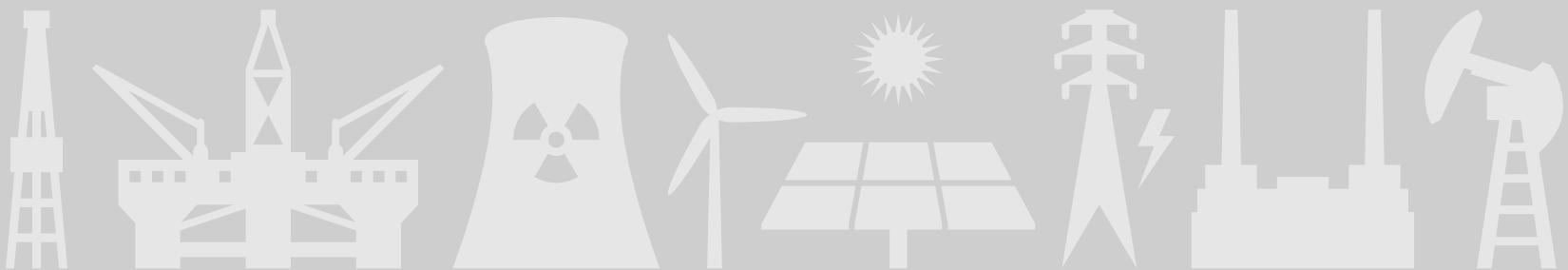


# DIFFICULTIES IN EASING SANCTIONS ON MYANMAR

Peter Kucik

APRIL 2016



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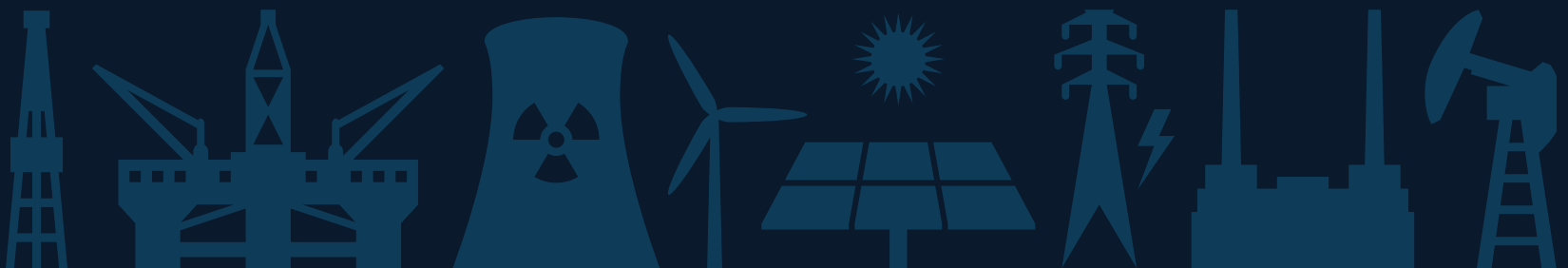
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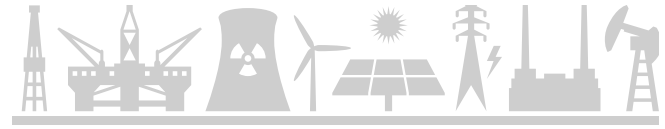
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# DIFFICULTIES IN EASING SANCTIONS ON MYANMAR

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APRIL 2016

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This policy paper represents the research and views of the author. It does not necessarily represent the views of the Center on Global Energy Policy. The paper may be subject to further revision

## FOREWORD

This paper is the first of a series of products that will be released by the Center on Global Energy Policy's Economic Statecraft, Sanctions and Energy Markets Program that focus on the removal of sanctions and the reestablishment of normal economic ties with postsanctioned jurisdictions.

Much scholarship and public attention has gone into the imposition of sanctions and their maintenance and consequences over time. This is sensible given that sanctions are increasingly the tool of choice by Western governments seeking to exert leverage on others and because these sanctions also target resources and economic ties of high value to the international community, such as energy. Relatively less focus has settled on the process whereby sanctions are removed. But, for all our collective interest, the removal of sanctions and return of a country to a normal place in the international economy is potentially the most important part of the process. Sanctions work best when countries (and other targets) clearly understand what action prompted punishment and how they can modify their behavior to have sanctions removed, then experience positive benefits from the removal. Such an arc helps reinforce the benefits of having sanctions removed and—importantly—establishes a clear contrast to the pain of sanctions when in place. Yet, many jurisdictions exiting sanctions can experience complications and unrealized expectations in the experience. The expanded use of more complicated sanctions tools and the fact that many such measures may remain legally in place while the postsanctioned jurisdiction completes its transition into “normalcy” means that this awkward period could be longer and more difficult than in the past.

This paper looks at Myanmar—a sanctions “win” in that the country was placed under short-duration, intense sanctions to achieve political changes that have now occurred—and seeks to identify key policy moves taken by the United States, its partners, and Myanmar in order to have sanctions relief take place and work. It also seeks to identify places where mistakes were made and where improvements could be made. As the first in this series, this paper also leaves open some

more general questions about how to structure future sanctions policies and sanctions removal policies for improved efficiency and effectiveness. Those topics will be addressed further in future research from the Center on Global Energy Policy and this program.

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## EXECUTIVE SUMMARY

The global sanctions regime against Myanmar is one of the few adopted that can be described as an unambiguous victory for the use of the tool and international efforts to press the country to undertake political reform. However, creating permanence for the gains reached through these efforts requires the same level of dedication, foresight, and seriousness in the removal of sanctions as the imposition of the regime in the first place.

Complicating this effort is the vast and intricate nature of the US regime on Myanmar. This situation is made exponentially worse by virtue of the US attempt to retain its sanctions infrastructure and maintain leverage to encourage further reform and prevent backsliding, while also encouraging Myanmar economic development and US-derived investment. While there is obvious tension in these goals, they are not necessarily irreconcilable.

Following the National League for Democracy (NLD) victory in the November 8, 2015, elections and the formation of the next government, there will be expectations both within Myanmar and internationally that the United States can and will work to prevent unintended consequences from the remaining sanctions and restrictions and follow through with its commitment to the now long-anticipated entry of additional US businesses into the Myanmar market. Without proper attention and care, the United States risks undercutting both policy imperatives and being left with diminished sanctions leverage and less market access for US investors and companies.

Although there are initiatives that could be undertaken by banks and other businesses to address certain obstacles, the impetus principally lies with the US government, as it has actively encouraged greater US participation in the Myanmar economy. If the United States really means to encourage and support the entry of US businesses into the Myanmar economy, it must do more to demonstrate that. Toward this end, I make the following recommendations:

1. The United States must be ready to deal with emerging sanctions issues quickly and allocate the resources necessary to handle them.
2. To help address such concerns efficiently, the US government must streamline its decision-making process for Myanmar. Unreconciled views across, and within, various agencies are

setting inertia and delaying decisions, even in areas such as licensing where policy direction has precedent. The White House is best positioned to conduct outreach, consolidate views, and advance policy decisions, and it needs to lead the Myanmar policy process.

3. The US government also needs to work to ensure that other critical stakeholders appreciate its goals, especially the NLD majority Parliament now in power in Myanmar.
4. To fully rebuild confidence in the Myanmar market, modifications to sanctions need to be done in a way that signals a permanent shift in the climate and US government approach. Licenses alone do not suffice, especially if they can expire or are likely to change. The United States should prioritize durable actions, such as delistings, as Myanmar works toward the ultimate goal of sanctions removal.
5. Although it takes time to investigate and assess each delisting case and review the facts and circumstances specific to each Specially Designated National and Blocked Person (SDN) seeking removal, there must be a reasonable timetable for entities seeking relief, and these entities must understand how the process will work and by when.
6. With respect to potential future imposition of sanctions under the standing sanctions regime, the US government must be clearer about the bases for those designations. Programs with clear criteria for both designations and removals, such as US counternarcotics trafficking sanctions, have the most movement on and off the SDN list and could serve in part as a model.
7. The US government should regularly consult and collaborate with US banks and businesses on sanctions matters, both to seek information and to address proactively the difficulties that they are encountering.
8. Finally, the US government, banks, and businesses should be open minded and look for other creative ways in which sanctions policies can be adjusted to better support the economic development and people of Myanmar.

## INTRODUCTION

It has been over three years since the United States began to relax and remove certain economic and trade sanctions against Myanmar, otherwise called Burma.<sup>1</sup> Sanctions pressure had built over years in response to large-scale repression by the government of democratic opposition in Myanmar and the ongoing confinement of prodemocracy icon Aung San Suu Kyi. In 2011, the United States began to reengage following Myanmar's first steps toward change, including releasing Aung San Suu Kyi and other prisoners, relaxing media restrictions, and enacting political and economic reforms. In announcing the initial policy changes that eased these sanctions, the United States cited its desire to support the reform process under way in Myanmar and the belief that the participation of US businesses would encourage further change, promote economic development that would help prevent a return to authoritarian rule, and contribute to the general welfare of the population.<sup>2</sup> While some nuanced requirements and targeted sanctions remain in place to preserve pressure on the Myanmar government to continue with reforms, the broad jurisdictional restrictions once imposed against the country—including prohibitions on new investment, the exportation of US financial services to Myanmar, and imports into the United States of products from Myanmar—have now been removed completely or licensed away. However, US businesses have not rushed into Myanmar, leaving unfulfilled a major goal of this policy shift.

Although an emerging, or even frontier, market, Myanmar is rich in natural resources, has a young labor force and a population of over 50 million, and is geographically positioned between two of the largest global economies in India and China. As one of the world's least developed countries, Myanmar has opportunities in nearly every market sector, including infrastructure, transportation, telecommunications, tourism, hotels, agriculture, natural resources, professional services, and manufacturing. Specific Myanmar commodity needs include construction equipment, resource extraction, refining facilities, power generation, renewable energy, processed foods, auto parts, chemicals, computers, textiles, garments, fertilizer, animal feed, and medical equipment.<sup>3</sup> While the immediate consumer market is limited, demand for consumer goods will grow when domestic incomes begin to rise.

The most optimistic growth estimates project a quadrupling of the Myanmar economy by 2030.<sup>4</sup> As a result, as other jurisdictions have removed sanctions, much of the world has reestablished trade and economic ties to Myanmar, and foreign companies have begun to invest again.

Myanmar remains a very underdeveloped country as measured on almost every international index. Although the situation is improving, the World Bank still ranks Myanmar among the lowest of all countries for ease of doing business. Its ranking reflects high cost of doing business, regulatory uncertainty and instability, neglected or nonexistent infrastructure, tremendous capacity and reputational issues, and ongoing conflict with ethnic minority and antigovernment groups. Registering a business in Myanmar costs more and takes longer than in nearly any other developing country. Quality and affordable work and living space remains limited, although new construction is creating more availability and prices are beginning to decrease. Modern banking and financial services are finally becoming more readily available—newly licensed foreign banks are preparing to open branch offices, and another licensing round by the Myanmar government for foreign financial institutions is in the works. Reliable power generation and access to functioning Internet connections and phone lines remain chronic issues, although the presence of telecom providers Telenor and Ooredoo has improved things. Logistics and supply chain issues continue to plague almost all operations—nearly 50 percent of Myanmar's food supply is routinely lost in transit. The legal and regulatory environments remain uncertain, and although the current Parliament continues to pass legislation, it is still unclear what the priorities of the incoming reformist government will be.

Although these are all important considerations that would inform corporate investment decisions, this paper in part focuses on the nuanced requirements and targeted sanctions measures that the United States maintains and how they could sway the investment decisions of US businesses and banks. There is considerable anecdotal and circumstantial evidence that they are causing an unintended stymying of US investment in the country and diminishing the success of the revised US sanctions policy, as measured by lack of



engagement and investment by US companies relative to that of other countries. If US sanctions are not correctly calibrated or implemented, it undermines the very purpose of their easing—encouraging further change, promoting inclusive economic development, and contributing to the welfare of the Myanmar people through increased US trade and investment. Failure to fulfill its commitment to create the proper conditions for US companies to reengage economically in Myanmar will diminish overall US leverage as others enter the market in its stead. Not only would US firms miss out on opportunities there, but inability of the United States to succeed in this after years of effort would call into question the credibility of its sanctions policy and potentially lead to calls for a wholesale removal of the program. Ironically, if the US sanctions policy cannot be implemented in a manner that supports development and economic growth in Myanmar, it could hurt Aung San Suu Kyi and her newly elected prodemocracy party—the once-repressed opposition forces that served as a basis for the original imposition of sanctions are now governing.

The Myanmar sanctions framework was built up over a decade and a half through both legislative and executive action, and the resulting interaction of those various authorities has produced a complicated set of prohibitions that lack a precise mechanism for their removal. Accordingly, the unwinding of the Myanmar sanctions has been a patchwork effort in undertaking a shift in US policy while obliging statutory requirements. While this process cannot be described as a model, the difficulties that have been encountered so far, and those that continue to emerge, can serve to illustrate what reasonably could be expected in the process of transitioning or easing similarly comprehensive sanctions programs and can provide lessons about what works and what does not. The United States still maintains other comprehensive sanctions programs, and showing that they can be successfully unwound in a manner that keeps targeted restrictions while allowing for US reengagement would address common criticisms of sanctions and only strengthen their value as a precise foreign policy tool.

This paper seeks to provide further guidance as to how the United States can achieve its twin goals with Myanmar: encouraging US businesses and banks to increase investment and engagement in Myanmar, while retaining the leverage Washington deems necessary to prevent backsliding on reforms. The paper begins with background

on the sanctions regime put in place by the United States, and it describes the segments of this regime that have been removed and the general licenses that have been granted to encourage US participation and investment in Myanmar. It then looks at the inroads US companies have made into Myanmar and analyzes how the remaining requirements and targeted sanctions may be acting as a drag on investment. It concludes with recommendations on how to improve US investment in the country while maintaining the restrictions and sanctions Washington has kept to ensure reforms in Myanmar are not stalled or eroded.

# BACKGROUND ON THE MYANMAR POLITICAL AND SANCTIONS PICTURE

## THE BUILDUP OF SANCTIONS AGAINST MYANMAR

The imposition of US economic and trade sanctions against Myanmar began in earnest in May 1997 in response to large-scale repression of democratic opposition in Myanmar by the then-ruling junta, including mass imprisonments and the house arrest of Aung San Suu Kyi, whose NLD party in 1990 overwhelmingly won an election that the junta refused to respect.<sup>5</sup> Over the course of the following decade, it evolved into one of the United States' most extensive sanctions programs, with layers of intersecting statutory and executive prohibitions.

President Clinton determined in accordance with specific congressional authorization (contained in an appropriations act) that the then-ruling military junta had committed large-scale repression of the democratic opposition in Myanmar.<sup>6</sup> He issued Executive Order (EO) 13047 pursuant to the International Emergency Economic Powers Act declaring a national emergency with respect to the actions and policies of the junta government.<sup>7</sup> Consistent with the congressional action, the order prohibited new investment in Myanmar by all US persons, in which “persons” is defined in the legal sense to mean both individuals and entities. It framed a unique definition of “new investment” consistent with the appropriations act to include entering contracts for the economic development of resources in Myanmar; purchasing equity interests in the economic development of resources in Myanmar; and participating in royalties, earnings, or profits in the economic development of resources in Myanmar. The term “resources” is broadly construed in US sanctions regulations to include any natural, agricultural, commercial, financial, industrial, or human resources. These broad yet technical definitions together prohibited most new partnerships, but existing contracts were grandfathered and allowed to proceed. Consistent with congressional intent, sales of goods, services, or technology outside the new investment scope were not affected. In fact, sales of goods, services, or technology into Myanmar were not at any time prohibited.

In July 2003, President Bush determined that continued and increasing repression by the junta warranted an expansion of the sanctions, and he signed into law the Burmese Freedom and Democracy Act of 2003 (BFDA).<sup>8</sup> Then to implement the BFDA, including its ban on importation into the United States of products of Myanmar and provisions targeting senior government officials, the president issued EO 13310. Beyond the BFDA restrictions, EO 13310 also prohibited the exportation or reexportation of any US financial services to Myanmar. It also “blocked” Myanma Foreign Trade Bank, Myanma Investment and Commercial Bank, and Myanma Economic Bank (MEB), the three state-owned banks that at the time were the only foreign exchange banks in the country. Blocking immediately imposes a complete prohibition against transfers, other transactions, or dealings of any kind with those named. This marked the introduction of targeted sanctions to the Myanmar program, and the first inclusion of Myanmar names on the US Treasury Department's list of sanctioned SDNs. Unless licensed or otherwise authorized, US persons are prohibited from nearly any dealings with the SDNs. Although exceptions were made for personal remittances and humanitarian aid, these measures effectively cut Myanmar off altogether from the US financial system.

Further US action was taken in response to violent junta crackdowns against peaceful demonstrations. President Bush in October 2007 expanded the targeting criteria for the Myanmar sanctions program with EO 13448 to include those involved with human rights abuses related to political repression in Myanmar, facilitating public corruption by senior government officials, or providing support for the Myanmar government. This latter category was quickly and steadily employed to target Myanmar businesspersons—the so-called cronies—and their companies for supporting the junta regime. In short order, the president sought to again increase pressure on the junta before its flawed referendum on a new constitution and issued EO 13464 in April 2008 to expand sanctions targeting ability to cover state-owned or -controlled enterprises.

Pressure was intensified again in July 2008, when President Bush signed into law the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 (JADE Act).<sup>9</sup> Among other things, the JADE Act set out certain categories of persons that were blocked by the statute, including current and former leaders of the junta and the military as well as their immediate families. The breadth and instant impact of this provision led President Bush to issue a limited waiver to reconcile the JADE Act measures with existing targeted sanctions against SDNs. Because US Customs Rules of Origin deemed gems to be products of any country in which they were substantially transformed and not, in those cases, their country of origin, the JADE Act also amended the BFDA to prohibit imports into the United States of any jadeite or rubies mined or extracted from Myanmar as well as jewelry containing such jadeite or rubies, regardless of where the gems were cut or set. Along with other extractive industries, gems sales were an important revenue stream for the junta and remain very lucrative, especially in trade with China—it has been estimated that Myanmar produces 90% of the global ruby supply by value, and that gems are the country's third most valuable export, after petroleum and agricultural products.<sup>10</sup>

In addition to these economic and trade restrictions, the United States had also built up, through legislation and executive actions, strict restrictions on almost all other engagement with the Myanmar junta. The United States banned visas for senior junta and business officials, limited both diplomatic and military-to-military relationships, and acted to restrict development assistance, including from the United Nations Development Programme, the World Bank, the International Monetary Fund, and Asian Development Bank as well as USAID. Taken together, these policies prohibited or restricted US interaction with most individuals and entities in Myanmar, and with the exception of grandfathered activity, their impact cut across all sectors and industries.

Apart from US measures, Myanmar was also subject to sanctions prohibitions imposed by the European Union (EU) and its member states, as well as separate programs maintained by Australia, Canada, Norway, Switzerland, and the United Kingdom. Although some of these sanctions lists were longer and more extensive than that of the United States, they often lacked information needed to positively identify their subjects. As a result, the US sanctions predominated for most multinational actors.

## MYANMAR REFORMS AND SANCTIONS RELIEF

After President Obama entered office in 2009, the administration began to reassess US national security and foreign policy holistically and practice “principled engagement” with regimes with which Washington was traditionally at odds—the resulting strategy employed a dual-track approach to improve bilateral relations and use diplomatic dialogue to advance human rights or other negative conditions, while continuing to engage with peaceful political opposition, believing that more substantive government-to-government relations can create permissive conditions in which civil society can operate.<sup>11</sup> The United States initially maintained status quo on sanctions while beginning to engage the Myanmar junta under this framework. Although there was vocal criticism and skepticism about this shift from some Myanmar activists and human rights groups as well as from within the US government, the new policy was discussed with Congress and received a level of bipartisan support. At the same time, the Myanmar government began to undertake political and economic reforms with the goal of opening the isolated country to foreign investment and increasing opportunity for growth. Following the 2010 Myanmar election, which was boycotted by Aung San Suu Kyi and the NLD, Myanmar transitioned from junta rule to a civilian government composed of former military leaders. Aung San Suu Kyi was released from house arrest just after the election, and in 2011 President Thein Sein and Lower House of Parliament Speaker Shwe Mann began a series of progressive reforms that directly addressed the most significant US and European concerns. These reforms included allowing greater personal freedoms, opening a dialogue with Aung San Suu Kyi and the NLD, and engaging with Myanmar's marginalized ethnic minority groups.

Aung San Suu Kyi and the NLD competed in the April 2012 Myanmar by-election to fill parliamentary seats vacated by those who had become ministers in the new government. The NLD won all but one seat it contested, and Aung San Suu Kyi was elected to Parliament. The international community, in turn, began to suspend or lift the major financial and economic restrictions. The EU, Australia, Norway, Switzerland, and the United

Kingdom either suspended or eliminated their sanctions programs in 2012, and all of their remaining restrictions were lifted by 2013, with the exception of restrictions on sales of military matériel and related services. Canada was the only jurisdiction that retained sanctions parallel to the United States. It removed comprehensive trade and investment prohibitions and financial services provisions but maintained a ban on arms trade and military assistance as well as an asset freeze and prohibition on transactions against certain designated individuals and entities, similar to the US prohibitions against SDNs.

The United States took a more gradual approach, beginning in May 2012 when President Obama and Secretary of State Clinton announced that the United States would begin easing certain sanctions in response to the historic reforms in Myanmar. The majority of broad financial, investment, and trade restrictions were licensed away or removed between 2012 and 2013. In July 2012, the United States issued general licenses—which are broad exemptions to US sanctions that remain in place—to permit the first new US investment in Myanmar in nearly fifteen years and to broadly authorize the exportation of financial services to Myanmar. The intention of this policy change was to support ongoing reform efforts by the Myanmar government, with the stated rationale that “participation of US businesses in the [Myanmar] economy will set a model for responsible investment and business operations as well as encourage further change, promote economic development, and contribute to the welfare of the [Myanmar] people.”<sup>12</sup> The general license authorizing the exportation of US financial services does not permit transactions with individuals or entities that remain blocked under the Myanmar sanctions program. In addition, it does not authorize transactions connected to the provision of security services with the Myanmar Ministry of Defense, any state or nonstate armed groups, including the military, or any entities they own due to particular human rights risks.

The statutory ban on new US investment in Myanmar was waived, and a general license consistent with that waiver authorizing such new investment was issued, provided it does not involve agreements entered into with the Myanmar Ministry of Defense, any state or nonstate armed groups, including the military, or any entities they own, or any individuals or entities blocked under the Myanmar sanctions

program. Additionally, any US individuals or entities engaging in new investment in Myanmar in an aggregated amount exceeding \$500,000 must address guidelines set up by the State Department in its *Reporting Requirements on Responsible Investment in Burma* report.<sup>13</sup> The official announcement of these changes also noted that the core authorities underlying the US sanctions remain in place, implicitly reminding that licenses can be revoked and restrictions reimposed quickly should the need arise. Alongside the licenses, President Obama also issued EO 13619 to allow the United States to sanction those that threaten the peace, security, or stability of Myanmar, including by undermining or obstructing political reform or the peace process with ethnic minorities, committing human rights abuses, or conducting arms trade with North Korea.

Only months after these policy changes had initially been implemented, it became clear that businesses were still having problems getting ready access to the banking and financial services needed to enter Myanmar. At the time, almost every major bank in Myanmar was off limits to US persons due to sanctions, including the three state-owned banks that were then the sole foreign exchange banks in the country. While a regulatory provision allowed those banks to process transactions solely for purposes of currency exchange, other regular banking activities with those institutions remained prohibited.

The US government recognized the critical importance of better access to the Myanmar banking system to the operational success of the US companies and NGOs entering the market. In February 2013, General License No. 19 (GL 19) was issued to support both the new authorizations for US investment and financial services in Myanmar as well as the broader policy of encouraging additional US economic involvement.<sup>14</sup> GL 19 authorized most transactions—including opening and maintaining accounts and conducting a range of other financial services—with four major sanctioned Myanmar financial institutions: MEB, Myanma Investment and Commercial Bank, Asia Green Development Bank, and Ayeyarwady Bank; GL 19 maintained the prohibition on transactions involving other SDNs and security services as well as new investment.

With respect to bilateral trade with Myanmar, the United States in November 2012 issued a general license to broadly authorize the importation of products from

Myanmar for the first time in almost a decade. In August 2013, Congress intentionally allowed the statutory import ban provision in the BFDA to expire, eliminating altogether those restrictions and the need for a license. Senator McConnell expressly called for the lifting of the import restriction, acknowledging reform by the Myanmar government and explaining that in choosing not to renew them, Congress would ensure that US companies remain on equal footing with competitors, bring greater certainty to those considering investment, and encourage bilateral trade for the benefit of the Myanmar people.<sup>15</sup> However, continuing concerns about labor issues and human rights in particular market sectors prompted President Obama to issue EO 13651 to reinstate the prohibitions on imports of jadeite or rubies from Myanmar and of articles of jewelry containing them that had been originally imposed by the JADE Act. (Because the JADE Act amended the BFDA import ban, when the BFDA provision expired, the JADE Act amendments did as well.) Additionally, the United States removed barriers to supporting full engagement by international financial institutions in Myanmar as well as some visa eligibility restrictions.

Most recently, the US government issued General License No. 20 (GL 20) in December 2015 to enable other critical transactions for trade normalization that would otherwise be prohibited. GL 20 authorized for a six-month period transactions that are ordinarily related to the export of goods, technology, or nonfinancial services to or from Myanmar, including participation in trade finance and payment port fees as well as shipping and handling charges associated with such trade. While GL 20 authorizes certain trade transactions involving SDNs and other sanctioned parties, it does not authorize any transactions to, from, or on behalf of those SDNs or otherwise blocked entities. In short, this means that SDNs can be involved in transactions necessary for trade among other parties but cannot themselves be traded with.

The US government has also actively set out and promoted the way forward for Myanmar individuals and entities seeking to be removed—“delisted”—from the Treasury Department’s list of sanctioned SDNs, commonly known as the “SDN list.” In order to be delisted, SDNs generally must petition the Treasury Department and show that they are no longer engaging in the activity for which they were listed or that the circumstances resulting in their

listing otherwise no longer apply. In the specific Myanmar context, SDNs seeking removal must demonstrate in a verifiable way that their behavior has changed and their support for peace, stability, and security in Myanmar. In a somewhat unique effort by the US government at senior levels to encourage Myanmar SDNs to engage in this process, Assistant Secretary of State for Democracy, Human Rights, and Labor Tom Malinowski visited Myanmar in June 2014 and met with individual SDNs to describe the requirements.

We explained that removal from the SDN list is an administrative—not a political—process managed by the United States Treasury Department in which petitioners must submit proof of fundamental behavior change. We want SDNs to change their behavior and not stand in the way of Burma’s [Myanmar’s] transition. We will look to see SDNs sever business ties with the military, respect human rights, including by avoiding involvement in land seizures, and respect civilian rule. One good way to demonstrate these things would be to conduct a credible, independent audit of all business holdings, plus a credible, independent social and environmental impact assessment of their operations. We also made clear that donations to charity, while welcome, would not be taken into consideration—for this purpose, what’s important is not how they spend their money but how they make their money.<sup>16</sup>

Throughout the implementation of these new policies, some prominent critics, as well as human rights advocates and civil society groups, expressed concern that the United States was moving too quickly, and that normalizing trade and removing financial restrictions without adequate safeguards would only overwhelm Myanmar and allow for exploitation of cheap labor and natural resources. However, the anticipated “gold rush” of US and multinational corporations into the country has not materialized even though the obvious sanctions obstacles have been reduced or eliminated.

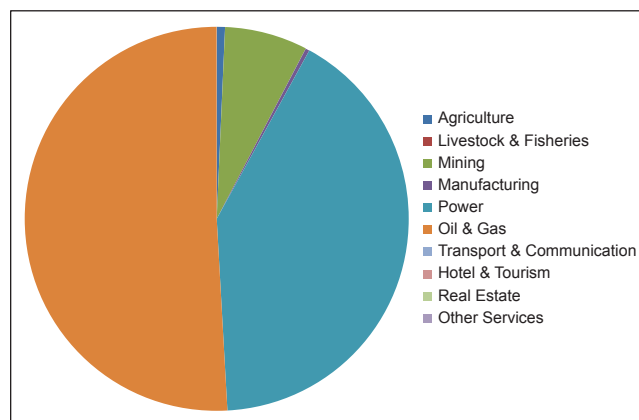
## THE EMERGING MYANMAR MARKET

Other steps have been taken, both internally and externally, to promote foreign investment. Aid, technical support, and funding have begun to flow in, with the United States, Japan, Europe, the Asian Development Bank, and the World Bank all working to provide multilateral and bilateral monetary and technical assistance to, among other things, rebuild Myanmar's regulatory and financial systems and update its laws. Myanmar has also begun to adopt laws and policies in conformance with international norms, including anticorruption and best practices for corporate behavior. In 2014, Myanmar was accepted as a candidate by the Extractive Industries Transparency Initiative (EITI)—an international organization that maintains standards for assessing levels of transparency with respect to accountable management of a country's oil, gas, and mineral resources—and will implement EITI standards and requirements to release information on tax payments, licenses, contracts, production, and other key elements around resource extraction. Disclosure of this information under the EITI is intended to allow citizens to see how the country's natural resources are being managed and how much revenue they are generating. The government has also been offering tax and export tariff breaks to draw in additional foreign investment and create jobs.

Myanmar has vast natural resources, including oil and gas, precious gems, minerals, and timber, as well as a large labor market. Though there was a major influx of foreign direct investment (FDI) into oil and gas pipelines and other infrastructure in 2010–2011 (no doubt aided by the relatively high oil prices at the time, see Figure 1), in the short and medium term, the country's most promising business and investment potential is in manufacturing, agriculture, infrastructure, energy, tourism, financial services, and telecommunications. FDI has broadened in acknowledgment of this (see Figure 2).

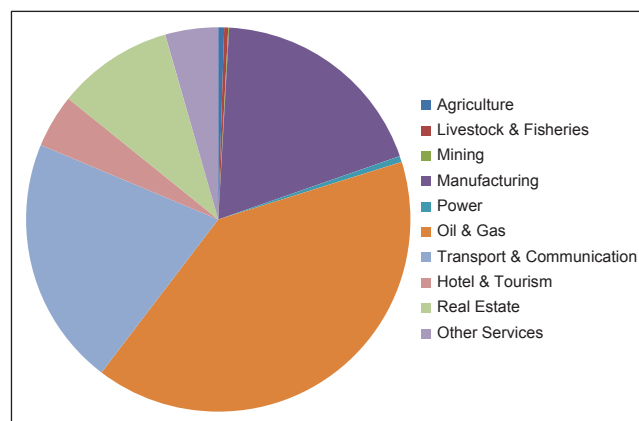
As the economy has begun to open and economic opportunity reemerged, FDI into Myanmar has climbed. FDI in the last fiscal year reached over \$8 billion, more than \$3 billion above expectations, which is attributed to growth in the energy, manufacturing, and telecommunications sectors.<sup>17</sup> Myanmar received \$4.1 billion in FDI in fiscal year 2013/2014 and exceeded its announced target of \$5 billion for fiscal year 2014/2015

**Figure 1: Myanmar FDI by sector, 2010–2011**  
(Millions of dollars)



Source: Myanmar Directorate of Investment and Company Administration (DICA).

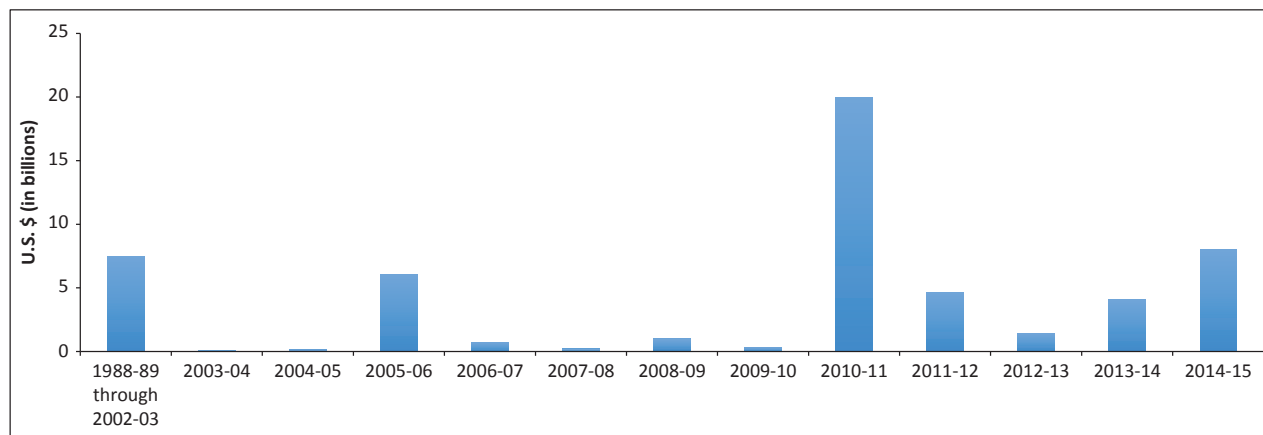
**Figure 2: Myanmar FDI by sector, 2014–2015**  
(Millions of dollars)



Source: Myanmar DICA.

with a total of \$8.01 billion.<sup>18</sup> Foreign investment worth \$2.9 billion has been approved for the 2015/2016 fiscal year, against an overall target of \$6 billion.<sup>19</sup> According to Myanmar's Directorate of Investment and Company Administration (DICA), 35 percent of total 2014/15 FDI went into the energy sector, while manufacturing and telecommunications each accounted for 25 percent. Myanmar has now beaten its FDI targets for each of the

**Figure 3: Myanmar FDI totals by year  
(Billions of dollars)**

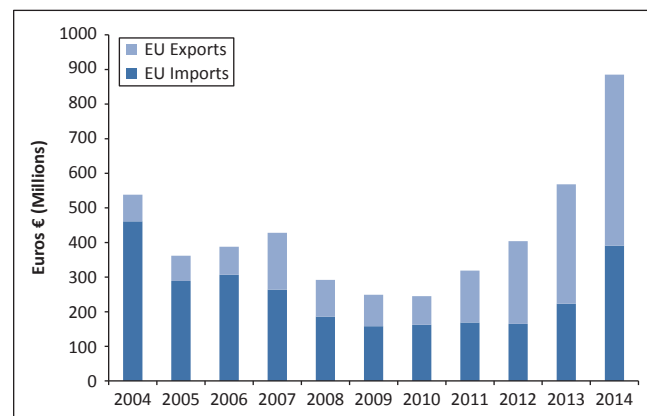


Source: Myanmar DICA.

last three fiscal years, and FDI for fiscal year 2014/15 was nearly twenty-five times the \$330 million received in 2009/2010, the year before the transition away from military rule (See Figure 3).<sup>20</sup>

Japan is the most outwardly visible investing country, and its companies are prominently involved across market sectors in the establishment of special economic zones and infrastructure development projects as well as the banking, automotive, food and beverage, and consumer products industries. According to DICA, Singapore companies accounted for more than half of the investment volume from 2014–2015, with a combined total value of \$4.2 billion, including in particular oil and natural gas projects. Hong Kong firms were the second largest set of investors with \$850 million, followed by Chinese companies with \$516 million. Companies from Canada, France, Germany, Indonesia, Norway, Qatar, South Korea, and Thailand have all been awarded tenders for major investment projects and expanded engagement throughout the oil and gas sector as well as in banking, telecommunications, and automotive industries. Trade between Myanmar and the EU has also grown, with imports, exports, and total trade between the two more than doubling between 2012 and 2014, according to EU statistics (Figure 4).<sup>21</sup> EU statistics also suggest that global trade with Myanmar has more than doubled since its political and economic reforms began (Figure 5).

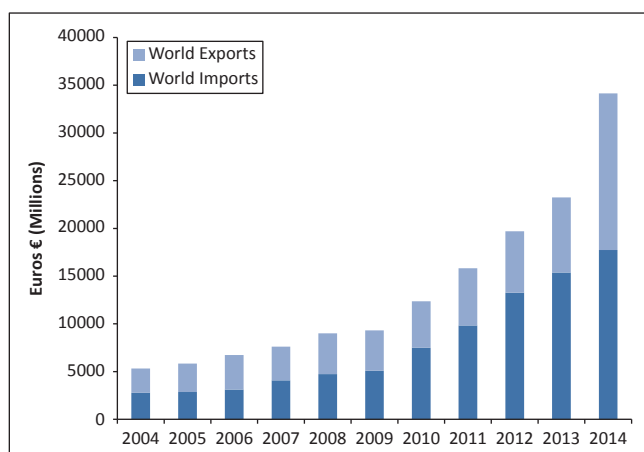
**Figure 4: Myanmar-EU Annual Trade, 2004–2014  
(Millions of euros)**



Source: European Union.

As for US investment, only two days after sanctions initially were eased in July 2012, a delegation of US business leaders and corporate representatives traveled to Myanmar to begin investigating the market. Since then, major US firms including Ball Corporation, Best Western, Colgate-Palmolive, Coca-Cola, Ford, Gap, General Electric, Hilton, MasterCard, Microsoft, Pepsi, Proctor & Gamble, Visa, Western Union, and Yum! with KFC all have started doing business with or entered Myanmar, in addition to investments by private equity firms such as TPG. Since the Myanmar economic and political reforms

**Figure 5: Myanmar-World Annual Trade, 2004–2014  
(Millions of euros)**



Source: European Union.

first prompted sanctions policy changes and opened the country to investment, US companies have committed to invest over \$600 million in Myanmar.<sup>22</sup>

While this amount is not insignificant, the overall level of investment as measured by the US government still falls somewhat short relative to other countries and certainly does not reflect the “open floodgates” anticipated by both advocates and opponents of the policy change. Before the easing of sanctions, there was negligible bilateral trade between the United States and Myanmar, even though sales of goods, services, and technology to Myanmar were not specifically prohibited. Following the easing of sanctions, imports totals from Myanmar into the United States immediately jumped to nearly \$30 million in 2013 and then \$93 million in 2014.<sup>23</sup> Exports from the United States to Myanmar over the two decades prior to 2012 averaged around \$15 million annually, but since sanctions were eased the monthly numbers have steadily increased. Total US exports to Myanmar were \$146 million in 2013 and should exceed \$200 million for 2015.<sup>24</sup> The official published figures on US investment in Myanmar, however, have remained static since the policy changes at a rather inconsequential \$1 million, particularly when compared with the \$600 million that US firms have committed to invest.<sup>25</sup> The US government has explained this at least in part by noting that a disproportionately large percentage of Myanmar FDI appears to come from

Singapore and attributes this to US companies, among others, routing their investments through corporate presence or branches in Singapore for ease of logistics and transfer.<sup>26</sup> However, even if US firms are in fact indirectly investing through Singapore or other third countries, such mechanisms would obscure actual investment levels and frustrate the policy goal of US businesses directly entering the Myanmar market to raise standards and promote further economic reform.

Notwithstanding the few conspicuous examples of US companies on the ground, such as previously mentioned Coca-Cola, Hilton, MasterCard, and Western Union, many others conduct business into Myanmar from outside its borders, and most have stayed away altogether—notably, no US banks have entered the market. While some foreign businesses in Myanmar have expanded beyond simply opening representative offices and are now running significant operations that generate jobs and local income, they all continue to encounter major challenges. These challenges—including continuing sanctions implications and emerging complications—appear to be preventing potential US investors from entering the market in a meaningful way. Finding a way to address those challenges will be critical following the 2015 election. Success in Washington’s stated goal of using US corporate presence to raise business standards and support further development in Myanmar of course requires that US companies be there. Now that reputational risks to market entry have been diminished by the landslide NLD victory, expectations in Myanmar that US businesses are coming soon will only be higher.



## MATCHING SANCTIONS TO POLICY OBJECTIVES

### CALIBRATION OF REMAINING SANCTIONS TO ENCOURAGE FURTHER INVESTMENT

In shifting its posture toward Myanmar, the US government—in contrast to its EU counterparts—chose not to terminate its sanctions altogether but instead to maintain much of the existing infrastructure of the Myanmar sanctions program. This nuanced easing and recalibration of targeted restrictions gives the United States a degree of leverage to pressure for additional reform and preserves the core underlying authorities to prevent backsliding by the Myanmar government. Even after the November 8, 2015, general election, every indication is that the United States will continue this policy through the government transition and into at least the beginning of the next administration. Its success to date has, however, been mixed. The current policy has prompted several sanctioned individuals to reform their corporate conduct and governing behavior, and the remaining targeted sanctions and restrictions have compounded the challenges already present in the Myanmar economy. They may also be damping efforts to promote US companies and investor involvement in the country's further development, in conflict with the goal of raising economic and business standards in Myanmar through US presence in the market.

Although new US investment and the exportation of US financial services to Myanmar have now broadly been authorized, certain areas of ongoing concern were carved out from the sanctions by the US government to refocus the sanctions in place. The financial services general license does not authorize transactions that may involve the security services and the Myanmar Ministry of Defense, any state or nonstate armed groups, including the Myanmar military, or any other entities that are 50 percent or more owned by those groups. Similarly, the authorization for new US investment leaves restricted any contracts or agreements undertaken with those groups. As discussed earlier, ongoing concerns about labor issues and human rights prompted the reinstatement of prohibitions on imports of jadeite or rubies from Myanmar and of articles of jewelry containing them

after the broader statutory prohibition on US imports of products from Myanmar expired.

More consequentially, US persons also remain broadly prohibited from dealings with blocked persons in Myanmar. This includes any individual or entity included on the SDN list, as well as any entity in which blocked persons directly or indirectly own a stake of 50 percent or more in the aggregate. Such entities are automatically sanctioned whether or not they appear on the SDN list under formal guidance colloquially referred to as the “50 percent rule.” In turn, any entities owned 50 percent or more in the aggregate by entities that are blocked by the 50 percent rule are themselves blocked, resulting in a cascade effect. The regulatory definition of property blocked by these provisions broadly comprises any and all property or interests in property, whether tangible or intangible, and including present, future, or contingent interests. Given the realities of the existing economic environment in Myanmar, where several sanctioned conglomerates each own multiple companies operating throughout the marketplace, the result is that many business interests remain off limits to US persons.

It is difficult to conduct business in Myanmar without involving SDNs or in some other fashion triggering sanctions implications—between the comprehensive extension of military holding companies, state-owned enterprises, and other SDNs into the economy, sanctioned individuals and entities own and control many of the most advanced and best-run businesses in every market sector, as well as much of the most desirable properties in Myanmar. The SDN list currently includes several of Myanmar's wealthiest and most prominent businesspersons as well as state and military corporations whose extensive portfolios span all sectors, including transportation, infrastructure, real estate, tourism, financial services, food and beverages, and extractive industries.

This fact, when combined with both the application of the 50 percent rule and the broad regulatory definition implemented by the Treasury Department to block direct or indirect property interests of any nature whatsoever, creates a potential minefield for US businesses, especially in the critical banking and financial services support

sectors. This is further compounded by the incredibly opaque structure and operation of the Myanmar economy. Businesses frequently cite the SDN list in Myanmar as the practical limit on options not just for partnership and joint venture relationships but also for purchases, sales, leases, and even typical daily business transactions. In an already challenging investment environment, the danger of inadvertently interacting with an SDN can constrain or cut off some sectors for engagement.

While this is not unusual for a targeted sanctions program, the recalibrated Myanmar program has atypical competing interests that are simultaneously pushing toward separate, if not entirely different, ends. Support for the country's economic development and entrance of US businesses has required further easing of even some of the recalibrated targeted sanctions. Without care, however, this further easing could undermine efforts to keep up pressure on SDNs. The US government is continually seeking to achieve the right balance and preserve sanctions leverage while supporting economic growth—all without real transparency in the country's economics, politics, or society. Consistently hitting the proper mark in this environment is inherently difficult if not impossible, and it has certainly proved to be so in practice.

## PRACTICAL IMPLICATIONS AND EMERGING COMPLICATIONS

In seeking a balance that both preserves sanctions leverage and supports Myanmar's economic growth and development, the US government unsurprisingly has encountered practical difficulties and impediments. Business actors understand the policy, but the policy itself is not structured to let them do their jobs without stumbling into a sanctions gray area, if not an outright prohibition. The effects of sanctions policy changes also can be hard to predict. As a result, the US government has been forced to resolve these issues one at a time, leaving businesses unclear as to what may come next.

The only other country that presently attempts this balancing act and maintains sanctions parallel to the United States is Canada, but perhaps not for much longer. As the new Canadian government under Prime Minister Trudeau reviews and assesses current policies, there is speculation that Canada will recognize Myanmar's election

and democratic reforms with the elimination of remaining sanctions.<sup>27</sup> Should this occur, the United States would be maintaining a completely unilateral sanctions program, and its policy—with potential impacts on third countries—would be at odds with the rest of the world.

### Additional Designations or Identifications

Aside from the sanctions that have been employed to disrupt military dealings between Myanmar and North Korea—an area of serious concern, but one that is discrete and even shared by some parts of the Myanmar government—the imposition of other new targeted measures has created additional uncertainty for investors. The October 2014 blocking, or “designation” on the SDN list, of Lower House of Parliament member Aung Thaung prompted concern about the direction of US sanctions policy, particularly in light of his position within the Myanmar government. Aung Thaung was a Myanmar military veteran and former junta leader who was considered to be a hard-liner—he allegedly was involved in human rights violations and anti-Muslim violence, as well as a 2003 attack on NLD activists and Aung San Suu Kyi that left several dozen dead, but he was designated for being a senior official of the government as a parliamentarian. While the US government has highlighted that its targeted sanctions policy remains in force alongside each sanctions-easing measure and outlined its ongoing concerns (including obstruction of the political reform and peace processes and commission of human rights abuses), the blocking of a government official evoked for many an earlier period of US sanctions against Myanmar. Although the sanctioning of Aung Thaung demonstrated that the United States, true to its word, would target individuals in Myanmar who are working against democratic reform and national reconciliation efforts, the move caught many by surprise and could shake confidence that the sanctions landscape is stable if not improving. The infrequency of such designations may perversely be seen as inconsistency and amplify their impact for potential investors already on edge.

The act of identifying entities that are blocked pursuant to the 50 percent rule may similarly undermine confidence in the sanctions landscape. Typically, the Treasury Department seeks to identify such blocked entities and incorporate them into the SDN list in order to clarify exactly who is sanctioned for US persons and other concerned parties.

These identifications assist the process of conducting due diligence and give some comfort to US businesses and investors that they have the information necessary to comply with sanctions prohibitions and requirements. However, such identifications could be misunderstood by some as a new imposition of sanctions, as opposed to an acknowledgement of a legal status quo. Such entities are already sanctioned and blocked whether or not they are added to the SDN list, and their identification would largely serve to streamline the due diligence processes for companies.

There are also cases where an entity that is actually considered sanctioned by the United States under the 50 percent rule has not been added to the SDN list, presumptively to avoid unintentionally offending a now-friendly government. But this lack of clarity has its own negative effects on Myanmar, namely damping investment. While due diligence would regardless need to be undertaken by US companies and investors entering Myanmar, placing the burden on those parties alone may have a chilling effect on US business and investment. Banks and companies fear that like an iceberg, there is a vast expanse of potentially sanctionable transactions lying just under the surface of every Myanmar business and, consequently, steer well clear of not only the SDNs but, largely, the country itself.

Lack of sanctions identifications has also led to some convoluted US government actions and perhaps reinforced confusion about its intentions. For example, prior to the issuance of GL 19, Ayeyarwady Bank was already blocked by application of the 50 percent rule, but it had not been added to the SDN list. Before the US government could issue a license authorizing transactions with the bank, it was first necessary to formally identify the bank as sanctioned and thereby provide a legal basis for the license. Accordingly, and somewhat unusually, Ayeyarwady Bank was added to the SDN list simultaneously with the issuance of GL 19 that authorized US persons to transact with it.

### General License No. 19

As discussed earlier, when US companies first began to evaluate the Myanmar market, they quickly realized that obtaining banking and financial services was going to be problematic, and it became clear that the emergence of

such problems could potentially interfere with the goal of encouraging the entry of US businesses to model best practices and promote economic reform. First GL 19 and now the current version of the authorization that is incorporated into the full set of regulations governing the remaining Myanmar sanctions illustrate how the US government is seeking to balance its broader foreign policy goals and interests against specific sanctions requirements and prohibitions. Transactions that would otherwise be prohibited, including with individuals and entities that remain blocked, can be authorized in order to address an instant or bigger picture need or desire. GL 19 was meant to establish a mechanism for US persons to deal with key Myanmar banks despite the fact that they remain sanctioned—without access to such financial institutions, US businesses would likely be unable to fully participate in the Myanmar economy. This would undermine the intention of the US government to leverage US business interests to support the ongoing reform efforts in Myanmar; model responsible investment and business operations; and encourage further change, promote economic development, and contribute to the welfare of the Myanmar people.<sup>28</sup>

The authorization in GL 19 has so far only been partly successful in furthering those goals. It would circumstantially seem that at least some US individuals and companies are opening accounts and handling financial transactions through this authorization, as there are a limited number of entirely nonblocked Myanmar financial institutions, and foreign banks are only beginning to receive licenses to open branch offices. More obviously, Visa and MasterCard have availed themselves of GL 19 to provide services to the generally licensed financial institutions, and their logos now appear on cards issued by banks that technically remain sanctioned.

However, efforts to establish correspondent banking relationships between US financial institutions and the generally licensed Myanmar banks have been less successful even though sanctions are themselves not a bar. US financial institutions establishing such accounts or processing such transactions with Myanmar do, however, remain obligated to conduct enhanced due diligence under Section 312 of the USA PATRIOT Act. While correspondent accounts may now be established between US financial institutions and all but a few Myanmar banks,

no US banks have yet done so, and financial transactions between the United States and Myanmar continue to be routed through third countries.

### General License No. 20

Sometime in spring 2015, US banks processing Myanmar transactions began to notice that Asia World Port Terminal (AWPT), a subsidiary of the blocked and listed SDN Asia World Company, was specifically reflected in trade documentation instead of the usual reference to only the port city of Yangon. The Treasury Department provided informal guidance that AWPT is blocked by the 50 percent rule due to its ownership and that financial institutions must block trade documents and payments referencing AWPT.

AWPT, however, is critical to Myanmar's foreign trade. Of the four Yangon port terminals, AWPT is the cheapest, fastest, and most frequently used, handling about 60 percent of the port's total cargo volume. The entire Port of Yangon, which benefits from deep water and its proximity to Yangon as well as industrial areas and manufacturing plants, facilitates around half of Myanmar's total trade. Banking and financial institutions and trade groups expressed concern that given the US government's consistent support for US trade with Myanmar, blocking AWPT could be inconsistent with US foreign policy goals. Anecdotally, once US financial institutions—as well as certain non-US financial institutions that were financing trade with Myanmar in US dollars—began blocking transactions involving AWPT, a significant amount of trade through AWPT was stopped, perhaps creating a “de-facto trade embargo.” To prevent further unintended consequences and inadvertent damage to the Myanmar economy, interested parties sought a general license to allow such transactions to again proceed.<sup>29</sup> Whether or not in direct response to that request or the expressed concerns, the United States issued GL 20, intending to support both US and Myanmar exporters and facilitate trade between the countries.

In fact, in announcing the authorization, the US government specifically noted its efforts to calibrate the impact of sanctions and support the normalization of US trade with Myanmar. The messaging around GL 20 is entirely consistent with the broader US foreign policy goal of supporting Myanmar's economic development by easing prior sanctions while maintaining targeted restrictions against specific individuals and entities. While

GL 20 currently extends only for six months, term-limited general licenses have regularly been renewed in other sanctions programs. That said, the relatively short timeframe may provoke reasonable concern with respect to longer-term trade finance arrangements.

GL 20 also authorizes US financial institutions to unblock and return transactions that were blocked on or after April 1, 2015, that now would be authorized by the new general license. The inclusion of this provision reinforces speculation that a significant number of transactions were blocked between April and December, as a general license can efficiently unblock them all at once as opposed to handling each on a case-by-case basis. Interestingly, due to the comprehensive prohibitions in place prior to the initial sanctions easing, a general license similar to GL 20 was in place to authorize the incidental transactions necessary to effectuate other authorized transactions.

### Yangon Stock Exchange

In another example of likely unintended consequences, while it has not been formally identified as such, the recently opened Yangon Stock Exchange (YSX) is in fact automatically sanctioned by application of the 50 percent rule due to the ownership interest of listed SDN MEB. Although most transactions involving MEB are authorized by general license, it does not extend to entities that are owned by MEB, which would require a separate authorization. Pursuant to an agreement signed in December 2014, Japan Exchange Group, the operator of Tokyo Stock Exchange, and Daiwa Securities Group own a collective 49 percent interest in the YSX, and MEB owns the remaining 51 percent.<sup>30</sup>

As a result, US dollar transactions involving YSX would be subject to blocking, even if there is no US person involved in the transactions, and any involvement by US individuals and entities with the YSX is of course prohibited. However, of more immediate and greater consequence is the fact that most major non-US financial institutions also refuse to transact with SDNs or other entities blocked by the United States and typically sever ties with such blocked entities when they become aware of them. Once the YSX begins trading next year, it could encounter difficulties with financial institutions like those that emerged in the AWPT context.

Daiwa Securities Group actually has already been involved in a project with MEB for almost twenty years now. The Myanmar Securities Exchange Centre (MSEC), a forerunner of the YSX project, is a joint venture company established in June 1996 with equal ownership by MEB and Daiwa Securities Group. The MSEC accordingly is also automatically sanctioned due to the 50 percent ownership interest of MEB even though it never has been identified as blocked.

### SDN Delisting Process

Although the Myanmar economy is still clouded with sanctioned individuals and entities, the risk to US investors and businesses is diminishing as SDNs have begun to seek and achieve removal of sanctions through the delisting process. While the delisting process was initially viewed with considerable skepticism, in April 2015 the chairman of the Union of Myanmar Federation of Chambers of Commerce and Industry and head of the Dagon Group of Companies, Win Aung, was successfully removed from the SDN list. This reinforced the credibility of the US government's process: to be delisted, Win Aung had to credibly demonstrate that he had changed behavior and met the criteria for removal. The US government investigates and assesses all such requests on a case-by-case basis, in consideration of the particular facts and circumstances specific to each individual and as reflected in the evidence presented as well as other sources of information.

Win Aung and his companies were the first prominent Myanmar business leaders to be removed from the SDN list, but others are also engaged in the process. In July 2015, Tay Za's former wife was delisted, as well as two deceased former junta officials. In recognition of their reform efforts, President Thein Sein and Lower House of Parliament Speaker Shwe Mann were removed from the SDN list late in 2012. Such successful delistings should prompt increased interest both in the removal process for those remaining on the SDN list and from businesses and investors as the overall sanctions risk in the market begins to diminish. Delisted individuals and entities not only can resume business with US persons immediately but also the removal process may almost be seen as vetting by the US government. Completing the requisite steps for removal also encourages adoption of international business norms and could make participants more attractive to potential global partners.

### State Department Reporting Requirements

There is still some confusion around the State Department's *Reporting Requirements on Responsible Investment in Burma* guidelines and exactly what is required for new investment in Myanmar. US investors of \$500,000 or more in the aggregate must file public and private reports annually with the State Department and are also required to notify the State Department when entering into a relationship with the Myanmar Oil and Gas Enterprise. While many companies have submitted these reports, there remains skepticism about the benefits and fear that the information will be skewed or misinterpreted and attract public criticism.

US businesses in Myanmar are subjected to considerable scrutiny, and these concerns are not unfounded. In 2015, the NGO Global Witness uncovered information about a local Coca-Cola director in Myanmar who also is a director and minority shareholder in a company that reportedly operates jade mines and has been connected to an SDN military holding company.<sup>31</sup> Coca-Cola explained that its original due diligence was based on the best information available at the time, and although confident that its investment is in compliance with applicable laws, this is not the type of attention that investors in Myanmar are seeking.

## RECOMMENDATIONS AND CONCLUSION

Unwinding any sanctions regime can be a tricky and difficult process. For programs as vast and intricate as the US regime on Myanmar it becomes exponentially harder, especially as the US government attempts to retain its sanctions infrastructure to maintain leverage that will encourage further reform and prevent backsliding while simultaneously encouraging the entry of US businesses that fear running afoul of the remaining structures. While there is obvious tension in these goals, they are not necessarily irreconcilable. Following the NLD victory in the November 8, 2015, elections and the formation of the next government, there will be expectations both within Myanmar and internationally that the United States can and will work to prevent unintended consequences from the remaining sanctions and restrictions and follow through with its commitment to the now long-anticipated entry of additional US businesses into the Myanmar market. Without proper attention and care, the US risks undercutting both policy imperatives and being left with diminished sanctions leverage and less market access for US investors and companies.

Although there are initiatives that could be undertaken by banks and other businesses to address certain obstacles, the impetus principally lies with the US government, as it has actively encouraged greater US participation in the Myanmar economy.

The United States must be precise and clear about its goals with the remaining sanctions against Myanmar. Although the United States has attempted to outline its purposes, lack of clarity in both the overall direction of the program and its application has undermined business confidence. There is no clear sense of how or when sanctions are likely to next be applied, or removed, or for what reasons, or how the next unexpected obstacle might be handled. The rhetoric surrounding the Myanmar sanctions program must match its intentions in order to rebuild comfort and set appropriate expectations. If the United States really means to encourage and support the entry of US businesses into the Myanmar economy, it must do more to demonstrate that. Toward this end, I make the following recommendations:

1. The United States must be ready to deal with emerging issues quickly and allocate the resources necessary to handle them. Even acknowledging that US government bandwidth assigned to Myanmar was occupied preparing for and then covering the November election, it cannot take half a year to address a discrete sanctions issue that broadly impacts trade between the United States and Myanmar, as it did in the case of GL 20. Deadlines should be set for licensing and guidance requests and proper resources provided to maintain them. The United States now has several models and licensing precedents providing examples for how to address unexpected issues or unintended consequences that might emerge with continuing sanctions, but US banks and businesses need to understand and be comfortable that such problems will be swiftly and efficiently dealt with.
2. To help address such concerns efficiently, the US government must streamline its decision-making process for Myanmar. Unreconciled views across, and within, various agencies are setting inertia and delaying decisions, even in areas such as licensing where policy direction has precedent. Tensions with Congress also temporarily delayed the confirmation of Scot Marciel as the next ambassador to Myanmar. Appropriate congressional outreach must be conducted to clearly communicate and explain sanctions goals and processes and to understand the outstanding concerns of Congress. The White House is best positioned to conduct outreach, consolidate views, and advance policy decisions, and it needs to lead the Myanmar policy process.
3. The US government also needs to work to ensure that other critical stakeholders appreciate its goals. The views of the new Myanmar government will be particularly important, as Aung San Suu Kyi has close ties to members of the US Congress who seek and

respect her opinion. Once in office, the NLD will be best positioned to evaluate the actual impact that remaining sanctions are having on the Myanmar economy, and the NLD appraisal should inform an assessment of the state of US goals as well as US sanctions posture moving forward.

4. To fully rebuild confidence in the Myanmar market, modifications to sanctions need to be done in a way that signals a permanent shift in the climate and US government approach. Licenses alone do not suffice, especially if they can expire or are likely to change. While licenses can also be rapidly issued or renewed, the real goal remains the removal of sanctions once they no longer are necessary—either on a case-by-case basis or holistically. US banks and businesses are far more likely to establish relationships and partnerships in Myanmar once they believe that sanctions changes are for the long term and not expressly limited or temporary in nature. The United States should prioritize durable actions, such as delistings, as Myanmar works toward the ultimate goal of sanctions removal. This can be done without a loss in US flexibility to act, as—in a crisis—either the president alone or in concert with Congress can impose additional sanctions.
5. Although it takes time to investigate and assess each delisting case and review the facts and circumstances specific to each SDN seeking removal, there must be a reasonable timetable for entities seeking relief. The US government has invested significant time and energy into the delisting process for Myanmar, but unless it can follow through, there is a risk that momentum will be lost and that the credibility of the policy and process will be undermined. The successful removals that have so far been accomplished illustrate that the process can work as advertised, but now that the Myanmar election is past, there are expectations that more removals should follow.
6. With respect to potential future imposition of sanctions under the standing sanctions regime, the US government must be clearer about the bases for those designations—both in the categories of persons and types of activities that will be targeted and the specific basis for each designation. While the US government has by word and action highlighted its current principal areas of concern, the full spectrum of targeting criteria still remains on the books. Although it is unlikely to take such actions now, the United States maintains the authority to sanction senior Myanmar government officials—even from the NLD. Programs with clear criteria for both designations and removals, such as US counternarcotics trafficking sanctions, have the most movement on and off the SDN list and could serve in part as a model.
7. The US government should regularly consult and collaborate with US banks and businesses on sanctions matters, both to seek information and to address proactively the difficulties that they are encountering. This is one intention behind the State Department’s *Reporting Requirements on Responsible Investment in Burma* guidelines and would further make clear that the US government not only will encourage US participation in the Myanmar economy but also will comprehensively help to effectuate it. A collective and concerted effort will be necessary to improve the Myanmar business environment for everyone involved.
8. Finally, the US government, banks, and businesses should be open minded and look for other creative ways in which sanctions policies can be adjusted to better support the economic development and people of Myanmar. The licensing models of GL 19 and GL 20 could be tailored as needed to support other economic sectors or initiatives and caveated to prompt and require adherence to relevant international norms. A general license could be issued to support those seeking delisting to help ensure that the vetting process is not only thorough but also credible and achievable. US banks and businesses could more formally pool

information about blocked entities that have not been identified in order to share the compliance burden. To gain comfort with Myanmar, US companies could also establish representative offices at little or no operational risk now that reputational concerns about the market have been alleviated by a successful election.

All of these recommendations would go further toward addressing the complications discussed earlier in this paper and could instill confidence that the US government is prepared to handle additional issues as they reveal themselves in the future.

Following the successful November election, the US government will look to see that Myanmar maintains its economic and political reform trajectory before changing its sanctions posture. The United States has actively sought ways to solicit and reward further economic and political reform and has sanctioned those attempting to undermine those efforts.

For the US government, what is at stake is a potential sanctions success story. The United States committed to support nascent reform in Myanmar both by exerting pressure on areas of continuing concern and, of equal importance, promoting US investment into Myanmar in order to raise standards of business and ultimately of living. Once the new NLD government is fully in place, there will be a higher level of expectation that the United States should follow through with that commitment. If it does not materialize, the United States risks undermining its good relationship with the Myanmar government and its people. Other countries will capitalize on the absence, and opportunity will be lost by both the US government and US businesses, but more importantly by Myanmar.

The United States can still solidify its legacy of support for reform in Myanmar and help to consolidate political progress—success would strengthen US ties to an emerging economy and democracy and underscore the efficacy of sanctions as a foreign policy tool. For its sanctions policy to be successful moving forward, the United States must uphold its end and support the SDNs that are working to reform, quickly resolve emerging sanctions issues, and actively assist the businesses seeking to operate in an economy that is incredibly difficult with

or without US sanctions. Ultimately though, regardless of US policy choices, only a continued positive political trajectory in Myanmar will provide full comfort to the international investment community—and that will simply take time.



## NOTES

- 1 The official English name of the country was changed by its government in 1989 from the “Union of Burma” to the “Union of Myanmar” and ultimately to the “Republic of the Union of Myanmar” in 2010. This change has been the subject of some controversy, which will not be addressed here. While the international community, including the United Nations, the Association of Southeast Asian Nations, and the European Union, mostly recognizes and uses the country name “Myanmar,” the United States continues to officially use “Burma,” including in its sanctions program and regulations. For the purposes of this piece, I will use “Myanmar” except when “Burma” appears as it is used by the US government in official capacity.
- 2 State Department, “Administration eases financial and investment sanctions on Burma,” press release, July 11, 2012, accessed December 2015, <http://www.state.gov/r/pa/prs/ps/2012/07/194868.htm>.
- 3 US and Foreign Commercial Service and State Department, *Doing Business in Burma: 2014 Country Commercial Guide for U.S. Companies*, 2014, accessed December 2015, <http://photos.state.gov/libraries/burma/895/pdf/2014CCGBURMAFinal.pdf>.
- 4 Ibid.
- 5 In the 1990 Myanmar election, Aung San Suu Kyi and the NLD won in a landslide, but the junta government refused to recognize the results, imprisoned many NLD members, and placed Aung San Suu Kyi under house arrest.
- 6 Section 570 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996 (Public Law 104-208).
- 7 International Emergency Economic Powers Act (50 USC. §§ 1701–1706).
- 8 Burma Freedom and Democracy Act of 2003 (Public Law 108-61; 50 USC. § 1701 note).
- 9 Tom Lantos Block Burmese JADE (Junta’s Anti-Democratic Efforts) Act of 2008 (Public Law 110-286; 50 USC. § 1701 note).
- 10 Newley Purnell, “U.S. Unlikely to Ease Restrictions on Myanmar’s Gems,” *Wall Street Journal*, April 6, 2012, accessed December 2015, [indonesiarealtime/2012/04/06/u-s-unlikely-to-ease-restrictions-on-myanmars-gems/](http://blogs.wsj.com/indonesiarealtime/2012/04/06/u-s-unlikely-to-ease-restrictions-on-myanmars-gems/).
- 11 2010 National Security Strategy, accessed December 2015, [https://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](https://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).
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