



Journal of Current Southeast Asian Affairs

Mark, SiuSue and Youyi Zhang (2017), From Impediment to Adaptation: Chinese Investments in Myanmar's New Regulatory Environment, in: *Journal of Current Southeast Asian Affairs*, 36, 2, 71–100.

URN: <http://nbn-resolving.org/urn:nbn:de:gbv:18-4-10625>

ISSN: 1868-4882 (online), ISSN: 1868-1034 (print)

The online version of this article can be found at:
<www.CurrentSoutheastAsianAffairs.org>

Published by

GIGA German Institute of Global and Area Studies, Institute of Asian Studies and Hamburg University Press.

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From Impediment to Adaptation: Chinese Investments in Myanmar’s New Regulatory Environment

SiuSue Mark and Youyi Zhang

Abstract: Myanmar’s political transition of 2011 was followed by changes in the political and economic realms of society. The transition emboldened social activism, expressed as protests regarding the injustices suffered by people under the military regime. Many of these protests were related to large-scale extractive investments that had little regard for local communities and the environment. After the West lifted most of its sanctions, transnational capital actors who had been absent for the previous two decades returned to the country, many of them offering higher investment standards. In response to the “push” of public pressure and the “pull” of new investments, reformists in the Government of Myanmar (GoM) are now attempting to implement a stronger investment regulatory framework. The GoM’s new demands on foreign investments to comply with higher investment standards are strengthened by Chinese state reformers’ own nascent efforts to curtail the excesses of that country’s state-owned enterprises globally. As a result, prominent SOEs are being pressured to adapt to the new operating environment, resulting in observable changes in investment behaviour. We conclude that reform efforts are challenged by limitations on reformist state actors’ autonomy and capacity to regulate investments.

■ Manuscript received 18 May 2017; accepted 23 August 2017

Keywords: Myanmar, China, Myanmar transition, Chinese investments, international investment norms, transnational capital, regulations

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Introduction

Given Myanmar's abundance of natural resources, its proximity to China and the lack of competition created by the imposition of sanctions by the West in 1990, Myanmar became one of China's most strategic economic partners in the region once the latter launched its "Going Out" policy in 2001. China's dominance in Myanmar's economy has risen significantly since the late 2000s. Using a number of official sources, Bissinger (2012) found that through the 1990s, actual investment in Myanmar from China amounted to a mere USD 8.5 million – only 0.23 per cent of all inflows – but rose to 60 per cent by the 2008–2009 fiscal year (FY).

This has led to an increased focus on the nature of the Myanmar–China economic (and political) relationship over the last decade. As early as 2006, Kudo (2006) was already warning that Chinese investments in Myanmar would have a negative impact on the latter's longer-term economic wellbeing. He said:

China's economic cooperation apparently supports the present regime, but its effects on the whole economy will be limited with an unfavourable macroeconomic environment and distorted incentives structure. As a conclusion, strengthened economic ties with China will be instrumental in regime survival, but will not be a powerful force affecting the process of economic development in Myanmar. (Kudo 2006: 1)

In Woods' 2011 analysis of the Myanmar military's state-building in the resource-rich ethnic ceasefire zones along the Yunnan, China border, he implicated largely informal Chinese investment flows in a violent process of land expropriation in the sectors of timber logging and rubber plantations as part of China's opium-substitution program (Woods 2011). His conclusions about Chinese investments were later echoed by Jones (2014), who included Chinese state-owned enterprises (SOEs) and private investors as beneficiaries of Myanmar's "state-mediated capitalism" under the military regime from 1988–2010. These works lead most to the conclusion that Chinese firms, mainly SOEs, benefited greatly from political ties between the two states prior to 2011 – often at the expense of local communities.

Recently, a Transnational Institute (TNI) briefing paper on China's engagement with Myanmar painted a much more nuanced picture. It argued that the evolving political context in Myanmar since its top-down military transition to a civilian government in 2011 challenged the way China had traditionally engaged with Myanmar, forcing the latter to question and change its strategy to one of diversified engagement with a

range of Myanmar interest groups beyond the government. This was largely driven by China's prioritisation of stability in Myanmar and concern with "the sustainability of the present system of governance and what this will mean for China," especially its multiple investments in the country (TNI 2016: 1). The present paper builds on this line of argument and seeks to elaborate specifically on the way the Myanmar government, in its drive to build its international and domestic political legitimacy, has started to rationalise its approach to regulating investments, thereby mediating the behaviour of Chinese SOEs in Myanmar.

Existing literature considers the processes of interaction between China and the West-dominated international order, as China has increasingly joined multilateral international organisations and agreements at both regional and global levels (Economy and Oksenberg 1999; Johnston 2008). For instance, Peterson (1999) examined China's interactions with major multilateral economic institutions such as the WTO, IMF, and APEC, suggesting that these regional and international organisations have effectively engaged China. In the realm of foreign direct investment, Lin (2010) analysed the rise of corporate social responsibility (CSR) in China and the role of US and EU markets and civil society in promoting this concept among Chinese government and firms, especially SOEs. Despite the burgeoning literature on China's adoption of international norms and standards, the literature has focused mostly on how Western states and multi-national corporations socialise Chinese state and commercial actors into global economic governance, with a few other studies about China–ASEAN relations (Ba 2006). Overall, however, there is a lack of sufficient knowledge about the role of non-Western host countries in China's adoption of international standards. Considering that a large portion of Chinese outbound investment flows into developing countries, we seek to address this gap in the literature by looking at how Chinese investors interact with Myanmar as a non-Western host state. In particular, as domestic political institutions mediate the socialisation process, we explore how Chinese investors adapt to the dynamic operating context of Myanmar.

The transfer of power in Myanmar to a civilian government in 2011 led to a visit by then-US Secretary of State Hillary Clinton in November 2011, the first in 56 years, followed by President Barack Obama's visit the following year. After more than two decades of sanctions, most were gradually eased in May and September 2012, allowing the country to re-

enter the global economy.¹ This led to the return of international financial institutions (IFIs) and corporations, mostly Western ones, that had been absent in the sanctions period. Sensitive to the new post-sanctions environment, these investors are offering a relatively more attractive option to Myanmar than those negotiated under the military era.

The transition was accompanied by an opening that allowed a wider range of social forces to engage with the state on a number of social and political issues. The new reforms emboldened the polity to claim the rights articulated by the highest levels of policymakers, including President Thein Sein, who publicly prioritised land restitution. On the ground, public protests for past and on-going land confiscations took central stage. Most of the protests were over land confiscations initiated in the military era (1988 to 2010), during which time the country was run by a military state with no constitution to check its power. It was during this period that many land-intensive investments were approved with few safeguards for communities and their environments, most notably by Chinese SOEs. Taken together, a central tension that the Myanmar state is grappling with is the balance between its need for internal and external legitimacy and the drive for more capital accumulation, as the country opens up to greater flows of capital.

In this paper, we seek to explore this tension further. Evidence for the study is derived from a review of relevant academic literature and numerous interviews with Myanmar, Chinese and international informants over the last two years. In response to the “pull” of new investments and the “push” of public pressure, we argue that Myanmar’s reformist state forces have introduced a series of changes to the country’s regulatory environment that are pressuring Chinese SOEs to make instrumental improvements to the way they conduct business in the country. Pressure on SOEs to adapt to the new environment is strengthened by the Chinese government’s own attempts to curtail the global excesses of its state-owned enterprises. We conclude that the nascent changes have not been fully realised due to limitations on reformist state actors’ autonomy and capacity to more strongly regulate investments.

1 Sanctions were initiated after the SLORC (1988 to 1997) refused to transfer power to the National League for Democracy, which had defeated the military government in an open election.

Theorising the Modern Capitalist State

Our conceptualisation of the modern capitalist state is informed by state-theorist Nicos Poulantzas, who argued that the bureaucratic structures of the state come to reflect and become part of the class struggles that play out in society, making the state a site of contestation. As the case of Myanmar has demonstrated, this contestation is most intense in the early years of a regime transition, as various state and non-state actors vie for power. At such times, a critical issue with which the capitalist state often grapples is the dual and often conflicting roles of supporting capital accumulation among the dominant classes and ensuring political legitimacy among the dominated. While the state reflects and reproduces dominant ideology, it sometimes needs to rely on its “relative autonomy” (Poulantzas 1973: 143) in order to create an “unstable equilibrium of compromises” between the competing classes (Poulantzas 1978: 31); this might require the adoption of material measures that are in the interest of the masses.

Compromises were necessary when the state started to lose political legitimacy in both the domestic and global spheres; the former was evidenced by the 2007 “Saffron Revolution” led by monks, and the latter was evidenced by sanctions from the West. Compromises were also needed when the very functioning of the capitalist system was in jeopardy, as was the case in Myanmar pre-transition, when the country was economically failing under sanctions from the West and was overly dependent on China. These failures were exhibited through low levels of employment, economic growth, and industrialisation. Faced with both political and economic crisis, the state in pre-transition Myanmar was forced to make a series of reforms, including taking measures to rein in capital through stronger regulation (Gamble 2006).

As the Myanmar government was trying to diversify its economic growth from the monopolies dominated by the Chinese, military enterprises and favoured “crony” companies, by promoting more competition, the post-transition period saw the return of transnational capitalist actors, which had mostly been absent in the last two decades under the sanctions policy. In this paper, transnational capitalist actors refer to both transnational corporations (TNCs) and IFIs. While IFIs have mandates beyond just profit-making, such as the World Bank’s stated mission to alleviate poverty, many IFIs and TNCs share and promote similar investment norms, including clear and consistent investment regulations, strong private property laws, and in many cases a policy of corporate social responsibility.

Although transnational capitalist actors that abide by higher corporate standards still comprise a small share of the total foreign direct investment, we seek to demonstrate that their impact is significant, simply because of timing. More state reformers appeared after the 2010 national elections, which resulted in the election of opposition party members and the development of a more independent parliament. Wanting to overcome the political and economic crisis left by the old regime, these state reformers became more open to accepting these new investment norms. Thus, as Bieler and Morton observed, “The phenomenon now referred to as globalization therefore represents the transnational organization of production relations which are internalized within states” (2013: 42).

Scholars in the business strategy literature (Tsebelis 2002; Henisz and Zelner 2006) have shown that the number of actors in a polity with the ability to influence political decisions (“veto players”) has an impact on the degree of influence that foreign investors, as well as other interest groups, have on policy making (Jensen et al. 2012). The above-mentioned scholars argued that the more pluralistic a governing authority, as demonstrated by checks and balances and presence of opposition parties, and the wider the distribution of veto authority, the greater the effort and resources that TNCs must expend to convince policy makers to assure sustainable investment projects, and the more diluted the influence of foreign investors over host states. This is because foreign investors must present their arguments against competing positions. In a departure from the free reign given to Chinese investments under the military regime, state reformers under the Thein Sein government started to call for stronger corporate governance, making modest gains. Given the greater strength of the democratic opposition in the current NLD (National League for Democracy) government, and the creation of new regulatory units such as the Environmental Conservation Department, the Government of Myanmar (GoM) may be able to further advance this agenda of corporate governance. In recent years, these developments have forced high-profile Chinese SOEs operating in Myanmar to adapt to an evolving operating context, which we demonstrate in the empirical sections that follow.

Myanmar–China Economic Relationship in Recent Decades

China's relationship² with Burma/Myanmar has always been highly involved, but not always been smooth, vacillating between hostility and interdependence (see Taylor 2009). Under U Nu's presidency (1948–1962), the relationship was troubled by border disputes, including the People's Liberation Army's incursion into the northern Shan State in 1952 to cut off Kuomintang (Guomindang) forces, and later by the Communist Party of China's (CPC) support for the Communist Party of Burma (CPB) and other politically aligned insurgent groups in the north. Since 1988, following the collapse of both General Ne Win's "Burmese Way to Socialism" and CPB's armed opposition against the military regime, the State Law and Order Restoration Council (SLORC), which became the State Peace and Development Council (SPDC) in 1997, consolidated power. Following this, China started to develop close political and strategic ties with the SLORC–SPDC regime, assuming that the Burmese armed forces, the *tatmadaw*, would remain in power. This was promoted by ceasefires in the mid-1990s. As a result, China became the most important ally to the SLORC–SPDC regime in the past two decades.

Beijing-based Chinese government officials and researchers acknowledged that the central government in Myanmar has mainly focused on stability: a secure environment for energy and resources needs, as well as secure borders.³ Agencies such as the Ministry of Commerce (MOFCOM) took the lead in policy-making towards Myanmar at the central government level. Another prime concern of the Chinese central government regarding Myanmar was related to the so-called "Malacca Dilemma." By transporting oil and gas overland through Myanmar, China would avoid passing through the waters of the Malacca Straits, which are dominated by the United States and its Asian allies (TNI 2016).

The economic security strategy adopted at the central government level is partly informed by the Yunnan provincial government's need for economic growth. Trade between Yunnan and Myanmar in 2014 ac-

2 Chinese investment in Myanmar has occurred in both the informal and the formal sectors. The informal investments have been documented by TNI papers, which show that these investments have been concentrated in the ethnic borderlands. These values might be even larger due to an intensification of anti-corruption campaigns in China (see Larkin 2014). The present paper does not look at informal investments as these are nearly impossible to regulate.

3 Interview with government think tank researchers, Beijing, 11 October 2016.

counted for 49 per cent of the former's trade with ASEAN, and almost 30 per cent of all trade between China and Myanmar (Hong Kong Trade Development Council 2016). For instance, the Myanmar–China oil and gas pipeline, one of the largest recent infrastructural investments in Myanmar, was originally proposed by academics at Yunnan University and Yunnan Academy of Social Science. The then-Party Secretaries of Yunnan Province, Bai Enpei, and of Kunming City, Qiu He, strongly supported the proposal as they planned to build an oil refinery in Kunming as a supplemental project to the pipeline (*Reuters* 2008). Upon receiving this proposal, Beijing appointed the China National Petroleum Corporation (CNPC) to implement the *Shwe* pipeline project, aiming to achieve both national energy security and local economic growth.⁴

The Sino–Myanmar economic relationship was also shaped by the growing autonomy of Chinese SOEs after decades of decentralisation and the fragmentation of the Chinese one-party state system, which weakened regulatory oversight even as competition between the SOEs increased in a race to invest around the world, Myanmar included. Both central and provincial governments relied on SOEs to realise their growth goals. Prior to 2011, Premier Wen Jiabao and Vice President Xi Jinping visited Myanmar to offer their support to SOE mega projects. Chinese policy banks were also key players. For instance, the China Exim Bank funded infrastructure projects like the Yeywa dam (China Exim Bank 2008) and airport projects in Yangon (MOFCOM 2017) and Naypyidaw (*ifeng.com* 2010).

Statistics from the Directorate for Investments and Companies Administration (DICA) show that from 1988 to 2016, a total of USD 18.52 billion in Chinese FDI was approved by Myanmar (DICA 2016). Bissinger (2012) showed that Chinese investments only started to grow in 2008. These included the USD 997 million Letpadaung copper mine and the USD 856 million Tagaungtaung Nickel Mine, as well as the multi-billion USD Shwe Pipeline and a number of large dams in Kachin, Shan, and Karen States. Partly as a result of financial losses from suspension of Myitsone Dam, which affected confidence in the investment climate, Chinese investments dropped significantly in 2012 and 2013, but picked up again in 2013 for a total approved investment of USD 4.5 billion from 2012 to 2016. However, investments from Singapore in that period surpassed those of China, with USD 13.9 billion. Nevertheless, China remains the largest approved total investor, with more than USD

4 Interview with a researcher involved in CNPC overseas programs, Beijing, 20 July 2016.

18.5 billion, followed by Singapore with USD 15.5 billion and Thailand with USD 10.5 billion, according to DICA's figures in November 2016.⁵

While nearly all of the Chinese investments were in the power sector, with much smaller investments in the oil and gas sectors, recent years have seen some diversification to infrastructure including roads, railways, ports and economic zones. Nearly all sources of these investments are from SOEs. Extractive sectors made up 68 per cent of all of Myanmar's actual investments between FY1988 and FY2011 (Bissinger 2012).

Myanmar Government Tightens Investment Regulations Post-2011

In recent years, the GoM has been increasingly strengthening its investment regulatory framework, first under President Thein Sein and then through the NLD government. This was catalysed by the public backlash against high-profile Chinese investments. The GoM's reformist efforts have also been facilitated by the return of transnational capitalist actors and, with them, improved international standards. The rationalisation of Myanmar's investments is having a direct impact on Chinese SOEs operating in Myanmar and, although it is still in the early phases and instrumental in nature, has led to observable modifications in their investment behaviours.

Political Backlash against Chinese Investments

The protest politics that accompanied the suspension of the Myitsone Dam made it clear that Myanmar civil society became a force to be reckoned with since the start of the Thein Sein government. On 30 September 2011, only six months after Thein Sein took office, and to the surprise of civil society and the Chinese government, he suspended the Myitsone Dam in Kachin State. This dam is a joint venture between the China Power Investment Corporation (CPI) (recently changed to State Power Investment, SPI), the GoM's Ministry of Electric Power, and the

5 There are a few limitations to this data: (1) Chinese companies often invest through third countries like Hong Kong; (2) Chinese companies often structure informal deals with Burmese and register as local companies; and (3) the suspended Myitsone dam project is still included, which inflates the investment amount.

Asia World Company.⁶ This decision was historical in terms of Myanmar's history given the scale of the advocacy efforts, which mobilised a wide range of civil society actors that were also effective in influencing key decision-makers in the government.

There continues to be speculation about the reasons why the president made this decision, but analysts have offered several explanations: (a) He had already decided earlier to cancel the project, but needed the political justification of a public outcry against it; (b) this would be a clear win for him in terms of gaining popularity soon after coming into office, both in the eyes of the Myanmar people and to the Western audience; (c) having been ostracised by the West for two decades, a move to demonstrate Myanmar's autonomy from China would strengthen the rapprochement with the West; and (d) Thein Sein wanted to reduce the tension in Kachin state, given the conflict between the military and the KIO, which resumed right before the dam's cancellation (Kempel 2012).

The Myitsone dam decision set the tone for the handling of the infamous Letpadaung Copper Mine in late 2012. The Letpadaung Copper Mine in Monywa District, Sagaing Division involved 7868 acres of confiscated farmland and affected 26 villages. In June 2010, rights to this project were acquired by Norinco (Wanbao's mother company), the China North Industries Cooperation, and the Union of Myanmar Economic Holding Limited, a military conglomerate (Kyu Kyu 2014). With the involvement of police and local authorities, the forced relocation of communities started in late 2010. The mine attracted a great deal of attention from domestic and international media for state forces' violent crackdown on demonstrators, including monks who were protesting the demolition of a revered Buddhist temple on the mine site. For a nominally democratic government that wanted to distance itself from its authoritarian past, the GoM was forced to take action.

A government commission headed by Aung San Suu Kyi, then a recently elected parliamentarian, was fielded to investigate this case and to determine whether and how the project should continue. The commission eventually determined that the project should continue, as long as the revenue shares were renegotiated and communities compensated.

6 Asia World Co. Ltd was founded in 1992 by a Kokang Lo Hsing Han, who was known to have amassed wealth through the drug trade, which he passed onto his son, Steven Law. Due to connections to his Singaporean wife, an estimated 50 per cent of Singapore's investments was exchanged between the two countries through Asia World. Steven Law and his wife were on the American sanctions list for their suspected connections to the drug trade (*Irrawaddy* 2000).

Regarding the handling of this case, the Chinese ambassador to Myanmar, Li Junhua, said at a press conference in December 2012:

We will accept [its recommendations] if they have good advice to create stronger mutual cooperation between Myanmar and China [...] Our embassy and company are ready to cooperate with the commission so that the correct result comes out [...]. (*Myanmar Times* 2012)

These two “wins” were credited to strong public opposition, and further emboldened Myanmar’s civil society groups. The outcomes of these two projects signalled to the public that the domestic political space had changed and now allowed for critique of Chinese (and other) investments that were deemed to be damaging to local communities. It is highly likely that this public outcry was privately acquiesced to by government reformers who wanted to see many of the earlier deals with the Chinese government renegotiated. This wave of public criticism of Chinese investments continued with the 2015 release of a *Global Witness* report on Myanmar’s largely illicit jade trade. This study implicated China as the main destination for a trade estimated to be worth USD 31 billion. *Global Witness* called this “the biggest natural resource heist in modern history” (*Global Witness* 2015).

Impact of Transnational Capital Norms on Myanmar’s Regulatory Framework

Together with the “push” of social activism, the Myanmar government’s attempts to rationalise foreign investments have also been influenced by the “pull” of relatively more attractive social and environmental terms offered by many returning transnational capitalist actors. This has coincided with the government reformers’ interest in diversifying the national economy dominated by military, favoured companies, and a handful of investor countries considered to not have offered Myanmar fair terms, and to create a more equal playing field. The deputy director general of the Forest Department,⁷ a department which has witnessed the extensive destruction of extractive projects, made the following statement:

We need more international investors. They should compete to invest here, and the best should come here. We don’t need to rely on the Chinese only [...] This means ease of doing business for

7 Interview with Deputy Director General of the Forest Department, Naypidaw, 22 December 2016.

everyone, not just cronies and Chinese, but domestic businesses and all other investors.

A more diverse group of transnational capitalist actors has been entering Myanmar since most sanctions were lifted in 2012. These include transnational corporations and all the major IFIs, such as the World Bank, the International Finance Corporation (IFC), and the Asian Development Bank (ADB). While still a small share of the total, approved investments as of November 2016 show increases in investments from a more diversified group of OECD countries that had previously adhered fully or partially to the sanctions policy. Official data demonstrate accelerated growth. While average annual investment from OECD countries was USD 1.7 billion over the 22 years from 1988 to 2011, it rose to USD 5.3 billion over the four financial years from 2012 to 2016 (DICA 2016).

In contrast to the older way of doing business, many of these investors are seeking to bring in higher social and environmental standards. Clearer land ownership and related issues of conflict arbitration and compensation guidance are issues around which businesses can increasingly be mobilised. These new dynamics were apparent at a seminar about land-based investments held at Myanmar's Chamber of Commerce on 2 July 2015. An IFC advisor to the Myanmar Business Forum (a network of foreign and domestic firms coordinating to address obstacles in Myanmar's investment context) presented the issues faced by companies seeking to source land for investments, including high transaction costs. The advisor said:

It is in businesses interest that government grants secure and clear land rights to people. The business would not have to do the run around trying to figure out who owns what. If land ownership is clear, you just have to pay for the land.⁸

New investment standards brought in by returning corporations demonstrate an understanding that negative impacts to reputation pose risks to their businesses' reputation and bottom line. Foreign companies, primarily Western ones, concerned with consumer image are starting to either set up their own companies or to set up supplier companies. Apparel manufacturers are training their suppliers in labour, health and

8 Statement made by the Myanmar Business Forum, Yangon, 2 July 2015. The views expressed by the firm have often been criticized by those opposing a legally backed private property model as facilitating the concentration of land into the hands of those who can pay the highest price for it. In the best-case scenarios, these transactions are made with willing buyers and willing sellers, but the seller often sells at sub-optimal conditions of financial duress.

safety, and land acquisition standards. In preparing to set up factories in Myanmar, one Western apparel company expressed concerns for potential land conflicts that might arise in the process of securing land for these factories. Precautions could involve hiring lawyers to document the paper trail for land ownership of a particular plot and consulting with communities prior to leasing. The company's corporate responsibility manager said, "We got burned by the media for sourcing cotton. We take the land issue seriously."⁹

A foreign telecommunications company expressed a similar sentiment:

We have many American shareholders and are sensitive to the SDN list. We currently have 1200 towers, and only about 100 are leased from government; the rest are privately owned since it is simpler. We get our subcontractors to double check, as well as our in-house counsel. We must be 100 per cent clear about an owner's claim to the land and they must have paperwork under the existing laws [...]. If not clear, we don't lease it.¹⁰

The Myanmar Centre for Responsible Business (MCRB), a non-profit headed by a former British diplomat, has also been working to raise the awareness of international best practices among businesses by facilitating discussions that bring together government, the private sector, and civil society to discuss the need for improving regulations in the extractive industry. These discussions aim to bring international standards into the domestic discourse. For example, in a workshop on the extractive industry in January 2015, the French oil and gas company Total shared guidance on the implementation of Free Prior and Informed Consent (FPIC) principles and complaint mechanisms. These venues provided an opportunity for civil society groups to constructively discuss their concerns with government and private sector – something that was rarely done in the past.¹¹

These new approaches to investment could also be seen among state reformers. Regarding the Letpadaung Copper Mine, the director general for DICA said:

9 Interview with an apparel company, Yangon, 25 May 2015.

10 Interview with MCRB, Yangon, 11 September 2015.

11 Despite these examples, not *all* new investors will be concerned with stronger corporate governance. A review conducted by the Business and Human Rights Resource Centre in 2015 found that many extractive companies and hotels do not even have land acquisition policies.

The copper mine was approved 30 to 40 years ago by the old regime. We cannot take back what we had granted in the past. Our role is to prevent those kinds of problems from happening again. Now we make sure of things before we go ahead. The Thilawa SEZ is a model for the government to replicate. The central committee for the national land use management is trying to take those standards and scale them up.¹²

Changing motivations among Myanmar government reforms have been accompanied by the passage of several important laws to strengthen the social and environmental safeguards on investments. Prominent among them was the 2012 Environmental Protection Law, with by-laws issued in July 2014. A director at the Environmental Conservation Department (ECD) said international technical advisors have supported them in the drafting of a number of regulatory instruments; these include the ADB for environmental impact assessment procedures, Japan's International Corporation Agency (JICA) for environmental management plans, and the IFC for environmental emissions standards and strategic environmental assessment procedures for the hydropower sector. The director of the policy unit said, "We can learn many things from international experiences and take the most appropriate for Myanmar. Traditional knowledge can't be used for new issues."¹³

International best practice was also considered useful for the drafting of the National Land Use Policy (NLUP), which was adopted by the Myanmar cabinet in January 2016 and was considered by many to be a much more progressive policy than what existed before. The deputy director general of the Forest Department, which served as the secretariat to the drafting process, said, "There is no policy like this compared to all others. It is in line with Myanmar standards."¹⁴ Concerning the role of international standards in the drafting process, he said:

We not only need international standards, but also our own. Not all international standards are in line with Myanmar's situation. But we need capacity building because our government closed the door for 50 years. After that, we decide our way.

While the Myanmar state is still challenged by numerous capacity gaps to enforce its regulations, it does not mean that foreign companies are immune to these changing regulatory frameworks. In response to these new

12 Interview with the Directory General for DICA, Yangon, 2 December 2014.

13 Interview with ECD, Nay Pyi Taw, 22 December 2016.

14 Interview with the deputy director general of the Forest Department, Naypyidaw, 22 December 2016.

international standards, Chinese companies operating in Myanmar said that they are causing pragmatic impediments and operational delays. One SOE manager in the power sector complained that:

The approval process of Myanmar government is much less efficient now than before the power transition. Now every detail of even some smaller projects needs to be reported to the top level, which prolongs the approval process.¹⁵

Response of Chinese Government and Adaptation by SOEs

After decades of enjoying market dominance in Myanmar, the Chinese government is now dealing with criticism from multiple interest groups, more diversified competition, and a rising bar on investments being imposed by the host government. This is not unique to Myanmar, as Chinese investments around the world have presented not only financial but also political challenges to Beijing. As a result, the Chinese government has been shifting its stance towards regulation of its SOE investments in Myanmar and globally.

Beijing's Evolving Stance towards Outbound Investments

In recent years, China has emerged as one of the largest sources of outward FDI to the developing world. This trend will inevitably grow stronger as China enters a new stage in its international economic statecraft through the launch of its “One Belt One Road” (OBOR) initiative, to which the country initially pledged USD 124 billion in a May 2017 summit (*South Asian Monitor* 2017). Started in 2013 by President Xi Jinping, this development strategy seeks to strengthen connectivity between China, Asia, Europe, Africa and beyond, based on construction of infrastructure along a road “belt” and a maritime “road,” while serving to stimulate trade through harmonised regulations and reduced protectionism. This is complemented by the Asian Infrastructure Investment Bank (AIIB), a new multilateral lending institution initiated by China with 37 member states and USD 100 billion in capital as of late 2016.

15 Interview with a manager from a Chinese central SOE, Yangon, 22 December 2016.

A distinct feature of China's "Going Out" strategy since early 2000s has been that most of the Chinese TNCs that operate overseas are SOEs. While traditional TNCs based in developed countries tend to act as autonomous economic entities, the state-owned TNCs also act as agents of their principal, the central government, in international expansion. For instance, some Chinese state-owned TNCs in the infrastructure and mining sectors have allegedly targeted markets in Africa as a means of improving political relationships between China and host governments (Gill and Reilly 2007; Alden and Large 2011).

It is commonly believed that the Chinese government imposes lower environmental standards on its overseas investments than many Western companies and multilateral investment institutions (Munson and Zheng 2012; Mol 2011). On the other hand, China's policy towards its overseas investments appears to have changed over the last decade, in response to a host of growing investment-related disputes between China and host countries, and the fact that Chinese state capital is closely coupled with the central government's political objectives. Various levels of Chinese state actors are demanding that SOEs, particularly those owned by the central government, follow local laws and regulations in host states, so as to ensure the effectiveness of Chinese economic statecraft (Sauvant and Chen 2014).

In November 2013 at the Third Plenary Session of the 18th Central Committee of the Communist Party of China, party leaders discussed the need for companies to actively adopt social and environmental standards (Third Plenary Session of the 18th CPC Central Committee 2013). By 2013, the Chinese Government had issued 31 regulations and guidelines pertaining to Chinese ODI (UNDP 2015). These regulations and guidelines mostly focused on company operations and Chinese worker safety, and rarely touched upon the respect for human rights in host countries. For example, in 2013, the *Guidelines for Environmental Protection in Foreign Investment and Cooperation* was issued by China's MOFCOM and the Ministry of Environmental Protection. These guidelines recommend that Chinese corporations should:

[...] respect the religious belief, cultural traditions and national customs of community residents of the host country, safeguard legitimate [labour] rights and interests [...] promote harmonious development of local economy, environment and community, and carry out cooperation on the basis of mutual benefits. (MOFCOM 2013)

An advisor to *Global Witness* said that Chinese companies, including state-owned enterprises, have been expanding their investments overseas

in the last decade and increasingly coming under pressure from various critics for not managing their relations with local communities effectively. Even though companies were of the opinion that they had already fulfilled their responsibility by following whatever standards were set by host governments (often minimal), they have not been able to stem rising public outcries. There are multiple, often contradictory, interests regarding how Chinese overseas investments should look – those of MOFCOM, state-backed insurance companies, banks, and the diplomatic service – which often face criticism in host countries. As a result, MOFCOM, which selects economic counsellors for overseas consulates, may deny its consent for a loan from China's Exim Bank if a company does not conduct an EIA acceptable to a host government.¹⁶ “Just because they are voluntary does not mean that they are worthless. These guidelines must be echoed by domestic legislation,” the *Global Witness* advisor concluded.¹⁷

One example from Africa demonstrates how these new dynamics are playing out. The China Exim Bank offered a multi-billion loan to finance the Standard Gauge Railway, as part of the East Africa Community Railway Masterplan. China's investment in the East African rail project is also designed, in part, to counter the perception that China is only interested in extracting African resources.¹⁸ In May 2014, during his visit to Kenya, Premier Li Keqiang witnessed the signing of a USD 3.8 billion contract for the railway between China Roads and Bridges Corporation (CRBC) and the Kenyan government, attaching political and strategic significance to the project. To ensure the smooth progress of the project, CRBC made efforts to appease local workers. According to a manager of CRBC on the construction site, “Our biggest headache is local workers' strike!” While he was confused why local workers strike, he worked to negotiate with local workers and insisted that they abide by Kenyan law and their contract, so as to prevent strikes from happening in the first place.¹⁹

Globally, there appears to be a change in the way Chinese enterprises work overseas. But the real test will be in the way China implements

16 Interview with CAITEC researchers, Beijing, 18 September 2016; also refer to MOFCOM 2014. For more information: <http://english.mofcom.gov.cn/article/zt_cv/lanmucc/201409/20140900731570.shtml> (5 September 2017).

17 Interview with an adviser to Global Witness, Yangon, 27 August 2015.

18 Interview with Economic and Commercial Counsellor's Office, Nairobi, 10 August 2015.

19 Interview with representatives from a CRBC subsidiary, Nairobi, 10 August 2015.

projects through OBOR and the AIIB. Observers have so far noted that consultations on creating an environmental and social framework for the AIIB are inadequate.²⁰

China in Myanmar

Prior to the transition in 2011, most Chinese investors were of the mindset that “they only have to meet local laws; if there are no local laws then they have met the requirements.”²¹ The head of public relations for a developer of the Myitsone Dam said:

In the old Myanmar, the old government era, you couldn’t talk freely, and everything was done on a government-to-government basis. You couldn’t check with families about their wishes or whether they were willing to relocate. (*Myanmar Times* 2016a)

After the Myitsone Dam decision and the resistance encountered in other projects, Myanmar–China scholars have opined that the country’s transition has changed Sino–Myanmar relations in a way that Myanmar sees China as less important than before and that China has less control over the direction of this relationship (for example, see, Li 2014). This kind of thinking led the Chinese government to resort to new ways of engaging with Myanmar and to seek ways to reign in its SOEs in the years following the transition. As evidence of this changing approach to Myanmar, the Chinese state-controlled *China Daily* ran a six-page special on Myanmar in early April 2016. Its front-page headline declared, “Lending a hand: Chinese firms realise the value of helping local communities as they focus on building a long-term presence in Myanmar.” The messaging from Beijing started to trickle down to its SOEs. The day after the NLD government came to power in April 2016, Wanbao released a 10-minute public relations video entitled “A New Dawn” explaining why the Letpadaung Mine project was suspended in 2012 and highlighting the need for social acceptance. In the video, Wanbao’s Deputy General Manager Luo Daqing said:

20 Please see: <<https://business-humanrights.org/en/asian-infrastructure-investment-bank-aiib-holds-consultations-on-its-environmental-social-framework-ngos-say-process-is-grossly-inadequate>> (5 September 2017).

21 Statement by legal advisor to the Myitsone dam at CGIAR Mekong Conference, Phnom Penh, 23 October 2015. The word ‘requirements’ means what the investor companies believe to be their corporate responsibilities.

If we do not take social risk into account, if we don't serve the local community well, and ensure stability, then without the support of local people, no matter how much money we have, or how good our technology is, the project will not succeed. (*Myanmar Times* 2016a)

Despite the negative image of this mine, it is one of the few mining companies in Myanmar to have undertaken and disclosed a comprehensive Environmental and Social Impact Assessment, which has been made public on Wanbao's website. According to the recommendations of the Commission, their revised compensation package includes USD 2 million annually to cover environmental costs during the production phase; 2 per cent of net profits toward corporate social responsibility initiatives for the communities (*Irrawaddy* 2016b); one or two jobs per household, or a monthly subsidy in lieu of work (*Myanmar Times* 2016b); and paying more for lost farmland and crops. While there is room for improvement, a representative of the Myanmar Centre for Responsible Business commented that the Letpadaung Mine is one of the better managed mines in Myanmar.²²

Still, the project continues to face challenges to its efforts to quell the continuing protests. One reason is the project's inability to detach itself from state security forces, which shot a local community member in 2015. Civil society groups say that while the company had generally adhered to the Commission's recommendations, which are not specific and lack strong enforcement, its efforts have fallen short. According to a researcher involved with a study for the Myanmar Alliance for Transparency and Accountability (MATA), this has resulted in villagers being worse off than before in terms of income and food security.²³

In another case, the SOE Power China, a member of the International Hydropower Association, indicated that it is aware of the unequal distribution of electricity between China and Myanmar and has stated its willingness to renegotiate bi-lateral agreements. In 2014, the vice president of Power China said, "if the new government thinks there is more power demands now in Myanmar, then of course there is no problem to meet the local demand first" (*Irrawaddy* 2014). Similarly, the China Non-Ferrous Metals Company (CNMC), a member of Myanmar's Extractive Industry Transparency Initiative (EITI), recently indicated that the company took lessons from the Letpadaung case when designing its own

22 Interview with MCRB director, Yangon, 27 December 2015.

23 Interview with MATA researcher, 5 February 2016.

CSR policies.²⁴ In yet another example, CNPC in June 2017 released an updated corporate social responsibility report about its oil and gas pipelines. According to the report, from the start of the project to late March 2017, CNPC and its partners invested more than USD 23 million in 178 social and economic assistance projects, covering education, infrastructure, health care, and communication along the pipeline routes.²⁵ By the end of 2016, local employees accounted for 72 per cent of the pipeline project staff. Highly-skilled Myanmar employees were assigned to important technical positions, and a total of 226 local companies participated in the project's construction (*The Independent* 2017).

Case Study of CITIC in the Kyaukphyu SEZ

As the Kyaukphyu SEZ project managed by the China International Trust and Investment Corporation (CITIC) is still in the early stages of development in Myanmar, a study of this case is used to further demonstrate the changes Chinese SOEs are undertaking.

The Kyaukphyu SEZ and deep seaport are central to achieving China's OBOR vision. In the last few years, for reasons including high insecurity in the region, the Myitsone precedent, ongoing protests, and a more critical regional government, the NLD government has been delaying project implementation. According to an interview with a CITIC representative, the project has been heavily delayed since discussions started in 2009.²⁶

CITIC managers believe that most CSOs and communities do not strongly oppose the project, and charged that some CSOs were set up to oppose and disrupt the investment project. They met with monks and local representatives to try to win their support, arguing that the SEZ project will bring more opportunities for local economic and social development.²⁷

Myanmar policymakers and civil society groups have expressed mixed feelings towards the SEZ and seaport. Several central committee members of the dominant Arakan National Party welcomed the SEZ project with the expectation that it will bring more benefits in terms of jobs, education, and local development to the local community.²⁸ In

24 Interview with CNMC staff, Yangon, 15 December 2016.

25 For more details, please see the full company report, online: <<http://csr.cnpc.com.cn/csr/xhtml/PageAssets/mdbg2016-en.pdf>>.

26 Interview with CITIC staff, Kyaukphyu, 10 June 2016.

27 Interview with CITIC staff, Kyaukphyu, 10 June 2016.

28 Interview with central committee members of ANP, Sittwe, 18 June 2016.

addition, members of the monk association in Kyaukphyu Township expressed a degree of support for the SEZ project, but want to see better treatment and more benefits for local villagers.²⁹

Other Myanmar stakeholders treat this investment with great wariness. A Rakhine Member of Parliament who was invited by SESAC to Beijing in 2016 to discuss Chinese investments expressed his dissatisfaction with the project. He said:

I haven't seen any better practices as regards to foreign investments. They could say that there are community investments incorporated into their operations, but we really feel that they are fake.³⁰

In early 2017, about 300 people from 25 villages in Kyaukphyu Township called for a suspension of the SEZ until the government could unveil a compensation scheme for land acquisition, a resettlement plan and SEZ by-laws (*Irrawaddy* 2017).

Given the conflicting opinions among policymakers and civil society, and delays from the central government, CITIC and the Chinese government are now looking for ways to engage with diverse stakeholders, including MCRB and Oxfam in Yangon.³¹ CITIC also benefited from its consortium partner, a Thai company. Based on the partner's previous experience, CITIC implemented a USD 1.5 million micro-finance scheme. The manager acknowledged that:

We should learn from international experiences regarding social license and social recognition both elsewhere and in Myanmar. For instance, Japan released more shares to local communities in their Thilawa SEZ project, which set a good example for our SEZ.³²

In early November 2016, a meeting organised under the UNDP brought together Chinese authorities, CITIC, Burmese civil society and government authorities. A meeting organiser said:

Five years ago, that kind of meeting was impossible [...] Their vice president participated. His attitude was open, friendly and respectful, indicating a willingness to work with NGOs. He said

29 Interview with CSOs, Kyaukphyu, 12 June 2016.

30 Phone interview with Rakhine State MP, 15 December 2016.

31 Interview with CSOs, Kyaukphyu, 12 June 2016.

32 Interview with CITIC staff, Kyaukphyu, 10 June 2016.

they want to do the best EIA and SIA. Myanmar is very attractive to them. They said the transition period gave them challenges.³³

This section demonstrates the impact that Myanmar's evolving regulatory framework has had on Chinese SOEs operating here, although these dynamics are subject to continual contestation and require stronger oversight. Burmese private sector representatives such as U Maung Maung Lay, vice chair of UMFCCI, Myanmar's chamber of commerce, said "Being a huge country, the Chinese government cannot control them. China itself is suffering in many areas due to this and tarnishing its image worldwide." On the other hand, he believes that progress is possible if companies become more ethical in their operations (*Myanmar Times* 2016a). While it is likely that China will only become ethical in response to pressures placed on it by the host government and local communities, rather than on its own accord, only time will tell whether these initial changes will result in lasting improvements in the lives of Myanmar people. Nevertheless, we believe they still represent a step in the right direction. In the final analysis, as noted by one of Myitsone's legal advisors, "Myanmar needs to define a clear vision and a transparent legal framework that investors can trust."³⁴

Limitations on the Burmese Government to Regulate

The degree to which the state will be able to advance higher investment standards is as much dependent on its capacity to carry out complex administration of such reforms as it is on the reformers' ability to maintain their autonomy in the face of resistance to reform.

The GoM's low capacity is reflected in its application of its own legal framework. For example, even though the land laws include clauses that call for fair market compensation when land is appropriated by the government for development projects, the detailed regulations are often ambiguous and their implementation not standardised. This is further hampered by overlapping authorities, a fragmented and "stacked" legal framework (Mark 2016), a lack of a proper registration of land ownership, and conflicting maps held by line ministries.

33 Interview with NGO, Beijing, 25 November 2016.

34 Statement by legal advisor to the Myitsone Dam at CGIAR Conference, Phnom Penh, 23 October 2015.

As a result of the ambiguities, even the Thilawa SEZ – which the government considers to be an example of a well-managed land acquisition – continues to face challenges and delays. In this case, the developers were unable to verify multiple claims on land, to manage uncontrolled speculation that brought many new false claimants, and a legal framework that does not provide clear guidance on what is considered “sufficient” compensation. The Thilawa Commission compiled a compensation package based on the 2012 Farmland Law and the World Bank’s displacement standards, which was criticised as inadequate due to claims that it left the former tenants worse off after they were moved.

While a project like Thilawa has received a lot of public scrutiny, capital that goes through informal channels is particularly difficult for the state to regulate. A political economy analysis found that:

FDI in large projects such as oil and gas, hydropower, or SEZs, goes through formal channels as these sectors are controlled by the State and entail massive investments. The remaining foreign investment is largely informal and involves partnerships with domestic companies to facilitate land deals, such as Chinese foreign investment in rubber in Kachin and North Shan states, and Thai and Malaysian investments in palm oil development in the southern Tanintharyi Region. (Scurrah, Hirsch, and Woods 2015: 14)

Perhaps even more difficult for the GoM is whether reformers will be able to maintain the autonomy to challenge those who are resistant to or even openly blocking reform. Many of those people who resist reforms have benefited under the military era and treated the state’s resources as private resources (Jones 2014). Under the Thein Sein government, the challenges to reform were rooted in a political system that still fundamentally reflected many of the old power relations. Callahan described this as follows:

In their infancy, the new political institutions of Burma reflect not so much the formal constitution as underlying power dynamics that are rooted in personal networks of loyalty and service binding together certain reform-minded retired and active-duty military officers, soldiers, and others who long benefited from direct military rule. (Callahan 2012: 123)

For example, when the Parliamentary Land Confiscation Inquiry Commission recommended that the military return about 300,000 acres of confiscated land across 655 cases, or about 63 per cent of the total, the military gave numerous reasons why the land should remain in its possession. Similarly, Yuzana Company continues to be involved in a 10-

year old dispute with communities over its 270,000 acre land concession in Hukawng Valley in Kachin State. In May 2015, more than 8,000 villagers from Kachin State signed a letter to the new government calling for its help in resolving this conflict (*Irrawaddy* 2016a).

Despite these challenges to the government's effectiveness in regulating investments, this does not mean that the Myanmar government has no impact on foreign investments. Resorting to diplomatic means, the NLD government started to formalise agreements with the Chinese government to reign in illegal border trade. The Myanmar government and the Chinese government have plans to sign an agreement to stop illegal timber trade.³⁵

Given that the transition is still in its early years, the Myanmar government is slowly but surely gaining experience in the enforcement of higher investment standards. The ECD applied its laws for the first time in a case involving 72 businesses in Mandalay's Industrial Zone II, according to the lawyer representing the affected communities.³⁶ The community filed a complaint with the Mandalay regional government according to Article 14 of the Environmental Conversation Law. The Mandalay Regional Government mandated the companies to clean up the pollution in the rivers within six months or risk having their licences suspended. Each company agreed to pay MMK 700,000 each year for continual maintenance.

Conclusion

We have attempted to demonstrate how the Myanmar government, in its effort to strengthen its political legitimacy, has been gradually rationalising its investment regulations in early post-transition years. The government has done this in response to a public that has become increasingly emboldened in terms of claiming reparations for past and ongoing injustices. This context created a situation ripe for reformist policymakers to accept new international investment norms brought in by returning IFIs and TNCs. The degree to which these initiatives result in clear gains for communities, in terms of mitigating material and social deprivation that often result from unfairly negotiated investments, depends heavily on the ability of state reformers to make and carry out regulatory decisions through the state's still-weak apparatus.

35 Interview with the Deputy Director General of the Forest Department, Yangon, 22 December 2016.

36 Interview with lawyer for case, Yangon, 12 December 2015.

In response to the convergence of these factors in Myanmar, as well as similar dynamics globally, the Chinese Government has started to make changes in the way its outbound SOEs are operating. Faced with setbacks and financial losses, Chinese SOEs have been engaging with more diverse stakeholders, conducting public relations campaigns, and investing to mitigate the environmental and social impacts of its investments. Despite the fact that many of these behavioural changes are instrumental means to achieve the aims of continued growth, we believe that they still present opportunities to improve from “business as usual.” An understanding of the openings that the transition brings can help Myanmar to construct an alternative sustainable path for itself going forward.

A European diplomat working on dams in Myanmar commented that political arguments might have more sway than normative arguments when it comes to influencing Chinese investment outcomes. He said, “Economics rules the day. We can’t compare economics to social and environmental issues. But there are political arguments to be.”³⁷ These political arguments will likely be related to an understanding of China’s incentives with regards to maintaining a favourable position in Myanmar, both economically and politically. The strength of Myanmar’s own political positioning will likely depend on reformers’ ability to justify their decisions as responding to the “will of the people,” as President Thein Sein did when he made his decision to halt the Myitsone Dam.

Along with clever political manoeuvring, Myanmar will need to continue to refine its regulatory framework and administrative capacity, both of which will help to attract the types of capital that will prove to be most broadly beneficial to the development of Myanmar. Last but not least, to ensure that the country’s growth is shared more equitably, public pressure acting on state reformers must remain strong and consistent.

Disclosure Statement

No potential conflict of interest was reported by the authors.

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