



RESEARCH BRIEF

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The Fate of Chinese Mega Projects in Myanmar in Light of Growing Sentiment Against Chinese Investors

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Key Points:

- Local animosities against Chinese investors in Myanmar stem from the irresponsible business conduct of some Chinese firms, which were aggravated by the presumption of opaque corporate practices for being associated with Myanmar's military junta.
- The investment governance systems of both China and Myanmar have been unsuccessful, in practical terms, in requiring Chinese investors in Myanmar to address the potential negative impacts of their projects.
- The recent introduction of the Myanmar Investment Law (MIL) provides a more transparent framework to improve investors' accountability, but Myanmar needs to ensure that enforcement efforts are taken seriously.

Introduction

Since Myanmar's democratic transition in 2011, local opposition against Chinese investments has become increasingly outspoken. Many locals believe that Chinese investors are pillaging Myanmar's resources whilst disregarding public interest.¹ Consequently, Chinese investors are doubting whether their projects will be adequately protected under Myanmar's foreign investment regime.

This Research Brief will demonstrate that the local resentment against Chinese firms stems from a combination of both *agency faults* committed by the Chinese investors and by Myanmar's military junta, as well as *institutional weaknesses* (ineffective investment governance frameworks in China and Myanmar under military rule). While resentment against Chinese firms remains widespread in Myanmar, the country's investment climate remains generally optimistic for Chinese investors. However, it should be noted that the pace of Chinese investments into Myanmar is

¹ RICHARD COCKETT, BLOOD, DREAMS AND GOLD: THE CHANGING FACE OF BURMA 221 (2015).

expected to slow down in the near future due to the negative impacts of the ongoing COVID-19 crisis on the economies of China and Myanmar.

Agency Faults

Irresponsible Business Conduct of Chinese Investors

Opposition to Chinese investments in Myanmar can be attributed, in part, to the Chinese investors' reputation for neglecting public health and environmental protection during the implementation of their projects. For instance, the Chinese firm managing the Letpadaung copper mine used significant amounts of sulfuric acid for industrial purposes, thus rendering the surrounding farmland infertile and causing health risks to the villagers.² Similar concerns were also raised over Chinese nickel mines in the Chin State; the locals have repeatedly protested against it due to their worries about extensive pollution.³ Likewise, the Chinese-led Myitsone Dam project was suspended because of the severe deforestation and river pollution it would cause.⁴ Moreover, as the dam will be constructed near a major continental fault line, where earthquakes occur, any local tremors could cause cracks in the dam and flooding to occur, endangering thousands of lives.⁵

² Jason Burke & Swe Win, *Burma: Riot Police Move in to Break up Copper Mine Protest*, THE GUARDIAN (Nov. 29, 2012), <https://www.theguardian.com/world/2012/nov/29/burma-riot-police-mine-protest>

³ Zami Mann, *Chinese-Backed Nickel Mining Project Draws Concerns in Chin State*, THE IRRAWADDY (Jan. 31, 2014), <https://www.irrawaddy.com/news/burma/chinese-backed-nickel-mining-project-draws-concerns-chin-state.html>

⁴ Thiha Tun, *Chinese Investor Assures Transparency If Myanmar Restarts Dam Project*, RADIO FREE ASIA (Dec. 26, 2013), <https://www.rfa.org/english/news/myanmar/dam-12262013140753.html>

⁵ *Id.*

⁶ CHARLTONS, LETPADAUNG INVESTIGATION COMMISSION ISSUES FINAL REPORT (April, 2013),

Unfortunately, these mega projects were started without conducting proper health and environmental impact assessments, which meant that no proper safeguards were put in place by the Chinese firms to mitigate risks to local people.⁶ Local animosities towards Chinese companies were further aggravated by accusations that forced labor was involved in the development of, for example, the China-Myanmar Oil and Gas Pipeline Project.⁷ These controversies, focusing on the poor business conduct of Chinese investors especially with regard to mega projects for energy and resource extraction, have reinforced perceptions that Chinese firms invest irresponsibly in Myanmar.⁸ Nevertheless, it should be noted that in more recent years, following the suspension of the Myitsone Dam project, Chinese investors have generally become more transparent in conducting environmental impact assessments as well as consulting the local public on any questions or opposition to the projects.⁹

Yet, one may question why the burden of safeguarding local public interest must lie solely with the Chinese investor. In particular, it is pertinent to note that prior to Myanmar's democratic reform, its military government generally overlooked this matter and did not

<http://www.charltonslaw.com/letpadaung-investigation-commission-issues-final-report/>

⁷ SHWE GAS MOVEMENT, SOLD OUT: LAUNCH OF CHINA PIPELINE PROJECT UNLEASHES ABUSE ACROSS BURMA (Sept. 5, 2011), <http://www.shwe.org/campaign-update/sold-out-new-report/>

⁸ Beth Walker, *Anti-Chinese sentiment on rise in Myanmar*, CHINADIALOGUE (May 3, 2014), <https://www.chinadialogue.net/article/show/single/en/6069-Anti-Chinese-sentiment-on-rise-in-Myanmar>

⁹ BIAN YONGMIN, *The Role of Environmental Impact Assessment in the Governance of the Nu-Salween River*, in INTERNATIONAL GOVERNANCE AND THE RULE OF LAW IN CHINA UNDER THE BELT AND ROAD INITIATIVE, 237 (2018).

require Chinese investors to undertake comprehensive risk assessments and impose strict safeguards. Furthermore, local animosities against Chinese firms were exacerbated because they had entered into investment contracts with the unpopular military junta, and were thus presumed by the public to be suspect and unfair.

Negative Public Image of Chinese Investors: Love-Hate Relationship with Myanmar's Junta

Under the previous leadership of Myanmar's military government, it is true that state legal institutions were perceived as being ineffective in protecting foreign investments.¹⁰ Although the military junta had enacted a foreign investment protection law in 1988, there was a climate of distrust caused by the unreliability of Myanmar's courts in enforcing investors' rights. The reality was that the courts were politicized and the ultimate decision-making authority remained with the military leaders.¹¹

Therefore, since the legal protection of foreign investments in Myanmar was deemed to be unreliable, Chinese investors had little option but to collaborate with the junta as the sole stakeholder that held sufficient power to safeguard their investments, either through proper or improper means.¹² Hence, by associating themselves with the oppressive military regime, Chinese investment projects were automatically

presumed to be unfair and opaque by the local people.¹³

To make matters worse, Chinese projects that were launched under the auspices of Myanmar's junta often required extensive land clearance to construct mining sites or to build hydropower dams. Consequently, these projects also required the relocation of local villagers, which was forcibly carried out by the junta.¹⁴ In many of these cases, while the Chinese investors were not directly involved in the displacement of people, the junta's intervention in the name of securing Chinese business generated significant resentment of the investors for affecting local livelihoods.¹⁵ Many villagers who were displaced received inadequate compensation, and the land that they were relocated to cannot be used for arable farming or rearing livestock.¹⁶ Overall, the villagers blamed Chinese investors for causing this predicament even though the latter had no direct involvement in the junta's tyrannical methods for facilitating land clearance.

In this sense, Chinese investors in Myanmar faced a difficult dilemma. On the one hand, they relied on the junta as the apex decision maker for investment protection, as opposed to Myanmar's courts which were perceived to be politicized and incompetent. Yet on the other hand, public perception of Chinese projects has been sabotaged by the junta's indifference and failure to

¹⁰ Beth Walker, *supra* note 8.

¹¹ International Bar Association's Human Rights Institute, *THE RULE OF LAW IN MYANMAR: CHALLENGES AND PROSPECTS*, 25 (Dec. 2012), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=DE0EE11D-9878-4685-A20F-9A0AAF6C3F3E>

¹² TOM MILLER, *CHINA'S ASIAN DREAM: EMPIRE BUILDING ALONG THE NEW SILK ROAD*, 92 (2019).

¹³ *Id.*

¹⁴ SANTASOMBAT YOS, *CHINESE CAPITALISM IN SOUTHEAST ASIA: CULTURES AND PRACTICES*, 238-240 (2017).

¹⁵ XUE GONG, *Chinese Power Investment Corporation in Myanmar* in *SECURING THE BELT AND ROAD INITIATIVE: RISK ASSESSMENT, PRIVATE SECURITY AND SPECIAL INSURANCES ALONG THE NEW WAVE OF CHINESE OUTBOUND INVESTMENTS* (Arduino Alessandro & Xue Gong, eds.) 134 (2018).

¹⁶ Thiha Tun, *Chinese Investor Assures Transparency If Myanmar Restarts Dam Project*, *RADIO FREE ASIA* (Dec. 26, 2013), <https://www.rfa.org/english/news/myanmar/dam-12262013140753.html>

safeguard local people's interests – the junta's harsh methods to secure investment protection have had negative spill-over effects on the public image of Chinese investors in Myanmar.

Nevertheless, beyond the cooperation between Chinese investors and the junta, local resentment towards the former also stems from institutional weaknesses in both China and Myanmar for failing to adequately control the approaches used by Chinese investors.

Institutional weaknesses of China and Myanmar

China's Poor Governance System on Investors' Conduct Abroad

The main issue with China's governance system for its overseas investment activities is that its institutional guidelines appear promising in upholding responsible business conduct, but they have been unsuccessful, in practical terms, in requiring Chinese investors in Myanmar to address the potential negative impacts of their projects.

The Chinese government issued guidelines on corporate social responsibility in 2008 for its state-owned enterprises, stipulating that Chinese investors should uphold "environmental protection, and people-centeredness."¹⁷ Likewise, the China Export-Import Bank (EXIM Bank), a key institution that funds most of China's foreign infrastructure investments, has, since 2007, required Chinese investors to submit documents on environmental and social impact assessments as part of the loan approvals process.¹⁸

Despite this, Chinese investors in Myanmar continue to neglect serious health and safety risks (as illustrated above). Ironically, the EXIM Bank was the very same establishment that approved funding for the suspended Myitsone Dam project, where no impact assessment had been conducted before or during the early stages of construction,¹⁹ thereby casting serious doubts on the independence and quality of the EXIM Bank appraisals in practice.²⁰

Furthermore, it remains unclear as to which regulatory body should oversee the conduct of Chinese foreign investors. For instance, the Chinese hydropower projects in Myanmar may be supervised by various agencies including the Ministry of Environmental Protection, the Ministry of Water Resources, and the Ministry of Commerce.²¹ However, as these ministries lack coordinating procedures to conduct joint assessments on investment practices, it is ambiguous as to whether there is a system that can effectively monitor any potentially poor corporate conduct by Chinese companies abroad.²²

As Chinese investors in Myanmar are faced with institutional guidelines that are more 'bark than bite', there is a lack of concrete measures to prevent any sub-standard corporate conduct in practice. This reveals a systemic flaw within China's investment governance framework; it seemingly fails to encourage responsible business conduct abroad and contributes little to alleviate anti-Chinese investors' sentiments in Myanmar.

¹⁷ STATE-OWNED ASSETS SUPERVISION AND ADMINISTRATION COMMISSION, CSR GUIDELINES FOR STATE-OWNED ENTERPRISES (Jan. 4, 2008).

¹⁸ WALTINA SCHEUMANN & OLIVER HENSENGERTH, EVOLUTION OF DAM POLICIES: EVIDENCE FROM THE BIG HYDROPOWER STATES 237 (2014).

¹⁹ BIAN YONGMIN, *supra* note 9, at 237-238.

²⁰ *Irrawaddy Myitsone Dam*, INTERNATIONAL RIVERS (undated), <https://www.internationalrivers.org/campaigns/irrawaddy-myitsone-dam-o>

²¹ XUE GONG, *supra* note 15, at 131.

²² *Id.*

Myanmar's lack of effective laws to protect foreign investments and local interests

As for Myanmar under its previous military regime, its institutional instability stems from a lack of effective legal frameworks to ensure that both foreign investments and the local people are adequately protected. With respect to safeguarding local public interest, Myanmar had no up-to-date laws to curb pollution or to control industrial waste produced by investors at the time when many Chinese investment contracts were entered into with the junta.²³ Indeed, prior to the enactment of the Environmental Conservation Law of Myanmar (ECL) on 30 March 2012, there were no laws to establish a system of environmental and social impact assessments for investment projects.²⁴ Thus, it may be unsurprising that many Chinese projects started prior to 2012 commenced works without imposing any safeguard measures since there was no legal duty to do so.

However, even with this, more encouraging, recent legal development, the ECL merely accords responsibilities and powers to the government of Myanmar “to lay down and carry out” such assessments;²⁵ it does not impose additional duties on foreign investors to conduct impact assessments for their own projects. Simply put, Chinese investors in Myanmar are not under any legal obligation to actively develop safeguard

measures to mitigate any social or environmental risks imposed on the local people.²⁶ Hence, as far as the Chinese investors are concerned, their investment activities along with any potential risks imposed on the locals, are legally permissible. Yet, regardless of Myanmar's state of law, the Chinese investors were still condemned as irresponsible investors because their neglect of environmental and public safeguards has been perceived as a lack of concern for the wellbeing of the locals.

Similarly, in light of controversies like the suspension of the Myitsone Dam project, many Chinese investors are worried that their mega projects in Myanmar now face an uncertain future. However, they should take note that there have been relatively few suspensions of investment projects under Myanmar's current democratic regime. For example, notwithstanding the Myitsone Dam saga which is located in the Kachin State, there are still thirteen Chinese hydropower projects operating in the Shan State and four more located in the Rakhine State.²⁷ Additionally, Chinese nickel mining projects in the Chin State have not been ordered to cease works despite public protests due to fears of environmental degradation.²⁸

This track record suggests that Myanmar is willing to accommodate unpopular Chinese investments as long as lives are not critically endangered, even

²³ Peter Gutter, *Environment and Law in Burma*, 9 LEGAL ISSUES ON BURMA JOURNAL 1 (2001).

²⁴ Environmental Conservation Law (ECL): The Pyidaungsu Hluttaw Law No. 9/2012.

²⁵ *Id.*, at section 7(m).

²⁶ DIANE TANG-LEE, *Complex Contestation of Chinese Energy and Resource Investments in Myanmar* in IN CHINA'S BACKYARD: POLICIES AND POLITICS OF CHINESE RESOURCE INVESTMENTS IN SOUTHEAST ASIA (Jason Morris-Jung, ed.) 209 (2017).

²⁷ Nan Lwin, *Infographic: 30 Years of Chinese Investment in Myanmar*, THE IRRAWADDY (Jan. 25, 2019), <https://www.irrawaddy.com/specials/infographic-30-years-chinese-investment-myanmar.html>

²⁸ Zarni Mann, *Chinese-Backed Nickel Mining Project Draws Concerns in Chin State*, THE IRRAWADDY (Jan. 31, 2014), <https://www.irrawaddy.com/news/burma/chinese-backed-nickel-mining-project-draws-concerns-chin-state.html>

if local livelihood is affected to some degree. Indeed, as aptly stated by Aung San Suu Kyi, the country will lose its economic reputation as an investment market if ongoing foreign projects are consistently terminated by the state.²⁹ By this logic, Chinese investors should not focus excessively on the example of the suspended Myitsone Dam project and the belief that Myanmar's investment climate is inherently unstable.

Myanmar Investment Law: A New Chapter in Foreign Investment Protection?

Myanmar's democratic government has recently sought to improve its investment climate by introducing the new Myanmar Investment Law (MIL) in 2016.³⁰ The MIL provides a more transparent framework that seeks to improve accountability for both Myanmar and Chinese investors. For instance, Myanmar now reserves the right to adopt fair measures which may affect foreign investments, including suspension, if it is necessary to protect public health.³¹ Similarly, investments that may cause "an enormous impact to the natural environment and ecosystem" are prohibited, and the investor could be prosecuted under Myanmar's domestic laws.³²

At first glance, it may appear that these legal provisions were introduced specifically to deal with the irresponsible business conduct of Chinese investors, which suggests some degree of codified biasedness. However, as a matter of

conventional international practice, such safeguards are not unique to Myanmar and have been incorporated into several modern investment treaties, for example the 2012 United States Model Investment Treaty and the 2009 ASEAN Comprehensive Investment Treaty.³³ Essentially, the MIL has modernised Myanmar's investment regime based on current regional and international standards, rather than curbing Chinese investments in particular.

That being said, the effectiveness of Myanmar's investment regime ultimately depends on the implementation of its laws, and Myanmar's investment authorities should be more proactive in enforcing the relevant legal requirements. While the law mandates that foreign investors must submit an annual performance report, which could be used for screening purposes, the Myanmar Investment Commission is not actively enforcing this and has only been issuing reminder notices.³⁴ To ensure that the MIL is strictly adhered to, Myanmar's authorities need to be more serious in policing such legal requirements. Nevertheless, there are some promising results in terms of the ability of legal institutions of Myanmar to spearhead improvements in transparency. The first notable instance is the strategic plan launched by Myanmar's apex court for 2018 to 2022, which will review standards of judicial independence following the country's political transition.³⁵ The primary objective is to

²⁹ LI CHENYANG & JAMES CHAR, *China–Myanmar Relations since Naypyidaw's Political Transition: How Beijing can Balance Short-Term Interests and Long-Term Values in MYANMAR: REINTEGRATING INTO THE INTERNATIONAL COMMUNITY* (Li Chenyang & Chaw Chaw Sein, eds.) 260 (2016).

³⁰ Myanmar Investment Law 2016 ("MIL"): The Pyidaungsu Hluttaw Law No. 40/2016.

³¹ MIL, s 89(b) & s 85(a).

³² MIL, s 41(e) & s 88.

³³ M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT LAW* 264 (2010).

³⁴ Thompson Chau, *Myanmar Investment Commission accused of transparency failures*, MYANMAR TIMES (July 2019), <https://www.nmmtimes.com/news/myanmar-investment-commission-accused-transparency-failures.html>

³⁵ Nyein Zaw Lin, *Judiciary to assess its independence, try to make system more people-friendly*, MYANMAR TIMES (Jan. 31

restore public confidence in Myanmar's courts and to deliver justice more efficiently. Simultaneously, this should bolster the confidence of Chinese foreign investors in relying on local courts to settle investment disputes.

Conclusion

Chinese investors in Myanmar must accept the reality that local resentment will not disappear any time soon. Due to their questionable business conduct and previous collaborations with the junta, Chinese foreign investors have been labelled with a presumption of guilt that their projects are unfair and opaque. Indeed, such negative sentiments from the local people are so entrenched that public protests against Chinese

projects persist. Yet, economically, Myanmar remains an attractive investment destination for Chinese companies, despite their unpopularity. Further, historically, Myanmar's democratic government has had the political will to shield Chinese investors from local antagonism as long as the investments did not critically endanger lives. The recently enacted MIL also seems promising as an approach which strikes a fair balance between the rights of local people and Chinese investors.

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2018), <https://www.mmtimes.com/news/judiciary-assess-its-independence-try-make-system-more-people-friendly.html>.