

**GIR** INSIGHT

# **ASIA-PACIFIC** INVESTIGATIONS REVIEW 2020



# **ASIA-PACIFIC**

## INVESTIGATIONS REVIEW

### 2020

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# Preface

Welcome to the *Asia-Pacific Investigations Review 2020*, a *Global Investigations Review* special report. *Global Investigations Review* is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing, telling them all they need to know about everything that matters.

Throughout the year, the *GIR* editorial team delivers daily news, surveys and features; organises the liveliest events ('GIR Live'); and provides our readers with innovative tools and know-how products. In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than our journalistic output is able.

The *Asia-Pacific Investigations Review 2020*, which you are reading, is part of that series. It contains insight and thought leadership from 37 pre-eminent practitioners from the region. Across 16 chapters, spanning around 200 pages, it provides an invaluable retrospective and primer. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these contributors capture and interpret the most substantial recent international investigations developments of the past year, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular topic. This edition covers Australia, Cambodia, China, Hong Kong, India, Indonesia, Laos, Myanmar, Singapore, Thailand and Vietnam in jurisdictional overviews. It also looks at the impact of AI, data privacy, forensic accounting and law enforcement in multi-jurisdictional investigations.

If you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you.

Please write to [insight@globalinvestigationsreview.com](mailto:insight@globalinvestigationsreview.com).

**Global Investigations Review**

London

August 2019

# Myanmar: Continuing the Fight against Corruption

Nwe Oo and Sher Hann Chua  
Tilleke & Gibbins

Under the National League for Democracy (the ruling party) government, led by President U Win Myint and State Counsellor Daw Aung San Suu Kyi, Myanmar has witnessed many remarkable improvements in its legal, social and economic commitments in recent years. Infrastructure development aside, the reforms have been largely focused on the liberalisation of market sectors and the promotion of foreign direct investment, including anti-corruption enforcement. Most notably, the Myanmar Investment Law 2016 was passed in October 2016 and the new Myanmar Companies Law 2017 was enacted in December 2017, allowing foreign companies to operate in the wholesale and retail sector and export certain goods; granting permission for foreign insurers and bankers to operate in the country's insurance and financial sectors; and symbolising the government's pledge to facilitate market liberalisation and encourage investment. In June 2019, the World Bank issued the *Myanmar Economic Monitor 2019*, commenting that Myanmar's economy is slowly picking up speed and regaining stability after a volatile 2018, supported by subsiding prices and exchange rate volatility. Real GDP is projected to grow at 6.5 per cent in 2018–19. Growth continues to be broad-based, supported by the industrial and service sectors. Industrial activities gained ground, supported by strong performance in the garments sector and construction activities. Services remain the key driver of growth, with momentum building in the wholesale and retail sector supported by reforms. Myanmar's economic outlook is positive with growth projected to further accelerate to 6.7 per cent by 2020–21. Growth will be supported by building reform momentum, planned large infrastructure projects and investment in sectors undergoing liberalisation. Recent reform actions include officialising the use of Chinese yuan and Japanese yen for trade settlements; inviting five foreign life insurance companies to apply for licences in Myanmar; allowing commercial banks to lend at 16 per cent interest without collateral; allowing foreign banks to operate in Myanmar; and introducing electronic budget submissions. However, such circumstances also pose inherent risks, including the potential for corruption in both the private and public sectors. It is critical that investors therefore be cognisant of the potential risks of exposure to corrupt or fraudulent practices, and of their obligations to comply with new amendments to the anti-corruption law.

Myanmar has taken significant strides in its fight against corruption. As of 31 May 2019, the new Anti-Corruption Commission has received and handled a total of 14,806 complaints and has completed 13,702 complaints since the establishment of a new anti-corruption commission on 24 October 2017. During the past two years, the anti-corruption commission has taken actions against not only high-ranking government officials but also private business persons and individuals. Corruption probes have involved the chief minister of the Thaninthayi Region government, the director general of the Food and Drug Administration of Myanmar, the managing director of No.2 Mining Enterprise of the Ministry of Natural Resources and Environmental Conservation, the director general and deputies from the Water Resources Directorate under the Ministry of Transport and Communication, the advocate general of the Yangon Region government, police officers, customs officers, judges, public prosecutors, officers from the General Administration Department, tax authorities, directors from private companies, and lawyers.

### **Corruption – an overview**

For over five decades, Myanmar has been a country largely closed to the scrutiny of and cooperation with the world at large, with the exception of some of its regional neighbours. Therefore, compared with other developing nations, little domestic or international focus had been placed on the improvement and enforcement of corrupt practices. This has had an understandable impact on the perception of corruption in Myanmar – one that persists today, even as foreign direct investment continues to grow.

Myanmar is ranked 132 out of 180 countries and territories in the Corruption Perception Index 2018 released by Transparency International, two steps down from the previous edition of the index, which placed it at 130 out of the 180 countries and territories evaluated. Although the issue of corrupt and fraudulent behaviour in the public and private sectors is not always as bad as the public perception of it, a problem does exist and cannot be ignored. Myanmar is aware of these perceptions and of its need to improve anti-corruption efforts to further encourage and promote foreign investment. To address the problem, Myanmar has focused on the passage and strengthening of anti-corruption laws and on supporting the establishment of anti-corruption agencies, with additional focus on education. For this purpose, the new anti-corruption commission opened offices in Myanmar's business cities Yangon and Mandalay in 2019, whereas previously the commission's only office was in Myanmar's administrative city, Nay Pyi Taw. The commission also established the Corruption Prevention Unit and Voluntary Advisory Group, and also held its Youth Integrity Camp and a mentoring programme in relation to the investigation of bribery offences, in collaboration with UNDOC. This focus is expected not only to improve the domestic anti-corruption environment but also to improve international perceptions of corruption in Myanmar, which is a step towards the overall goal of improvement of international relations and foreign investment.



## Overview of anti-corruption laws and updates on the anti-corruption regime

The key anti-bribery and corruption legislation for prosecuting corrupt conduct in Myanmar is the Penal Code and the Anti-Corruption Law of 2013. Other civil and criminal law provisions in separate legislation also address bribery and corruption; however, the Penal Code and Anti-Corruption Law provide the foundation for which the legal system counters corrupt activities. Myanmar's Anti-Corruption Law was enacted in 2013 and is the first in a series of laws, notifications and guidelines that specifically address corrupt conduct. More recently, in 2018, the Myanmar Anti-Corruption Commission published a notification under section 72(b) of the Anti-Corruption Law that introduced a series of fundamental principles for companies to adopt in developing appropriate internal control measures to prevent corruption. Other enacted laws that have provisions addressing bribery and corruption include the Myanmar Investment Law 2016 and the Myanmar Investment Rules 2017. This continued trend of implementing additional laws addressing corruption is intended by the government to demonstrate Myanmar's commitment to improving opportunities for foreign business and investment.

Section 161 of the Penal Code addresses the acceptance of benefits by government officials or public servants in exchange for the exercise of their official function or omission of such exercise; however, the wording of this particular section appears to limit the punishment of the offense to only government officials or public servants. Sections 162 and 163 similarly prohibit acceptance or solicitation of a bribe by any person for inducing or motivating a public servant's decision-making by corrupt or illegal means (section 162) or by using personal influence (section 163). Nonetheless, in practice, private individuals offering bribes can be charged for abetting convicted public servants in a crime under the Penal Code section on abetment.

On 21 June 2018, the parliament enacted its fourth amendment to the Anti-Corruption Law 2013, which extended the powers of the Anti-Corruption Commission.

The amended law defines corruption as:

*the direct or indirect abuse of one's position and authority or other means by any person in order to perform an act or refrain from performing a lawful act or give someone his legitimate right or give someone his illegitimate right or wrongfully prohibit a person from his legitimate right, such as by giving, attempting to give, accepting, receiving, or attempting to receive by any means a bribe.*

Prior to the above amendment to the Anti-Corruption Law 2013, the law's definition of 'corruption' that was punishable applied to 'an authoritative person,' which was defined as a public servant or government official. The wording 'an authoritative person' has been replaced with 'any person' in the 2018 amendment, and corruption can now occur by 'other means,' so now corrupt acts by any person, not only government officials, may be prosecuted. This change in the definition of corruption means that private acts of corruption (that is, acts of corruption between private parties) are now punishable under the Anti-Corruption Law as amended in 2018. The Myanmar Anti-Corruption Commission reported one case where this revised definition may have been applied by a township court that found a lawyer guilty of corruption for obtaining excessive legal fees. This case is being followed with great interest by the legal community in Myanmar.

The Anti-Corruption Commission is empowered to investigate and prosecute violations of anti-corruption laws in the country. The Anti-Corruption Commission has the power to take investigative and prosecution action on its own initiative. In addition, it may also act at the request of the president, parliament or in response to complaints brought forth by any person. Under the latest amendment enacted on 21 June 2018, the Anti-Corruption Commission is empowered to issue orders requiring private organisations to establish business ethical codes and anti-bribery and corruption policies.

### Corporate Code of Ethics

The 3 August 2018 Announcement of the Directorate of Investment and Company Administration (DICA)'s Anti-Corruption Code of Ethics for Companies and Bodies Corporate sets forth anti-corruption guidelines for companies and other corporate bodies incorporated in Myanmar 'when making business deals with ministries concerned or government organisations, and companies or organisations in the private sector.' The announcement prohibits the following activities when carrying out business within Myanmar:

- making and offering, directly or indirectly, gifts, entertainment or other preferential treatment;
- providing, directly or indirectly, necessary assistance in travelling; or conferring, directly or indirectly, a financial advantage to get a business opportunity;
- offering, directly or indirectly, charitable donations;
- conferring, directly or indirectly, political contributions; and
- providing, directly or indirectly, assistance to get employment in companies or organisations for personal interest.

There is no clarification or additional information in the Code of Ethics to provide guidance on the prohibited activities. There is also no indication whether a corrupt intent must be present, whether a token traditional gift of small value is excluded, who will administer or enforce the Code or monitor company activities for corruption, or what penalties or other consequences may be imposed.

The vagueness of the Code of Ethics is perhaps underscored by the final article, which provides that the DICA 'encourages' all companies and corporate bodies to abide by the Code. This implies that compliance is voluntary, which would account for the absence of a designated enforcement agency and penalties for non-compliance.

In October 2018, the Myanmar Anti-Corruption Commission issued Notification No. 14/2018 pursuant to its authority 'concerning the need for all businesses to establish a strong business code of ethics to prevent corruption.' The new Notification, very much like the Code of Ethics, provides principles of conduct for companies to avoid corruption and seeks to persuade companies doing business in Myanmar to refrain from corrupt acts and take preventive measures such as adopting a company code of conduct and policies and procedures for avoiding corruption. Like the Code of Ethics, no penalty or punishment is set forth in the Notification, and there is no explicit statement of responsibility for regulating or enforcing the Notification, although that would come under the general purview of the Anti-Corruption Commission pursuant to the Anti-Corruption Law.

This Notification can be seen as a companion to the Anti-Corruption Code of Ethics and echoes the emphasis of the government in publicly trying to persuade companies to avoid corruption.

### General reputation of being corrupt

The Anti-Corruption Commission has also been given the authority by the Anti-Corruption Law, as amended in 2018, to determine that a person has a general reputation of being corrupt, and initiate investigations, based on *prima facie* evidence that they have committed a corrupt act. The focus of this most recent amendment has been on the expanded powers of the Anti-Corruption Commission and the new corruption criteria for a person who has the 'general repute' of being corrupt.

### Uncertainty in the anti-corruption framework and ongoing legal reforms

These important amendments and political commitments portend continued strengthening of the anti-corruption legal framework and culture in Myanmar. This is a significant step forward, but much remains to be done to strengthen Myanmar's anti-corruption regime to a point of equity with many of its international partners.

The implications of expansion of the definition of bribery and corruption to include private transactions are not yet clear. Myanmar's relatively low ranking in every international corruption index is seen by the government as a significant impediment to foreign investment. At this stage of the country's development, foreign investment is highly desirable in both the public and private sectors, so naturally the Myanmar government wants to be seen as addressing the corruption problem.

Despite the above, it is encouraging to note that the present government is continuously demonstrating its interest in combating graft within the public service sector. In July 2017, State Counsellor Aung San Suu Kyi launched the four-year Civil Service Reform Strategic Action Plan, which envisages extensive reforms within public service. In her officiating speech, the State Counsellor explained that the Strategic Action Plan sets out, among other things, initiatives to strengthen the code of conduct in civil service, improving training on ethics and anti-corruption, making grievance and whistle blowing mechanisms more effective, enforcing asset disclosure requirements for senior positions, and introducing new technologies into administrative processes to minimise opportunities for bribes.

Anti-corruption provisions have also been included in some newly enacted statutes. For example, the Myanmar Investment Law 2016 explicitly states that in performing their duties under the act, members and officers of the Myanmar Investment Commission 'shall carry out such duties in accordance with the Anti-Corruption Law'. The Myanmar Investment Rules 2017, issued by the Ministry of Planning and Finance in March 2017, further states that when assessing an investment proposal, the Myanmar Investment Commission can take into consideration whether the investor or its associates have committed an offence or acted in contravention of the law in Myanmar or in other jurisdictions, 'including any environmental, labour, tax, anti-bribery and corruption or human rights law'.

The new Myanmar Companies Law 2017, which is set to enter into force on 1 August 2018, also seeks to introduce and modernise company transparency requirements. For example, the new law contains provisions mandating non-financial reporting requirements for companies, such as the submission of an annual director's report, which must consist of a fair review of the company's business, including a description of the company's primary business, an analysis of the company's performance during the year, a description of risks and uncertainties facing the company, and any other matters that may be prescribed. Such a step is expected to improve transparency in the private sector, which in turn impacts upon private and public bribery.

### Impact of overseas anti-corruption laws

Companies doing business in Myanmar should not only comply with domestic legislation but also be fully aware of the far-reaching extraterritorial effect of some overseas anti-corruption laws, such as the United States' Foreign Corrupt Practices Act (FCPA) and the United Kingdom's Bribery Act 2010.

The FCPA prohibits the bribery of foreign officials. It is extraterritorial in effect and affects all US companies and persons as well as foreign companies and persons who issue securities on a US exchange or otherwise engage in activities in furtherance of a bribe in US territory. Importantly, the US Department of Justice has adopted an expansive definition of what constitutes an act of bribery in the United States, and has interpreted it to catch the transfer of money through US bank accounts, including, potentially, all US-dollar transactions that are cleared through bank accounts in the United States. The FCPA also contains a books and records provision requiring issuers to make and keep accurate books, records and accounts that, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets. In addition, the FCPA's internal controls provision requires issuers to devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. These provisions apply to all companies, both US and non-US, that have their securities issued on a US exchange. They are expansive provisions and have been used to prosecute companies in cases where bribes have been paid to private individuals.

On the other hand, the Bribery Act 2010 of the United Kingdom covers bribery of private persons as well as public officials. It also has extraterritorial application. For example, the Bribery Act prohibits offering or accepting a bribe outside the United Kingdom provided that the offender has a close connection with the United Kingdom. Persons with a 'close connection' include British citizens and organisations incorporated in any part of the United Kingdom. Similarly, the Bribery Act's corporate offence – which occurs when an organisation fails to prevent those performing services on its behalf from paying bribes – applies not only to organisations incorporated under UK law, but also to any other company carrying on a business, or part of a business, in the United Kingdom, regardless of where the act of bribery takes place.

The fact that conduct may not constitute an offence under local law does not necessarily mean it is permitted under the FCPA or the Bribery Act. Although the domestic anti-corruption laws of Myanmar do not cover acts occurring outside Myanmar, these foreign laws generally apply to bribes extended by Myanmar citizens and companies in those jurisdictions, as well as

corrupt acts committed in Myanmar by British and US citizens and companies. It is therefore important for foreign investors to be aware of any overseas anti-corruption laws that may apply to them, such as the FCPA and the Bribery Act (UK).

## Compliance measures

While Myanmar has taken significant steps towards improving the investigative and enforcement mechanisms available to it in combating both public and private corruption in recent years, it is still imperative for foreign and local investors to take a proactive and cautious approach to ensure that they are minimising potential liabilities, both under domestic and foreign anti-corruption laws.

Although the current legal framework in Myanmar does not mandate the establishment of a compliance programme – other than the guidelines laid down in the Myanmar Anti-Corruption Commission's Notification No. 14/2018 discussed above, the formulation of comprehensive compliance training programmes is critical for good governance, and to ensure that company executives and employees are aware of the domestic and international legal obligations that they and the company have. This is particularly important in Myanmar where the anti-corruption regime is only in its early stages, where enforcement and interpretation is inconsistent, and where there may be cultural acceptance of some forms of impermissible behaviour. At the grass-roots level, anti-corruption compliance policies should be made available in both Myanmar and English languages for ease of access. Companies are also encouraged to undertake annual assessments to identify the material risks faced, as well as host regular training programmes for internal stakeholders and employees. Important steps adopted at the preventive stages to prepare and implement compliance programmes may lessen the likelihood of future investigations, liabilities and expenditures. Similarly, stakeholders ought to understand the intrinsic relationship between corruption and money laundering and also seek to ensure a holistic application of the existing anti-money laundering provisions under the Anti-Money Laundering Law 2014 when playing their respective roles in combating corruption in Myanmar.

## Conclusion

Myanmar is a dynamic and evolving foreign investment destination. With its valuable natural resources, large and youthful domestic population, and a concerted focus by the government on the liberalisation of its economy, it is expected that the robust interest in the country will increase. As investors continue to enter the country, they do so in a jurisdiction in which the laws, regulations and enforcement mechanisms have naturally lagged behind those of its international partners. Anti-corruption is one such area. The initiative is there and great strides have been made, but uncertainty remains in some regulatory and enforcement sectors despite a clear long-term commitment to improving anti-corruption efforts.

It should be noted, however, that no efforts will immediately change the challenging anti-corruption environment to which domestic and foreign business operators are exposed in Myanmar. It is for this reason that investors should be diligent in their efforts to understand the risks and the legal restrictions and protections available, and should work to develop programmes to minimise such risk through education, evaluation and compliance. As a nation

that has topped the Charities Aid Foundation's World Giving Index for three consecutive years, the culture of giving and gifting is deep-rooted within local values. Often, the simple act of giving is not tainted by implied motives, but ignorance of the law is not a defence and a lack of awareness of allowable legal limitations may nevertheless land one in trouble. Hence, a carefully designed and implemented investment strategy, including anti-corruption compliance initiatives, can help an investor, its executives and employees understand the constantly evolving anti-corruption landscape in Myanmar, and limit potential liabilities accordingly.



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**Sher Hann Chua**  
Tilleke & Gibbins

Sher Hann Chua is a consultant in Tilleke & Gibbins' Yangon and Bangkok offices. Sher Hann's practice focuses on intellectual property and corporate and commercial matters. She has strong business acumen and a habitual commitment to helping companies capitalise on their strengths and maintain their competitive edge. Sher Hann has represented a broad range of clients across industries that include energy, food and beverages, pharmaceuticals, real estate, media and entertainment, information technology and automotives. She has regularly appeared before registrars and government bodies on behalf of clients in negotiations, enforcement actions and regulatory affairs. She has also advised various multinational companies on anti-corruption compliance and regularly contributes to thought leadership publications.

Prior to joining Tilleke & Gibbins, Sher Hann was an associate at a leading law firm in Kuala Lumpur, Malaysia, where she advised on intellectual property, technology, franchising and regulatory issues. Sher Hann received a law degree from the University of Reading, and she holds a master's degree in intellectual property from University College London. She is admitted to the Malaysian Bar and is fluent in English, Bahasa Malaysia and Chinese.



---

**Nwe Oo**  
Tilleke & Gibbins

Nwe Oo is a senior attorney-at-law in Tilleke & Gibbins' Myanmar office. Practising primarily in the firm's corporate and commercial group, Nwe Oo is a skilled litigator with far-reaching experience in both civil and criminal commercial matters. As a former prosecutor, he has substantial experience handling primary cases, appeals and amendment cases in the Divisional Court and Supreme Court of Myanmar.

For almost a decade, Nwe Oo acted as an expert legal adviser to numerous local Myanmar firms, including a leading information technology company, where he served as in-house counsel. In this role, Nwe handled human resources and employee affairs, tax, commercial memoranda of understanding and agreements, company formation and business matching, franchise agreements and management, consultancy and project management, and investment negotiations. With Tilleke & Gibbins, Nwe Oo is active in advising clients on intellectual property and commercial matters, including customs and tax, project development, corporate formation, joint ventures, distribution and franchising, anti-corruption and employment law.

Nwe Oo is a member of the Bar Council of Myanmar.

# Tilleke & Gibbins

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Established in 1890, Tilleke & Gibbins is a leading South East Asian regional law firm with over 150 lawyers and consultants practising in Bangkok, Hanoi, Ho Chi Minh City, Jakarta, Phnom Penh, Vientiane and Yangon.

Our firm represents the top investors and the high-growth companies that drive economic expansion in Asia in the key areas of commercial transactions and M&A, dispute resolution and litigation, and intellectual property.

Tilleke & Gibbins advises clients on anti-corruption matters in South East Asia. Many countries we work in are attractive destinations for foreign investment. They are also high-risk environments for corruption, asset concealment, fraud and other forms of economic crime. The US government has made prosecutions under the Foreign Corrupt Practices Act (FCPA) a national priority, and more cases under the UK Bribery Act are expected. In addition, ASEAN governments are increasing their own anti-corruption efforts. Failing to curb or prevent corruption can have devastating economic, legal and reputational consequences.

Through our multi-jurisdictional presence, we assist clients seamlessly across borders. Our attorneys and consultants are deeply knowledgeable about local business practices and cultures, which allows us to provide a unique blend of legal and practical advice in this complex field. We provide the following anti-corruption services:

- Advising clients on local anti-corruption laws, regulatory regimes and business culture.
- Designing, advising and implementing compliance programmes.
- Advising clients on the FCPA and the UK Bribery Act.
- Conducting anti-corruption due diligence on agents, partners and M&A targets.
- Performing anti-corruption risk assessments.
- Overseeing internal corporate investigations.
- Defending and prosecuting corruption-related allegations.
- Assisting with asset recovery and protection.

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No. 1608, 16th Floor, Sakura Tower  
339 Bogyoke Aung San Road, Kyauktada Township  
Yangon 11182, Myanmar  
Tel: +95 1 255 208  
Fax: +95 1 255 207

Sher Hann Chua  
sherhann.c@tilleke.com

Nwe Oo  
nweoo@tilleke.com

[www.tilleke.com](http://www.tilleke.com)

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