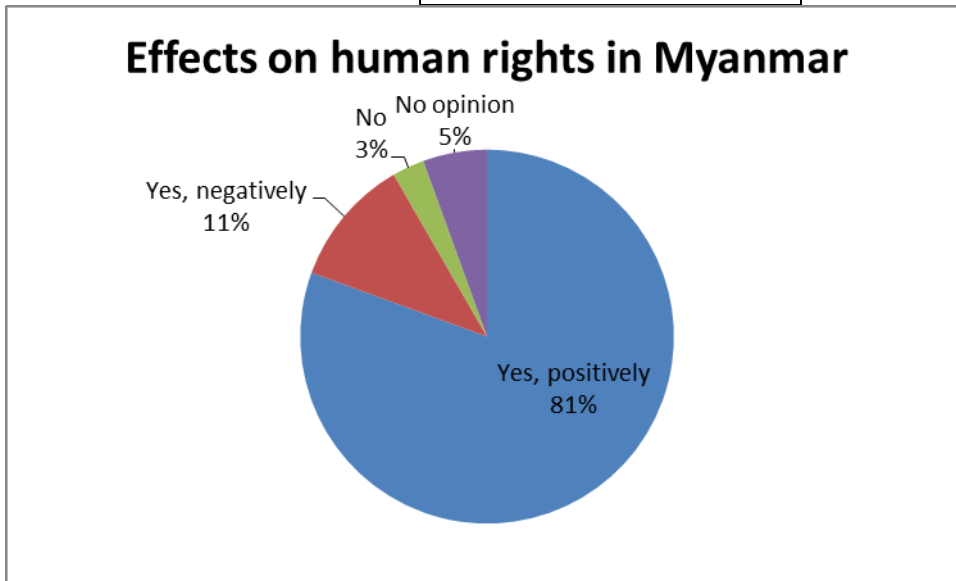
In the same manner as for employment and social impacts, a number of respondents stated that in order to level the playing field between the two areas, a set of core environmental standards should be accepted by both parties and included in the investment agreement. A number of key issues related to the extractive industries are being described as worrying. Logging, mining, oil and natural gas extraction have particularly contributed to deforestation, soil erosion, landslides, river siltation, damaging topsoil fertility by chemicals, and pollution. A respondent is pointing out to the fact that although the 2012 Foreign Investment Act has provisions on the requirement to carry out environmental and social impact assessments for large projects which have potential negative impacts on communities and the environment, the Myanmar/Burma Government still does not have adequate capacity and mechanisms to monitor and oversee the environmental impact of foreign investments.

Human rights aspects

59% of the total respondents thought that an EU-Myanmar/Burma investment agreement would have no impact on human rights in the EU. 11% of the respondents believe that the impact on human rights in the EU would be positive, 8% that the impact would be negative and 22% did not have an opinion on this issue.



81% of the total respondents thought that an EU-Myanmar/Burma investment agreement could have a positive impact on human rights in Myanmar/Burma. 3% of the respondents believe that such an agreement would have no impact on human rights in Myanmar/Burma, 11% that it would have a negative impact and 5% did not have an opinion on this issue.



Regarding the positive impacts, several respondents thought that **an investment agreement was an opportunity for influencing Myanmar/Burma human rights policies**. They stated that the EU investors in Myanmar/Burma, bringing along their corporate standards and governance principle, would contribute to increase standards and cause spill-over effects for domestic companies. Other respondents stated that this agreement could have a positive impact on human rights in Myanmar/Burma if it includes specific provisions on human rights standards.

Regarding the negative impacts, a number of respondents are developing on the major concern of land-grabbing issue in Myanmar/Burma. FIDH is reporting that farmers and entire communities are being evicted from their land to make way for infrastructure and commercial projects. Farmers also are being increasingly prosecuted or sued for tending land that was confiscated from them. Land confiscation and forced relocation are now prohibited under Article 126 of the new Foreign Investment Act, with foreign investors not being permitted to lease land for investment purpose if there is objection from affected communities. It is expected that an investment agreement will reinforce these national requirements. A number of respondents stated that the requirement for companies to carry out human rights due diligence should be included in the investment agreement.

OTHER ISSUES

Very few respondents mentioned other issues. A NGO mentioned the problem of corruption at all levels in Myanmar/Burma. In light of that concern, an investment agreement should ensure that it is consistent with international standards on corruption, such as the UN Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction.

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Public consultation on the future EU-Myanmar/Burma investment relationship
List of the contributors

(In **bold**: those who have accepted that their contribution be published)

EarthRights International

Institute for Human Rights and Business

European Services Forum (ESF)

International Federation for Human Rights (FIDH) and its member Altsean-Burma

Paung Ku Civil Society Strengthening Programme in Myanmar/Burma

Diageo

Chemoprojekt a.s.

A.P. Moller – Maersk Group

Schenker

Dewhirst

Euro-Burma Office

BASF SE

Beiersdorf AG

Confédération des Syndicats Chrétiens (CSC)

REPSOL EXPLORACIÓN, S.A.

Aice - Associazione Italiana Commercio Estero

Razel Bec SAS - Fayat Group

Gesellschaft für bedrohte Völker - Society for Threatened Peoples

Institut de Soudure

DKSH

Olympus

Mithra Pharmaceuticals sa

SGH Warsaw School of Economics

Green Power Energy Co., Ltd

West Indochina

Vriens & Partners

Eni

Volvo Bus Corporation

Radanar Ayar Association

Dredging International NV

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Italian Embassy in Yangon

Maersk Line

MHE-Demag

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List of bilateral consultations held with civil society stakeholders

A series of bilateral interviews were also conducted to complement the public consultation. These bilateral meetings/interviews took place with companies or targeted organisations, whether in Europe, in Thailand or in Myanmar/Burma.

Name of the entity interviewed	Interview date (2013)
1. Private companies	
TESCO	30 May
DKSH	20 June
Siemens	20 June
Total	21 June
Standard Chartered Bank	2 July
Heineken	9 July
Beiersdorf	12 July
L'Oreal	15 July
2. Trade association representing business	
Euratex	11 June
3. International organisations representing trade unions and employers	
International Organisation of Employers	28 May
International Labour Organisation (ILO) Office	19 June
International Trade Union Confederation (ITUC)	9 July
4. Non-Governmental Organisations	
Institute for Human Rights and Business	21 June
APRODEV (Association of World Council of Churches related Development Organisations in Europe)	3 July
FIDH - International Federation for Human Rights	8 July
Transnational Institute (TNI)	8 July

In addition, European Commission services contacted the following entities for bilateral interviews which were not available to meet or did not reply. These include:

- BusinessEurope,
- Friends of the Earth Europe,
- World Wide Fund European Office,
- Chatham House,
- Unilever,
- TetrapakPhilips Electronics
- AB Foods,
- Roche.