

Myanmar – Japan Cooperation Programme for Structural Adjustment of the Myanmar Economy

Trade and Industrial Policy Working Group

March 2003

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The Government of
The Union of Myanmar

Japan International
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Foreword

This study was conducted within the framework of the technical cooperation programme of the Government of Japan, in response to the request from the Government of the Union of Myanmar.

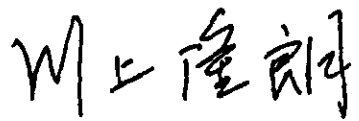
The study was carried out as a joint research by taskforce teams, consisted of professionals from both Japan and Myanmar, and assisted by consultant teams from leading institutes in both countries.

The taskforce and consultant teams held a series of discussions, and conducted several field surveys. This report was prepared jointly by Japanese and Myanmar taskforce teams based on a mutual understanding.

I hope that the useful suggestions presented in this report will contribute to the formulation of policies for sustainable development of Myanmar, and it would be my great pleasure if the report would be used practically by organisations, officials and experts concerned.

I wish to express my sincere appreciation to the officials in the Government of the Union of Myanmar and to other relevant organisation and people concerned for their close cooperation and valuable input in the study.

March 2003



Takao Kawakami

President

Japan International Cooperation Agency

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Member List of the Taskforce

**Legal Aspects of Private Business Environment
in Myanmar**

1. Introduction

At the workshop on Japan-Myanmar Cooperation for Economic Structural Adjustment in Myanmar held in Tokyo (4 to 6 December 2000), it was agreed to set up a working group of current situation and development possibilities in respect of trade and industry in Myanmar. Accordingly, a Draft Perception Report (Discussion Paper) – July 2001 was prepared by JICA Study Team of Consultants and in that report it had been included to conduct survey of legal framework with the cooperation of Japanese Consultant and Myanmar Counterparts.

Important objective of the study is to specify detrimental factors to private sector activities in the current Myanmar legal system including the aspect of legal drafting and enforcement.

1.1 Background

This report arises principally out of the author's two years study as legal researcher under the Myanmar Economic Structural Adjustment Programme funded by JICA from June 2001 until December 2003. The primary objective of legal portion was to assess the legal aspects of Myanmar for private sector development and to make recommendations for modernisation of the legal framework by way of revising existing laws, regulations and institutions and promulgating new ones. The study will give special focus on private company and its activities in the market under current legal environment. The author collected relevant legal documents and did analysis of the extent and depth of issues, the causes and consequences, thereby suggesting remedy options for more reliable, stable and transparent application of legal instruments to enhance market economy mechanism. The remedies will also include possibility of introducing a legal instrument with specific objective of SME development. Although initially executed with support of the Attorney General Office (AGO) and Law Department of Yangon University, because of the broad scope of its objective and time constraint, the project far reached the prime target.

The assessment of the legal framework for private sector activities was based on 18 months of research and reports on following major individual subjects: (1) financial sector, (2) insurance, (3) investment laws, (4) sector specific laws, (5) dispute resolution and insolvency law, (6) tax laws, (7) business entities, (8) accounting, (9) land and property rights, (10) commercial contracts, (11) economic integration, (12) technology Transfer, (13) foreign Trade and (14) international Treaties.

After completion of the individual data gathering, after Yangon Workshop in December 2002,

an overall report and recommendations were prepared in order to: (1) assess the overall private sector legal framework; and (2) identify a strategy for building and improving the private sector legal framework for the future, based on Myanmar characteristics, requirements, and goals for social, economic and legal development.

The present report represents a very rough figure of Myanmar overall legal environment for private sectors since no time for input and/or comment from local counterpart experts was possible. As a result, it is strongly recommended that further comparative joint research and discussion be conducted to complete and elaborate the content of the report.

The views and opinions set forth in this report are those of the author and may or may not coincide with those of the JICA team for Economic Structural Adjustment. The recommendations reflect the author's earnest belief about what is needed in respect of the legal framework for Myanmar to achieve its goal of rapid industrialisation and modernisation by mobilising domestic and foreign resources of investment by fostering market economy mechanisms. These recommendations are based in turn on one and half year analysis while working on this project as well as several of experience as a legal researcher primarily in the field of public and private sector activities in transitional countries like Vietnam, China and other market oriented ASEAN countries.

1.2 Methodology

To implement the work programme, the author chose the focal survey method focusing on determined legal document to clarify its relations with surrounding laws and regulations.

The study was conducted in compliance with the economic situation and policy of Myanmar and did not concentrate in the classical academic legal interpretation and analysis of each provision.

Depending on the needs, the author conducted local field surveys and interviews toward relevant authorities to clarify the implementation and enforcement mechanism of laws and regulations and/or administrative directions.

1.3 Concept of the “Legal Framework” for Private Sector Activities

In Myanmar, the “legal framework” for economic activities for private sector stands for all of the laws, regulations, normative legal documents and legal institutions needed to facilitate dynamic economic development in a market economy under SPDC orientation.

As Myanmar Government well knows, promulgation of laws and regulations is insufficient in itself to establish an effective legal framework. Therefore, the institutions needed to implement and enforce the laws and to resolve disputes under them, including sufficient and well-functioning courts, law enforcement agencies, effective legal information systems, efficient and centralised registers for land, pledges and mortgages, and enterprises. Even more important are well-trained lawyers, judges and law enforcement officials to make legal institutions function as required and intended by the law. To support it, there is a need for well-equipped and well-functioning legal education and training institutions.

This report primarily addresses recommendations for the law-upgrading agenda to perfect and complete the substantive and procedural legal framework for private sector economic activities in Myanmar. The term “law-upgrading” includes not only promulgation of laws, ordinances and resolutions of the SPDC but the issuance of normative legal documents by Myanmar Government and its ministries and agencies as well.

Any legal framework must be shaped and determined by the purposes and policies which it is meant to serve. In this case, the relevant policies are those aimed at promoting private sector activities for economic development.

SPDC sets out the nation’s economic policy and its purpose as follows:

- Proper evolution of the market-oriented economic system
- Development of the economy inviting participation in terms of technical know-how and investments from sources inside the country and abroad

Thus, SPDC encourages the move toward a market economy underscoring the need to establish legal guidelines and well-defined investment rules in order to secure private and foreign investments.

In modern market economy, rapid, self-sustaining and high economic growth can best be achieved through properly functioning market mechanisms. The 1997 Asian Financial crisis dramatically illustrates the importance of a sound and transparent legal and regulatory framework for their operation.

More specifically, current policies determining the shape and timing of the law-upgrading agenda

are those shown below:

- To become an industrialised, modernised society;
- To integrate fully within ASEAN; and
- To integrate fully within the World Trade Organization (WTO).

A well-conceived comprehensive legal and institutional framework is one of the main elements needed to encourage and facilitate dynamic, productive economic activity, including foreign and domestic investment.

In a properly regulated market economy, healthy competition is established and people can benefit from increased quality of goods and lower prices.

The legal framework must foster the smooth and efficient operation of the economic multiplier to maximise the speed and extent of economic development. At the same time, considering the rich nature of Myanmar natural resources, continuing protection of the environment and conservation of resources is essential for sustainable economic development which benefits the greatest number of people.

1.4 Role of the Legal Framework in a Market Economy

Knowing that the purpose is to create and facilitate dynamic, self-sustaining and high economic growth within a market economy, the outlines and nature of the legal framework needed for Myanmar's economic development become clear.

The function, scope and shape of the legal framework for a market-driven economy are different from the legal framework for an authoritarian military regime. In an military command economy like Myanmar, the military and bureaucracy serves as influential economic actor and decision maker, and the economy is driven by bureaucratic directives in accordance with the military direction. A military command economy creates margin for constant bureaucratic and discretionary intervention in the economy.

By contrast, in successful market economies, the chief economic actors and decision makers on a day-to-day basis are not government bureaucrats, rather, they are individuals, private and public business entities operating as consumers and suppliers, as workers and businesses, as borrowers and lenders, as buyers and sellers, and as importers and exporters. The economy is propelled

forward by an infinite number and variety of individual decisions, contracts and transactions by and among millions of market actors. Because of their limitless number and scale, market decisions, contracts and transactions can only take place within a framework of general laws rather than in response to specific bureaucratic directives of decisions.

In a market economy, therefore, the paramount function of the State – as the manager of the economy – becomes that of an enabling agent which creates and implements the legal framework and other conditions necessary and desirable for the market to function and respond efficiently to countless individual market and business decisions and actions. In a market-driven economy, the primary economic policy objective of the government and the legal framework must be to enable an infinite number of economic transactions between and among market actors to take place as easily and efficiently as possible. Achieving this objective will enable the economic multiplier to work most efficiently and effectively to create jobs and raise incomes for the greatest number of people through increased trade, investment and other job creating economic activity.

Consequently, in its role as manager of the economy, among others, the State must provide a well-conceived legal and institutional framework of laws, regulations and law enforcement mechanisms which facilitates and encourages investment and trade reducing transaction costs. Within the legal framework, it is also the government's task to provide well-trained and wise regulators, inspectors, law enforcement officers, and judges who can effectively protect the public and the market itself from fraud, deception, unsafe products, restrictive trade practices and environmental degradation without damaging the investment climate.

For the economic multiplier to work efficiently and effectively, a well-conceived legal framework is essential to facilitate conclusion and implementation of the largest number of productive and beneficial market economic transactions in the shortest time possible. At the same time, in order for economic growth to be healthy and sustainable, the legal framework must provide essential transparency for the legal tools and administrative framework. The fundamental elements of a market-oriented legal framework needed for this are

- a) a clear and complete definition of property and property rights, and the means to exercise them;
- b) a clear and complete system of rules for making contracts;
- c) courts and other government supported mechanisms providing for the speedy and effective enforcement of legal rights – including contract and property rights – and settlement of disputes.

A clear legal basis for the ownership, purchase, sale, lease, mortgage and transfer of property and property rights is the bedrock of a market-oriented economic system.

Contracts are the essential legal mechanism of the market, an effective system for making and enforcing contracts allows market actors to make their own rules as between them for each transaction, rules which are enforceable by the State through the courts and judgment enforcement officers. With contracts, parties can make their own “law” with respect to each deal or transaction. In this way, contracts greatly expand economic activity by providing a secure means for the future transfer of property rights and property.

In Myanmar, the formal legal systems are the product of comprehensive legal transplants of law from the British India with minimum degree of domestic adaptation. These legal systems provides a basic framework of rules for economic transactions including property rights, contracts and the organisation of firms, as well as legal institutions to administer and enforce the laws. The comprehensive legal framework for economic activity actually in force pave the way for rapid growth since entrepreneurs can operate in the context of a known legal system getting some level of predictability to transactions. This is very different from a situation in transitional countries like socialist regime Vietnam.

A good legal framework cannot by itself create or stimulate investment or other productive economic activity since many other factors are also necessary including social stability, appropriate macro-economic policies, adequate physical infrastructure and effective educational system.

However, the lack of effective laws and their prompt implementation, or poorly-designed or outmoded laws or institutions can discourage, impede or even strangle desirable investment and business activity. Moreover, without comprehensive, transparent, well-conceived and well-enforced laws, the rich and powerful together with the corrupt can make their own rules, thereby violating the social equity. Modern, comprehensive, transparent and well-designed commercial laws and legal institutions, on the other hand, can provide the proper economic incentive structure as well as the clarity, stability, predictability and confidence needed to promote and facilitate dynamic, broad-based and productive market-driven economic growth.

To summarise, the overall objective of a legal framework in a market economy should be to promote dynamic, sustained and equitable economic growth, development, industrialisation and modernisation through market mechanisms and to spread the benefits of economic development

by creating jobs, by allowing the greatest number of individuals possible to engage in any lawful business, through stock and financial markets which allow ordinary people to invest in businesses operated by others, through competition that creates better quality and lower priced goods, and through technology transfer. Benefits are also spread through better social services as economic growth increases tax revenues, provided that increased tax revenues are used to improve education, health care, roads and other public services.

1.5 Basic Standards for Substantive Laws and Institutions in a Market Economy

To achieve the overall objective of encouraging and facilitating productive economic activity of private sector, modern, comprehensive and well-designed laws and institutions should:

- a) Set out clear and complete rules, procedures and statements of duties and rights to enable market actors to know whether contemplated transactions are permitted. This will provide the clarity, stability, predictability and confidence needed to facilitate productive business and investment activity for private entrepreneurs. In this regard, to run smoothly and efficiently, a market economy needs legal principles which generally permits all economic transactions except those which are specifically and expressly prohibited by law.
- b) Provide effective remedies against parties who default on their contractual and other legal obligations which fully compensate injured parties for their actual losses – including inflation, lost profits, and costs of legal or administrative proceedings, when consistently and effectively applied, such remedies encourage market actors to comply with their contracts.
- c) Enable the public and the market actors to easily obtain basic and essential legal and financial information about individual enterprises in the market through effective institutions and requirements for public registration and public disclosure of such information by all entities doing business.
- d) Reduce the costs and risks of entering into business transactions –particularly investment– by, in turn, reducing bureaucratic interference in economic transactions to the minimum amount possible consistent with the market itself. This is because bureaucratic interference inevitably reduces the speed and number of possible investment and business decisions and transactions which is the case in Myanmar. Such an intervention inhibits productive economic activity, growth and development. Bureaucratic interference should be reduced by:
 - 1) Eliminating in most cases prior bureaucratic review and approval of private sector enterprise formation, investment, contracts and other economic transactions as much as possible by making rules and procedures clear, complete, simple and automatic. For example, the legal requirement for most investment or formation of companies should

- become a simple matter of registering essential information at a central register instead of extensive review and approval of proposed enterprises by bureaucratic agencies. Such prior bureaucratic review should be restricted to only those cases where absolutely needed to protect public health and safety, the environment and the market itself, as in the case of building permits, for example.
- 2) Promoting compliance with health, safety, environmental, land use, tax and other laws through selective and qualitative inspections and investigations by well-trained inspectors and law enforcement officials instead of spending extra time and effort obtaining assurances of such compliance at the registration stage.
 - 3) Leaving much of the enforcement of laws and contracts to the economic actors themselves through lawsuits and arbitration. This allows the government to use its scarce law enforcement resources to intervene in the important cases, such as serious fraud, deception, monopoly, restrictive business practices, environmental degradation or other activities which gravely threaten the public and the market itself.
- e) Provide incentives needed for all citizens to engage in productive investment, transfer of technology, technical and economic skills development and healthy economic activity. Most important in this regard is to establish and maintain a simple tax system, transparent and predictable with effective tax rates which are at or below regional ASEAN levels. Discretion at tax collection discourages productive investment and economic activity by Myanmar citizens and encourages tax evasion.
 - f) Promote vigorous competition in all sectors as the means to ensure the greatest benefits for the most people through greater quality and lower prices for goods and services by more rapid international trade liberalisation, and by providing laws and enforcement machinery to protect the operation of market mechanisms from monopoly, unfair competition, fraud and predatory, restrictive business practices. A well-functioning market economy needs protection from private and public monopolies and restrictive trade practices as well as from bureaucratic over-regulation.
 - g) Provide efficient mechanisms for the orderly exit of inefficient enterprises from the market so that the economic assets of the country can be used in the most productive way possible as determined by the market.
 - h) Provide market actors to structure the market with the maximum possible freedom from bureaucratic interference consistent with the foregoing principles.
 - i) Make the laws easy to find and known about for all citizens through an effective programme of public education and awareness, an efficient, well-organised legal information system, well-trained lawyers, judges and law enforcement officials.

2. Private Business in Myanmar

2.1 Overall Situation of Private Business in Myanmar

In Myanmar, development of market economy system is clearly defined by the SLORC (actual SPDC). The role of the State on market management and control is not yet clear in the existing legal documents. However, there is no doubt about the will of the state to carry major role at economic activities and control over the market.

Socialistic development in Myanmar did not create solid roots since this approach has been abandoned in less than 30 years. Still, existence of State Economic Enterprises is having a considerable influence over the private business environment in Myanmar.

The Asian financial crisis started from Thailand in 1997 followed by drastic decrease in the influx of foreign direct investment, rising import price due to foreign exchange fluctuation and stagnating export affected the domestic business performance dramatically. Such influence from the Asian economic crisis also reflected to the government policy toward private business activities specifically from the beginning of 1998.

2.2 Outline of Legal Framework for Private Business

When referring to private business in Myanmar, we can not forget several existing laws such as Company Act, Special Company Act, Foreign Investment Law and related laws and regulations. To establish the lawful development of private businesses, two pillars e.g. suitable legal system and implementing mechanism should exist to fulfill the basic requirement. Without any of them, there is no possibility of guaranteeing lawful development of the market economy. In this study, considering that the situation of companies having different forms of ownership also has significant influence over private sector development, we will consider about all forms of business activities existing in Myanmar domestic market.

The issues related to development of private businesses in Myanmar exist in both legal framework and its application system as mentioned before. The existence of inherited British laws and regulations, the laws enacted during socialistic period and the modern laws enacted by SLORC/ SPDC are not sufficiently interconnected when we see the development and implementation in the actual market economy.

Registration of companies under the Companies Act means that a particular company defines

the basic fundamentals and disclosure such information as a member of the market economy thus establishing the first step for its transparent existence. Creation of the “Level Playing Field” is still far from being established due to quite a small number of enterprises are registered. Other forms of businesses are flourishing since the registration is not compulsory for such activities. Therefore, it is quite difficult to clearly understand the actual situation of real business activities in Myanmar. Myanmar needs to shift gradually in the direction toward desirable competition environment in the market by upgrading the actual market entry mechanism stipulated in the laws.

Furthermore, Myanmar needs to develop actively the international relationship specifically focusing on economic transactions. The preparation of legal framework related to private businesses should consider not only its domestic influence but also the influence it will have over the people and countries involved in such an international transaction, in an environment where huge number of people, money, information and goods cross the board in a daily basis. To develop the industry and economy, it is indispensable to establish modern company law system acceptable by the international business community. There is a need for classification of existing substantive laws and at the same time, review of procedural laws, implementation and enforcement mechanism accompanied by institutional capacity.

However, state administration concerned private business related laws in Myanmar differ significantly with those in modern market economy nations of which recognise the fundamental role of law in the market economy. However, what is needed now is to first adapt the actual legal framework to the modern legal framework recognised by international business community

3. Priority Agenda for the Private Sector Legal Framework

3.1 Laws to Improve Access to the Market and to the Factors of Production

For the economic multiplier to work well, the laws must ensure that investors have easy, unimpeded access to the market itself and to the factors of production, namely, technology, land, buildings, finance in the form of capital and credit, labour and “enterprise” –that is, the willingness to take risks and work hard to make a productive enterprise succeed. In regard to enterprise, the people must have adequate incentives to work in productive activity in the country through the promise of appropriate financial rewards. Where the legal system provides or permits obstacles to access to the market or any of the factors of production, economic growth and development is inevitably reduced to a level below its potential, if not stopped altogether.

3.2 Market Entry and Access

This section addresses laws which provide for the establishment and start-up of new enterprises and investment projects.

3.2.1 Modernisation of Companies Act

There is no item currently on the legislative agenda which is potentially more important for Myanmar economic development than modernising or amending the Burma Company Act to provide a well-conceived, modern private sector Companies Law. This would greatly improve market access for ordinary Myanmar citizens as well as introduce improvements which would enable the efficient and effective mechanism for mobilising domestic funds for productive investment. To achieve the aim of aiding economic development, the amended Company Act should achieve the following:

- a) Make Myanmar companies more efficient mechanisms for mobilising capital by providing for a healthy capital structure, better protection for minority shareholders, clear rules for directors’ liability and major company transactions such as mergers and transformations of companies into other forms.

The amendment should correct major deficiencies in the existing Company Act by providing for a healthy capital structure, more substantial and specific protection for minority shareholders, clear statements on key concepts such as directors’ liability, and comprehensive provisions for mergers of one company into another and transformation from one form of company into another.

Clearly, a proper Company Act is an essential prerequisite for a well-functioning stock

market.

- b) Provide clearer, more comprehensive rules for corporate governance to improve the management of companies and better control of managers by shareholders.

In addition to the foregoing, the amended Company Act should replace sketchy, incomplete rules with a comprehensive and well-defined system of corporate governance which gives shareholders the means for complete and adequate oversight, without interfering with company directors' powers to manage the company on a day-to-day basis. The new law, however, must provide shareholders with effective means to oversee the managers in a manner which encourages both honesty and the risk taking needed to be competitive in a global economy.

If this is done, a well-conceived Company Act could become a solid basis on which to unify the rules governing state-run enterprises (SEEs) and foreign invested enterprises as well. Currently, Myanmar, in effect, has not one, but three separate Companies Laws which apply or not depending upon whether the company is an SEE, a foreign invested company, or a privately-owned Myanmar company –namely, the 1950 Special Company Act, the 1988 Foreign Investment Law, and the 1914 Companies Act. The Companies Act provide for comprehensive and adequate rules for the establishment, governance, operation, or dissolution of companies although in an outdated manner. These laws are also inflexible with respect to capital structure, increases in capital and company restructuring through merger, change of ownership or transformation. In this regard also, a modern companies law could provide a successful mechanism for privatisation of SEEs and the development of the stock market.

- c) Expand offices of registrar to further facilitate company establishment procedures.

It is crucial for economic development that the access to the registrar is easy to create new companies. Currently there is only one registrar office in Yangon for company registration. Therefore, it creates disincentive to create new companies in other regional states and divisions. In this regard, the new regulation should

- open regional level agencies of Registrar responsible for coordinating and telescoping the entire enterprise and company establishment and registration process;
- set out clear time limits for submitting recommendations to the MIC;
- require that the business registration certificate be issued together with the Permit to Trade thereby de facto combining the two procedures into one.

Faster entry into a market is important, because every day which is spent in waiting for approval to establish a new enterprise or company is a day in which that enterprise or company is not

investing for productive purposes by building new factories, not hiring new employees, not producing additional goods and services for the economy and otherwise not making positive contributions to economic development. Accordingly, the revised Company Act should accomplish the following:

- 1) Complete the process begun by the new regulations and consolidate the two-stage procedure of Permit to Trade and registration into one by abolishing the Permit to Trade stage and requiring only registration of enterprises and companies.
- 2) Also eliminate the requirements for more than seven in order to further streamline the formation process. In addition, the one-shareholder company is essential to provide the flexibility and protection needed to encourage investment for productive purposes.
- 3) Make the process as routine and non-discretionary as possible. If the application and articles are complete and correct when filed, a business registration certificate will be issued, whereupon the company will be considered legally to have been established and authorised to do business except for those few highly regulated fields on a “negative” list which will require an additional license or approval. This would establish the principle that all enterprises and companies are permitted to be automatically registered and authorised to do business except those which are specifically prohibited or which specifically require an additional license as specified on the “negative list”.
- 4) Appoint a single, specific department at the provincial level to be responsible for all routine business registration. No other departments need to be involved except in the case of highly-regulated industries requiring additional licensing which would be included on a “negative list”, such as banks and hospitals.
- 5) Establish a relatively inexpensive flat fee for registration regardless of the size of capital to encourage as many businesses as possible to register at whatever capital they wish. Basing fees on the size of the capital encourages companies to apply for the lowest possible capital size, whereas the policy should be to encourage as much capital mobilisation as is needed and possible.
- 6) Require all registered enterprises and companies to notify the business registration department immediately of any changes in the registered information and to file annual or other periodic reports with the business registration department as a mean of state management to determine which registered enterprises have apparently ceased to carry on business.

Moving to a modern system of automatic company formation by simple registration of basic information as recommended above would greatly improve access to the market for many would-

be entrepreneurs and is a very practical way to implement the right of every Myanmar citizen to go into business as guaranteed by SPDC.

3.2.2 Establish a modern national enterprise register

Together with steps to substantially improve the Enterprise and Companies Law along the lines suggested above, efforts should be undertaken to implement a modern and unified system of business registration. Few institutional modernisation projects have greater potential for improving the transparency and functioning of a market economy in Myanmar than establishing a unified, computerised and centralised national enterprise and company registrar easily accessible to all members of the public, as well as State Agencies. Such a register is an essential tool of state management of enterprises in most countries with successful market economies, a tool which allows for more effective and efficient State monitoring of the business sector, facilitates enterprise formation and development, and provides greater confidence in business relationships through disclosure of basic information about each enterprise to the public upon demand – such as the legal status, location, owners, directors, authorised agents of enterprises – and limits on authority of each director or agent.

In addition, such a register provides an efficient mechanism by which enterprises can protect their names and trade names by registration and helps the state to prevent businesses from using similar names resulting in confusion in the market place. In some countries, a business register also provides third party actors within the market with a means of preserving valuable commercial rights with respect to individual enterprises by putting the public on notice of such rights through registration of such matters as, for example, unpaid judgments, contracts for the sale of the entire business, bankruptcy petitions etc.

Modern technology has greatly expanded the services which business registers can provide to the public and the Government. Old style, hard copy business registers only provide members of the public with information about individual enterprises. With computerisation, however, the range of information to be provided will greatly increase.

In Myanmar, existing business registration systems are quite primitive as an effective tool of state management to promote economic development for the following reasons:

First, Myanmar currently lacks state and division level register for enterprises which is open to the public. Instead, there is only one in Yangon and entrepreneurs are discouraged to form

a business in other states and divisions since they have to travel to Yangon to establish a business entity.

Second, there is no system to update registration on a regular basis such as an annual, or biennial or five year report as is required in other countries.

Third, and most detrimental is that, unlike in many successful market economy countries, basic registered information is hardly made available to members of the public.

To correct these deficiencies, an appropriate legal document should be promulgated and implementing actions taken which would:

- a) Replace the current manual registers with a single computerised register at the national level in which all enterprises with a permanent address would be required to be registered as a condition of doing business, including SEEs, private individual Myanmar enterprises, private Myanmar companies, foreign-invested enterprises, cooperatives, NGOs, enterprises of social and political organisations and traders, etc.
- b) Require enterprises to file simple periodic updated reports (annual or every two or three years).
- c) Make registration easy, simple, fast, and inexpensive in order to encourage and allow as many enterprises to register as possible.
- d) Limit the registrar's discretion to refuse registration to situations where:
 - 1) There are obvious errors on the face of the application or the Charter;
 - 2) The name or trade name or logo of the enterprise could be easily confused with an enterprise already registered or well-known.
- e) Index registered enterprises by multiple factors including: name; trade name; registration number; address; products, services and/or other business activities; authorised and issued capital; and names of managers and partners. This will allow recovery of more and varied kinds of basic information.
- f) Allow third parties with appropriate documents to register certain basic legal information about an enterprise such as bankruptcy, unpaid judgments, etc.
- g) Make registered information easily available to all members of the public by providing full computer extract and inspection of the file of any registered enterprise upon payment of a modest fee. Allowing the public to inspect the original file itself is a very important means of state management of enterprises. This is the best deterrent to filing false documents, since the filing party will know that those who are best able to detect falsehood will have access to the business registration record i.e. other shareholders, directors, customers,

suppliers, creditors, business associates, etc.

- h) For most enterprises, registration can and should completely replace licensing so that, in most instances, the only requirement to do business or become incorporated as a company would be to register the enterprise, except for enterprises concerned with producing or distributing goods or services requiring special regulation which would be listed in the governing legal document such as intoxicating products liquor, restaurants, food processing, medicinal drugs, dangerous chemicals, hospitals, schools, banking, insurance, and professionals such as lawyers, doctors, accountants, etc. Currently in Myanmar, in addition to registration, companies and enterprises must obtain numerous other licenses to establish and operate their business: The administrative procedures associated with granting these licenses are causing difficulties and complications for businesses.

The solution which many countries with successful private sector economies have found is to eliminate licensing and time-consuming company formation procedures by replacing them with routine enterprise registration which takes one day or even just an hour instead of days, weeks or months. Instead of being granted business license, businesses will be asked to register and publicly announce their activity. Businesses can conduct their own activities as soon as they have completed the obligatory administrative procedures. It should take only one day to register a business. Some sectors will still need to secure business licenses, such as those in the currency trade, insurance and those relating to weapons and poisons.

It is respectfully suggested that a computerised enterprise register for all enterprises regardless of sector, centralised at the national level and easily accessible to members of the public, would be the best and surest way to reduce bureaucratic procedures, promote economic growth, increase transparency and provide the public and the Government with a highly effective tool for state management of enterprises.

3.2.3 Foreign investment

The benefits of foreign investment for Myanmar would be as follows:

“.....private foreign direct investment can be one of the most effective means for transferring management and business know-how as well as technology to accelerate the development of a country’s productive capacity. Well directed capital and technology can enrich everyone, including the people of the host country, as well as foreign investors.”

Myanmar recognises these benefits and, from the beginning of the economic liberalisation, has sought to attract foreign investment. The legal centerpiece of this effort has been the Foreign Investment Law, first passed in 1988. An effort to: streamline investment licensing; allow foreigners to invest Myanmar currency earned from other investments; meet investor concerns about matters such as harassment from the many agencies authorised to inspect enterprises.

Nevertheless the Foreign Investment Law, problems have emerged. First, there is a significant difference between “approved” investment and “realised” investment i.e. investment projects actually implemented. As Myanmar’s Government well knows, what ultimately counts is realised investments in projects actually implemented. Even without considering the Asian financial crisis, however, foreign investors now see Myanmar as having a very poor investment climate with high costs, legal and bureaucratic obstacles and financial risks for production and business relative to other Asian countries.

Among the costs, obstacles and risks often cited as problems in connection with investing in Myanmar are the following:

- a) Slow and bureaucratic investment procedures
- b) Difficult access to land
- c) The discretionary personal income taxes collection for foreigners
- d) Restricted and difficult access to foreign exchange
- e) High costs for power, water, communications, internal transportation and house rents
- f) The “dual price system” under which foreigners and foreign-invested enterprises pay higher prices than Myanmar enterprises for services and utilities including those mentioned in the preceding item (e)
- g) High costs of corruption

The following changes could be made in the Foreign Investment Law and regulations and other relevant laws and regulations affecting foreign investment to reduce at least some of the major costs and perceived risks in doing business and otherwise improve the investment climate in Myanmar:

- 1) Replace the existing bureaucratic and time-consuming project-by-project system of discretionary review, approval and licensing by multiple government agencies based on lengthy applications and detailed feasibility studies with a streamlined registration system

using simple forms whereby all investment projects are automatically approved upon registration except for those projects clearly described in a short, clear and precise “negative list” of sensitive projects such as, for example, retail merchandising, manufacturing explosives, etc. Only the projects listed on the “negative” list would be prohibited or subjected to special review and approval. All other projects would be automatically approved upon completion and filing of registration forms with the Foreign Investment authorities. At the same time, provide for environmental, health, safety and other standards to be enforced by inspections during the construction and operational stages instead of through the licensing process.

For foreign investors, the Foreign Investment Law and its under-laws erect a highly bureaucratic, time-consuming system of case-by-case discretionary licensing of investment projects based upon the judgment of government officials as to project feasibility and desirability. Moreover, the investment license is only the beginning; thereafter, investors must obtain numerous other approvals for various purposes from other Government agencies to implement the project.

Myanmar’s bureaucratic, discretionary investment approval system produces delay and uncertainty, thereby increasing both the risk and the cost of proposing investment projects in the first place. Each day’s delay imposes costs upon foreign investors and their Myanmar partners for both out-of-pocket expenses and lost opportunities. By adding to costs, bureaucratic procedures and delays reduce the ultimate rate of return to the investor and thereby make Myanmar less competitive as a place in which to invest; it is easier and cheaper for investors to set up in other ASEAN and Asian countries. In addition, the discretionary nature of the process invites the danger of abuses such as favouritism, corruption and monopoly for those who already have licenses.

The experience of other countries demonstrated that such reforms simplifying and automating the foreign investment approval process produce dramatic results. A number of other countries have also used the negative list system to streamline their investment approval process. In these countries also, streamlining investment approval processes has facilitated substantial increases in foreign and domestic investment in successive years.

As part of the effort to eliminate most permits, licenses and regulations affecting and impeding foreign investment, countries are increasingly doing away with the distinction between “foreign” and domestic investors.

- 2) Eliminate the requirement that investors identify a specific piece of land at the outset. Finding land can be an expensive and difficult process anywhere and is even more difficult in Myanmar. Requiring the investors to specifically identify the land before they even know if

their project will be approved greatly adds to the expense of even applying for investment approval in Myanmar. In most countries with successful market economies, as in Singapore, for example, foreign and domestic investors usually first register a company under the Company Act which automatically gives them the right to do business. After that, they find and obtain properly zoned land, design buildings, obtain construction permits, and build their factory or other project in accordance with building and environmental protection rules and specifications.

- 3) Allow foreign-invested projects to be organised in the form of shareholding companies. Normally, in countries with successful market economies investors can choose any form of business organisation they wish. Usually, the form selected is that of the shareholding company. In Myanmar, however, foreign invested joint ventures and 100% foreign-owned enterprises must take the form of a limited liability company. Unlike the shareholding company the limited liability company has a very rigid capital structure and shares which are not freely transferable and, therefore, could never be traded on the stock market.
- 4) Eliminate discrimination against private sector participation in foreign-invested joint ventures. To encourage foreign investment, the range of possible joint venture partners should be as wide as possible.
- 5) Take steps to assure investors of free and easy access to, and availability of, foreign exchange by taking measures such as those suggested in Section 3.2.10, namely adjustments to the Kyat/Dollar exchange rate which are more in line with the market, or providing investors with the means of obtaining their own foreign exchange or by phasing out exchange controls altogether and floating the Kyat. The lack of certain and easy access to foreign exchange and the lack of certainty about its availability, together with the increasingly bureaucratic procedures with respect to obtaining foreign exchange allocations, have been identified in the foreign investment field as the largest specific reasons for the decline in foreign investment in the manufacturing field.

Foreign exchange is the life blood of foreign investment (and, in the current circumstances, domestic investment as well). Without access to foreign exchange, a foreign investment project cannot survive for long (this is also true of many domestic investment projects which need to license technology and/or import equipment, spare parts and production components.). Without certainty that foreign exchange will be available when needed and that access will be free and easy, few investors will venture into Myanmar in the future. Consequently, to revitalise the flow of foreign investment into Myanmar, foreign investors will need renewed assurances of foreign exchange access and availability. With the current system of foreign exchange controls and restrictions, this is not possible.

- 6) Shift resources from bureaucratic approval procedures and control of daily business operations to investment promotion and facilitation to increase the amount of investment approved and actually realised. Although substantial resources are devoted to bureaucratic procedures which delay and discourage investment, relatively few resources are directed toward investment promotion and investor services such as collecting and providing needed information to investors and assisting them in project implementation. To attract significant foreign investment, there is a compelling need for an ongoing, well-organised investment promotion and investor services programme to familiarise foreign investors with Myanmar and provide both potential and existing investors with needed information and other services. To encourage investment, Myanmar should de-emphasise bureaucratic approval procedures and increase investment promotion and investor services.
- 7) Being a founder member of WTO, consideration should be given to changes in the investment law which will be needed to conform to WTO requirements under the Agreement on Trade Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS) which deals with investments in the services sector.

3.2.4 Improve arbitrary income tax collection

Myanmar Income Tax Law stipulates determined tax rate for income earners. However, those legal provisions are often ignored by tax collecting authorities. Tax rate are discretionarily determined by tax collecting officers and in some of the cases companies are taxed twice a month. Such a practice out of the stipulation of tax regulations creates instability of business environment by providing unpredictable tax burden on business profits. Not talking about tax legislation itself but unpredictable enforcement here is a great concern among private sector entrepreneurs.

Revision of tax collection procedure should be implemented and improved.

3.2.5 Access to technology

Closely related to foreign investment is the subject of transfer of technology. One of Myanmar's main purposes in seeking foreign investment is to promote technology transfer. In this regard, Myanmar has taken positive steps to encourage the transfer of technology by promulgating Science and Technology Development Law in 1994. However, requirement needed to protect intellectual property, especially industrial property rights still remains obsolete.

Such a situation discourages transfer of high technology which Myanmar seeks to introduce.

Few technology owners are willing to warrant its quality to another user where the owner does not have total control over its use or application.

The Myanmar technology transfer regulation does not stipulate details of intellectual property rights and therefore, further strengthening of this aspect will be vital to promote high technology import for industrial modernisation.

Outside of the laws and legal documents relating specifically to technology transfer, there are other obstacles and disincentives to technology transfer and development inherent in various aspects of Myanmar's legal system which should be considered. For example, Myanmar's licensing system for foreign investment and domestic companies itself discourages the technological development which the country seeks from increased private sector national and foreign investment. This is because the licensing system slows or prevents entry into the market of new enterprises which would compete with established firms. This, in turn, protects established firms from competition thereby giving them less incentive to seek and acquire or develop new technology in order to survive. Competition is the key factor favouring rapid technological advancement, because of the powerful incentive to acquire or develop new technology in order to become more efficient. Therefore, to encourage technology development, Myanmar should foster the development of the appropriate economic conditions, namely, a diversified, dynamic, and competitive local industrial base which can best come about through competition resulting from freedom and ease of market entry.

While competition is the spur for technology development, the indispensable means for technology transfer is the freest possible interchange of people and information. In this regard, Myanmar citizens suffer from requirement of exit visas to study and acquire new capacities and from difficult access to the Internet. By abolishing exit visas, Myanmar could eliminate a major barrier to technology transfer since this will allow Myanmar managers and experts to travel to foreign countries to study technologies abroad and to attend international conferences and seminars which are a common means of technology and know-how transfer. By opening up to the Internet, Myanmar will provide itself and its people with the most important new tool for technology transfer.

Significant barriers remain, however, to the international exchange of information and people essential to increasing access to technology for Myanmar:

- a) Although improved in recent years, entry visas for Myanmar are still expensive and time-consuming compared to other countries in the ASEAN region. Expensive and cumbersome entry visa procedures discourage technology transfer because foreign technicians, scientists and business executives are among the most effective means of transferring technology and production “know-how” through training and examples provided to Myanmar managers, technicians and workers.
- b) Another significant obstacle to technology transfer into Myanmar has been policies which make international telecommunications and Internet access very expensive by world and regional standards. Cheap and easy access to the Internet is essential for Myanmar citizens and enterprises seeking to learn new technologies, because the Internet has become one of the main channels by which technology and know-how are made available to ordinary citizens. Currently, however, fees for Internet access for Myanmar citizens are among the most *expensive in the world*.

In the long run, however, such policies could be very expensive for Myanmar and in fact threaten its overall economic and strategic security by reducing the flow of technology transfer into the country and investment in high technology industries.

Myanmar should review restrictive practices and fee levels because more Internet users mean more information exchanged with the outside world. In the era of information technology, the speed of economic development depends on knowledge and technology rather than natural resources and low cost labour.”

Myanmar citizens should not be restricted and to pay more for Internet access than their riche ASEAN neighbors and should pay less.

A better long-term solution may be to introduce competition into this field by opening up market entry for Internet Service Providers and allowing them to set their own prices in response to market signals. Inevitably, competition would bring Internet access prices down. By lowering the price barrier to Internet access to at least ASEAN levels, the country will greatly benefit from increased technology transfer to its citizens through the Internet.

To eliminate the foregoing obstacles to technology transfer into Myanmar and thereby encourage high technology transfer, Myanmar may wish to consider the following changes in its current laws, decrees and other legal documents and policies:

- a) Make market entry as easy as possible for both foreign and domestic investors as already

recommended under the companies Law and foreign Investment Law topics above.

- b) Strengthen Intellectual Property Protection legislation in accordance with WTO TRIPs Agreement until 2006 and adhere to WIPO as soon as possible.
- c) Put resources in obtaining and providing information about technology to Myanmar enterprises and training Myanmar business executives, lawyers and engineers in negotiating technology transfer agreements.
- d) Further simplify procedures and reduce costs for entry visas especially for foreign technicians, scientists and business executives. Such a policy should be made to apply both to tourists and business visitors on a permanent basis to boost both tourism and technology transfer.
- e) Further reduce Internet access and usage fees to levels at or below those charged by other countries in Southeast Asia.
- f) Further reduce charges for international telecommunications to more reasonable rates by international standards. As noted above, Myanmar's international telephone charges are among the highest in the world. This discourages using a major means by which technology is transferred, namely phone calls and faxes.

3.2.6 Access to land and buildings needed for investment projects

Land and buildings are indispensable elements for every investment project. Without clear and certain long-term rights to own, use, or lease land and buildings, no industrial or agricultural project can be implemented. Consequently, the ease with which land and buildings can be located and proper title obtained becomes a crucial factor in the speed with which projects which exist "on paper" become implemented in reality.

However, obtaining needed rights to land and buildings for investment and other purposes is encumbered by unclear and overly complicated procedures.

Even where land use rights seem to be clear, costs of obtaining land may be high because of the high land transfer tax or because of the cost of clearing the land of occupiers having no legal right to use of possession.

Without providing to foreign and domestic investors, including farmers, clear and strong rights to use land for their economic activities, and without making it easy for investors to obtain land for investment projects, Myanmar will have difficulty in attracting the high quality investment that it seeks.

To complete the legal framework for rights to land and buildings, consideration should be given to revising relevant laws and other legal documents and taking other action necessary to:

- a) Provide security of tenure of land for longer periods for investment projects. This provides those having the right to use land with the needed incentive to invest in their land, and lesser periods of time may be considered too short to justify installing expensive plant and equipment. Investors have a strong and understandable need to feel secure that their project's right or title to the land is clear, certain and of sufficient duration to meet the foreseeable needs of their project. The shorter the term of land tenure, the greater is the instability and less is the investment.
- b) Introduce easy, streamlined, transparent and automatic procedures for investors to exercise land use rights including changes in land usage, transfers, leases, mortgages and enforcement of mortgages use, by:
 - 1) Eliminating the requirement that changes in use, transfers, leases mortgages and enforcement of mortgages in respect of land and building rights be approved case-by-case by the authority; and
 - 2) Making such transactions subject only to streamlined and simplified registration by a registration agency below the level of the competent agency, except for a few cases which might be set forth on a "negative list", which would require further approval or would be automatically rejected.

Currently, virtually any land use right requires township review and approval before it can be exercised. This greatly adds delay, uncertainty, bureaucracy and cost for any investment. In most countries, land use and changes in land use are governed by "zoning" laws which specify permissible uses for large areas of the land e.g. heavy industry, light industry, commercial or residential. This enables investors to change land use so long as they conform to the overall zoning regulations –and register the change– and they need apply to the authorities (the "zoning board") only if they wish to do something for which the land is not zoned. This system has proved to be an efficient system of state management of land elsewhere which is cost-effective for both the State and investors.

- c) Establish a system of centralised modern registers for land and housing rights which are fully and easily available for inspection by any member of the public. This will make determination of rights to land and buildings easy. To be fully effective as a tool to facilitate investment and economic activity, the registers should be unified for both land and buildings and must be fully open to the public. In other words, investors and other members of the public should be able to obtain a full extract of all rights which are registered with respect to

a specific piece of land and/or a building such as land use rights, ownership rights, long-term lease rights, mortgages, rights of way, etc. this will enable investors on their own to locate land and/or buildings needed for investment projects and determine who holds, what rights exist with respect thereto. With a well organised unified public register for land and buildings, therefore, Myanmar would have developed an essential tool with which to

- 1) identify and locate land and/or buildings suitable for investment projects
 - 2) determine what rights exist with respect to such land and buildings and who possesses them; and
 - 3) transfer to such projects adequate, clear and use, ownership or long-term lease rights.
- d) At the same time, encourage people to register land and houses by eliminating the heavy fiscal disincentives for registration of land and buildings, namely “fees” and taxes. Currently, it is reported that real estate transactions are unregistered – in part because of difficult procedures and document requirements, but also in substantial part because people cannot afford to pay the heavy transfer taxes and “fees”. Registration is crucial both to economic development and state management of land and houses. In some other countries with similarly high taxes on land transfers, the State has suspended the requirement to pay taxes for a period of time to encourage people to register. The better approach would be to abolish the transfer tax and replace it with a low, flat registration fee.
- e) Simplify, streamline and speed up the procedures for issuing land use certificates and building ownership certificates by:
- 1) Reducing the evidence needed to prove title;
 - 2) Adopting the proposal of requiring that provisional title be issued in cases where “title was not proven but probable” that would become permanent after a suitable waiting period, such as three months following publication of notice.
 - 3) Providing for legal actions to establish ownership or land use rights based on the comparative weight of the evidence which could be brought before a neutral tribunal such as the civil court whereby:
 - (A) A legal or natural person claiming title with possession or other evidence of title could submit the claim to the tribunal.
 - (B) Notice of the claim would be published in a newspaper.
 - (C) All other claimants would be required to submit their claims within a reasonable period following the original publication, say three months.
 - (D) All evidence in support of claims would have to be presented by a specific date after which no further evidence would be accepted or considered.
 - (E) Within a reasonable time thereafter, the tribunal would then be required to award

clear ownership or land use rights to the claimant which had submitted the strongest evidence as compared to that of all other claimants, even if such evidence would be insufficient to obtain registration from the concerned officials.

- (F) The registration officials would be required to register immediately any ownership or land use rights awarded by the tribunal.
- (G) Provide means of resolving uncertainty about rights to land or buildings by neutral tribunals in proceedings governed by simple, clear, streamlined and transparent procedures including the action to establish ownership or land use rights mentioned above. Once a decision is made by the competent tribunal, it could be appealed and reversed or modified only if it was based on a serious error of law, but never on the basis of factual evidence presented after the required cut-off date.

3.2.7 Access to credit

It is clear that access to credit is major problem for Myanmar private enterprises, farmers and, consequently, economic development. The following should be done to improve the legal framework to encourage and facilitate access to credit:

3.2.7.1 Establish a comprehensive framework for secured lending as follows:

One of the chief obstacles to bank credit for Myanmar enterprises are the difficult procedures involved in providing collateral to secure obligations to repay loans. These procedures are complicated in substantial part because of the difficulties which borrowers have in giving, and lenders have in enforcing, pledges and mortgages. Improving laws and regulations in this field would provide greater security to lenders which would then encourage them to lend more to enterprises. In addition, simpler and more certain rules and procedures will reduce transaction costs for enterprises and creditors alike and thereby make bank credit more affordable.

- a) In the short-term, implementing regulations for the Registration Act should be promulgated which would:
 - 1) Establish a centralised, computerised registration system at the national level for mortgages, pledges, leases and other secured transaction devices which is easily accessible to all members of the public. Such a centralised public register for secured transactions – similar to those in operation in many other countries – will encourage lending by providing an easy way for creditors to know whether other creditors already have loaned against the same property and to establish priority among several creditors who may hold pledges or mortgages over the same property to secure separate obligations.

Many countries provide for registration of mortgages of immovable property in the land register and pledges of movable property in a separate register. Because Myanmar's registers for land and buildings are not easily accessible to the public, consideration should be given to a centralised register for both mortgages of immovable property and pledges of movable property which is separate from the ownership registers. For movable property already registered, e.g. motor bikes or cars – for the sake of efficiency, registration of a non-possessory pledge should be in the central register with a cross-reference to the ownership register. For movable property not registered or required to be registered, registration of the security interest would also be in the central register to establish priority under the Registration Act for non-possessory pledges.

- 2) Provide that non-possessory pledges and mortgages can cover property acquired in the future. Such a provision is needed to provide for modern financing devices such as “floating charges” on the inventories of supplies and goods in process or held for sale, as well as the accounts receivable and bank accounts of enterprises. This is because such assets are always changing and fluctuating.
 - 3) Provide flexibility and security to lenders and borrowers by explicitly permitting pledges and mortgages to secure both present and future obligations. This would also provide security – and therefore encouragement – for “revolving” credit loans to finance working capital on an ongoing basis as is done in many other countries. Revolving credit or revolving loans are loans to a business that are continually renewed to finance recurring business expenses needed for ongoing operations such as wages, supplies, etc.
 - 4) Clearly state that contracts' rights and other intangibles can be the subject of a non-possessory pledge or assigned as security. Although this can be deduced from various provisions in the Registration Act, a specific statement to this effect would strongly comfort foreign and domestic lenders.
 - 5) Provide for enforcement by noting that, under Registration Act, the parties may agree upon procedures for liquidation of pledged or mortgaged assets by means other than public auction if they wish and provide examples of such other procedures, including taking possession of the pledged or mortgaged asset by the secured party and liquidation by a commercially reasonable private sale.
- b) As a longer-term priority, the Registration Act and other relevant legal documents should be amended or a new secured transactions law enacted which would, first of all, incorporate into the Registration Act the rules recommended above and, second, eliminate existing overly restrictive provisions on mortgages and pledges and greatly expand the property which could be subject to non-possessory security interests as follows:

- 1) Eliminate the requirement for prior registration of ownership of property to have a non-possessory pledge of that property as now required by Registration Act.
- 2) Expressly permit a pledge or mortgage to secure both present and future obligations.
- 3) Expressly permit a pledge or mortgage of after acquired property.
- 4) Eliminate the provisions requiring explicit valuation of property to establish multiple pledges.
- 5) Eliminate all requirements for the certification of pledge and mortgage documents by a notary or other authorities unless the parties themselves agree to such certification.
- 6) Eliminate requirements in the law that title documents must be delivered to the mortgagee or pledgee (although the parties could agree to such delivery if desired by them).
- 7) Provide clear alternatives and rules for enforcement of pledges, mortgages and other security interests which would include giving the mortgagee or pledgee as the secured party the power peacefully to repossess and sell a pledged or mortgaged asset himself in any commercially reasonable manner in the event of default by the debtor as an alternative to proceeding through the competent state body.
- 8) Provide priority security interests over other pledges or mortgages for unpaid sellers of equipment to encourage sales of equipment and for possessory pledges of negotiable instruments to ensure the uninhibited negotiation and transfer of such instruments
- 9) Eliminate restrictions in the law on the pledgor or mortgagor disposing of the pledged asset and leave this to the agreement of the parties.
- 10) Make clear that where the pledge or mortgage has been registered, a pledgee or mortgagee can enforce his rights against third party purchasers or other transferees of pledged or mortgaged property when the debtor or other obligor fails to fulfill his obligation. This will place a duty on purchasers of valuable property always to check the register of mortgages and pledges to ensure that the property is not subject to a prior pledge or mortgage.

3.2.7.2 Complete comprehensive framework to strengthen banking and financial system

Stronger banks are better able to lend for productive purposes than weak banks. Further, the Asian financial crisis has shown that weak banking systems have been the downfall of a number of the Asian tiger economies. The crisis has also shown that those with stronger banking systems, such as Singapore, have been better able to weather the crisis. Actions should therefore be taken to strengthen Myanmar's banking and financial system such as the following:

- a) Improve and complete soon for a comprehensive and sound regulatory system for banks and

credit institutions. Specifically in this regard, in late 1990, the SLDRC enacted two laws which provide a legal framework for the sound regulation of banks and credit institutions, namely the Central Bank of Myanmar Law and the Financial Institution of Myanmar Law. Now, the challenge for the Central Bank is to utilise its powers under these laws to issue appropriate implementing regulations and take the other actions necessary to create a sound system of prudential regulation of the banks and a team of well-trained bank examiners to implement the system. Monitoring the financial health and performance of banks is especially important in light of the lessons of the Asian financial crisis.

For example, among other important provisions, Article 44 of the Financial Institution of Myanmar Law require banks and credit institutions to conduct auditing and financial reporting including submission of an annual report to the Central Bank. Article 45 requires that banks and other credit institutions have their accounts and financial statements audited annually by an external auditing company approved by the Central Bank. These are all sound provisions. Implementing regulations can strengthen them by plainly requiring that the auditor's report be published with the financial statements as this requirement is not clear from the law because of the separation of the reporting and auditing provisions in the law. Such a requirement would be in accordance with the best international practice and would build public confidence in the banking system.

- b) Rapidly adopt and implement international accounting and auditing standards throughout Myanmar and for banks and credit institutions in particular. This will contribute greatly toward building international and national confidence in Myanmar's banking system and will help the banking system integrate more easily into the international financial system.
- c) Using external audits, identify all non-performing loans in bank portfolios and eliminate them with all deliberate speed.
- d) Ensure that regulations clearly require that all lending be made on the basis of financial rather than political consideration – such as the instructions of government officials, for example – to ensure the soundness and solvency of the financial system for the benefit of the entire economy for the long-term.
- e) Provide for the creation, transfer and termination of negotiable instruments and commercial paper such as bills of exchange and promissory notes in accordance with international practice and experience. At the same time, revise current regulations on checks to conform with international standards. This will help build Myanmar's financial market and strengthen the position of creditors which in turn will encourage greater lending.
- f) Encourage, facilitate and regulate insurance, since well-run insurance companies become important sources of credit and finance in many economies.

- g) Study the criminal law to ensure that criminal sanctions are not imposed on bankers for making honest mistakes in granting loans (as opposed to knowingly making loans for corrupt or other illegal purposes).

3.2.7.3 Measures to enhance bank credibility

Like many developing countries, Myanmar today appears to be largely a cash economy. This may reflect a popular reluctance to use banks and the banking system. Experience elsewhere has shown that a sound banking system in which businesses and ordinary people have confidence is an essential mechanism for mobilising domestic savings for productive investment.

To start with, consideration should be given to eliminating laws, regulations, rules and practices which discourage the use of banks and checking accounts.

In addition, serious consideration should be given to other more drastic measures aimed at directly encouraging use of banks by ordinary people. A deposit insurance system is one example. A bank secrecy law – similar to ones enacted by other countries – could be another. In many other countries, ordinary people are reluctant to use banks because of fears that their accounts will be revealed to government tax and other officials or even seized, or that banks will fail from mismanagement.

At a minimum, confidentiality provisions restricting credit institutions from giving out information except in clearly defined urgent cases would provide more comfort to potential bank customers. And stronger bank secrecy provisions would be even more encouraging to ordinary citizens to use the banks if such provisions are perceived to be strong and taken seriously by the authorities.

3.2.8 Access to investment funds

3.2.8.1 Promulgate legal documents for securities market regulation

A consistent theme is the need for new investment in Myanmar and the need of existing Myanmar enterprises for new capital. In this regard, one of the most important actions that a government can take to encourage and facilitate investment is to provide the proper legal infrastructure for a well-organised, well-regulated capital market for company shares, bonds, and note, as well as mutual funds, government securities and other investment instruments. There are two key subjects to be covered by the legal framework in this area:

- 1) Regulation of the issuance and sale of shares, bonds and other securities offered to the public. There is no provision when the draft securities regulations are to be promulgated.
- 2) Establishment and regulation of an exchange for the purchase and sale of such securities by the public.

Combined with the device of the joint stock company, where management is separated from ownership and ownership takes the form of freely negotiable shares, capital markets have proved to be a highly effective means of mobilising capital for productive private sector investment. Promulgating the appropriate legal documents needed to establish and regulate capital markets is the first legislative step to be taken after an amendment is introduced to Company Act as recommended in Section 3.2.1.

In this regard, the Company Act and the draft legal documents establishing and regulating capital markets should be reviewed together and any overlapping provisions eliminated to avoid confusion and possible conflict. Rules relating to the formation, capital structure, management, operation shareholder protection, liquidation and dissolution of joint stock companies should be left to the Companies Act. Such rules must and should be formulated, however, with the capital market in mind. For example, the companies law should provide for a flexible capital structure to allow issuance of all kinds of shares, bonds, and hybrid securities, as well as provide for authorised but unissued capital, a device which permits boards of directors to issue new shares without having to overcome bureaucratic obstacles other than the conditions prescribed by the company's articles of incorporation or the securities laws.

The appropriate area for regulation by capital markets legislation are offerings to, and solicitations from, the public in connection with shares, bonds or other securities. As the Companies Act must be formulated with the capital markets in mind, so capital market regulations must be careful not to discourage the formation of joint stock companies through over-regulation. As noted in the section on Companies Act, the formation of joint stock companies should be an easy and unencumbered process. Not every joint stock company must or will offer shares or debt securities to the public but all have the potential to do so. As long as joint stock companies are privately held, they should be left alone by securities market regulations as much as possible.

The goal of securities market regulation must be a limited and carefully balanced one, namely to protect investors by enabling them to have as much relevant, truthful information as possible about potential and actual risks of their proposed investment without the process being so

burdensome and expensive as to discourage its use. Over-regulation can stunt or even destroy the very thing sought to be achieved by capital markets legislation, e.g. increased productive investment and economic growth. The best securities market regulation in the world can never guarantee that every investment will be safe or profitable. Rather, good capital market regulation can only help assure that outside investors will have as clear and fair an idea of the risks and potential of a proposed investment as those inside the company, and that insiders may not take unfair advantage of outside investors by using their undisclosed information about the company gained from their inside positions.

3.2.8.2 Provide means for supply of securities

Once established, in order to grow and develop, a stock exchange will need a continuing supply of publicly traded shares and other securities. To generate such a supply, the following legislative actions could be taken:

- a) Amend the existing Company Act as recommended above, to provide for
 - 1) easy formation of shareholding companies; and
 - 2) easy transformation of limited liability companies into shareholding companies.
- b) Provide clear rules and procedures for transformation of SEEs into shareholding companies and privatisation.
- c) Amend the Foreign Investment Law as recommended above to provide for
 - 1) foreign-invested companies to be formed initially as shareholding companies;
 - 2) easy transformation of existing foreign-invested companies from the limited liability form of company into shareholding companies and allow them to issue shares to the public – provided that the requirements of Myanmar’s securities regulations are met.

These measures are intended to facilitate the formation and creation of shareholding companies. This in turn is crucially important for developing a successful stock exchange and capital market because, in most countries, shareholding companies are the primary source of shares, bonds and other securities traded on stock exchanges, whereas limited liability companies are prohibited from wide share ownership and from issuing securities to the public. This is also true under the existing Myanmar Companies Act.

3.2.9 Trade liberalisation

Trade promotes investment and economic development. Investors need freer trade to ensure access to the materials, equipment and other inputs needed for production from both internal and

international markets. Additionally, investors invest only to make products which they can sell in international or domestic markets. Both investment and trade are key economic activities which create jobs through the multiplier effect, and jobs in turn are a principal means for creating wealth for the people and for the country. Restrictions on trade – both internal and international – create obstacles to investment, greatly slow down the multiplier effect and thereby hinder a country's economic development.

Undoubtedly, Myanmar's international and internal trade has undergone significant liberalisation reforms since 1989, and trade liberalisation has played a key role in fostering the dramatic economic growth experienced in the 1990s. In fact, Myanmar has introduced a number of important trade liberalisation measures recently, including reducing the tariff rate in line with CEPT scheme.

Potentially, one of the most needed new trade liberalisation measures is to permit all enterprises to engage in import-export activities within the scope of their registered business without being required to have an import or export license. Currently, enterprises wishing to import or export are required to obtain import-export trade licenses.

Despite Myanmar's slow progress in trade liberalisation, much more needs to be done at a faster pace because both international and internal trade in Myanmar remain hampered by numerous restrictions. Thus, the problems are both tariff and non-tariff barriers to imports and exports which include high tariffs, a complex tariff system with several different rates which may vary for the same product depending upon the end user, import and export quotas and bans on certain products, official price lists, and heavy bureaucratic procedures connected with trade.

Elimination of these trade restrictions will be required for Myanmar to fully comply with the WTO and meeting its obligations under AFTA (the ASEAN Free Trade Area). More importantly, Myanmar's trade restrictions have the following negative effects on Myanmar's economic development:

- a) Import restrictions and/or high tariffs prevent or hinder access of investors in Myanmar to needed inputs which in turn reduces production, job opportunities and the potential for exports. The restrictions on imports and exports combine to favour inefficient, protected, capital intensive, import substitution industries over labour intensive industries which manufacture products for export. Despite recent trade liberalisation measures the general

thrust of Myanmar's "tariff and trade control system is to favour import-substituting activities and production of non-traded goods over exporting activities" and notes that "some exports are particularly disadvantaged directly by the continued use of export taxes, but all exports are disadvantaged by the extensive system of import taxes and controls." Further to that, at the moment, the situation is exacerbated by the persistent overvaluation of the Myanmar Kyat, and the reintroduction of surrender requirements which force exporters to trade their foreign exchange earnings at over-valued exchange rates.

[see Section 3.2.10 regarding foreign exchange controls in this regard]

- b) Import restrictions and/or high tariffs encourage smuggling by significantly raising the price of legitimate imports relative to smuggled goods. As a result, high profits can be made by the smugglers which, of course, is a powerful incentive to continued smuggling. In fact, Myanmar's trade regime tends to favour smuggling and consumer trading activities over productive investment because:
- 1) Easier, high profits can be made in smuggling and illegal trading, whereas taking the trouble to get an investment project established and keeping it operating is much more expensive in time and money and much more problematic in view of the current overall investment climate.
 - 2) While traders can always get consumer goods from smugglers who can bring in goods in manageable quantities most investors must go through the official import system in order to get production inputs, such as equipment, spare parts and raw and intermediate materials. In other words, smuggling production equipment or tons of raw materials is difficult or impossible whereas it is easy to smuggle in watches, TV sets, or other consumer goods.
 - 3) High tariffs and import restrictions encourage corruption because the great need of investors for their production inputs in order to survive is a strong incentive to bribe officials and the high profits to be made by smugglers make it worthwhile to bribe officials as cost of doing an illegal and highly profitable business.

To counter and reverse the above adverse effects of the current trade regime on Myanmar's economic development, it is respectfully recommended that consideration be given to the following actions:

- 1) Generally, all laws legal documents, procedures and policies concerning Myanmar's international and internal trade should be thoroughly and systematically reviewed and revised as necessary, to reduce or eliminate current trade restrictions as much as possible in order to

encourage and facilitate economic growth in general, and investment in export manufacturing industries in particular, by ensuring that trade is as free as possible.

- 2) Specifically, it is recommended consideration be given to the following:
 - a) Conducting the review of laws and regulations recommended in item 1 above with the aim of conforming to important international trade agreements, including the ASEAN and WTO agreements.
 - b) Taking actions and promulgating legal documents either to eliminate the requirement to obtain ex-in licenses or to speed up the process for issuing them, so that enterprises from all sectors will be able to import and export to the extent permitted by their business establishment license without a special permit from the Government.
 - c) Continuing to eliminate all remaining export duties and restrictions as rapidly as possible.
 - d) Per section 3.2.10, adjusting the exchange rate for the Kyat to a market clearing level or, even better phase out exchange controls to spur exports and discourage imports.
 - e) The number of customs tariff rates should be drastically reduced in number to five or less.
 - f) Generally, import tariffs should be reduced to levels at or below the levels prevailing in the ASEAN region and AFTA requirements should be met sooner rather than later; specifically, import duties on all production equipment, components and raw materials should be reduced to nominal amounts, while at the same time eliminating exemptions to simplify customs administration and reduce its cost. Reducing import duties in fact is the best way of helping exporters on a long lasting bases.

It might be argued that high import duties, import duties, import bans and other import restrictions are necessary to protect domestic industries from foreign competition. In fact, protection of industry by high tariffs and other import restrictions is illusory because:

- Such protection leads the protected industries to believe that they are shielded from international competition, giving them less incentive to produce goods which are able to compete in quality and price with those of foreign competitors, with the result that protected industries produce goods of lower quality and higher prices than foreign goods, thereby making the protected industries less competitive in the international market place.
- High tariffs, import restrictions and low quality and/or higher priced domestically produced goods mean that high profits can be made from smuggling into Myanmar foreign-made goods which are lower priced and/or higher quality. Such high profits are

a powerful incentive for smuggling which has resulted in a flood of smuggled goods into the country with which domestic enterprises must compete.

Thus, many industries supposedly “protected” by high tariffs in fact are not protected because the higher tariffs render them less competitive internationally, and they often end up having to compete against foreign goods anyway which are smuggled in because the high tariffs have made smuggling a highly profitable activity.

Periodically, new “crack-downs” on smuggling are announced. While administrative measures, such as tax stamps, and increased enforcement efforts may from time to time have a temporary effect, these administrative measures cannot begin to prevent the smuggling: this is because the incentives for smuggling – namely the opportunity for high profits created in substantial part by high tariffs and import restrictions – are too strong for such measures to have a substantial and lasting effect. This is especially the case in a country like Myanmar with a geography characterised by a very long seacoast and long mountainous borders which are difficult to patrol. High profits from smuggling enable smugglers to quickly introduce counter-measures, such as counterfeit stamps or even actual stamps originally issued for other goods and, regrettably, bribes to low paid officials which can easily exceed their salaries and bonuses. Moreover, the import stamps add one more item of cost for legitimate traders, making them still less competitive with the smugglers.

Thus, high tariff “protection” far from being a benefit to Myanmar enterprises, in fact, only prevents them from becoming internationally competitive overall. Hence, the only way to significantly reduce competition from smuggling is to take away or reduce the high profits from smuggling by removing import barriers and by reducing tariffs to levels at or below those prevailing in the region. In addition, actions must be taken to improve the competitiveness of domestic industries by exposing them to greater competition by lowering tariffs and eliminating import barriers and by serious efforts to lower the high costs of doing business in Myanmar, such as high costs for land; high costs of income taxes on skilled employees at rates more than double those of other countries in the region; high costs of international communications; high costs of internal transportation; high transaction costs resulting from complex bureaucratic procedures and, in some cases, corruption. Reducing the high tariff “protection” for Myanmar enterprises will soon make them globally competitive much sooner.

For Myanmar, as for many less-developed economies, export and import taxes are a major source

of government revenues. Understandably, there are concerns that reductions in tariffs would adversely affect government revenues. However, “a properly structured reform” would have no adverse effect on revenues and could even increase them for the following reason:

- If very high tariffs were reduced, imports of the goods affected would increase and with them duties collected at the lower rate, especially if import bans and other restrictions were lifted.
- “The main reason for reducing tariffs is to encourage economic growth and with that growth other sources of taxation revenue should increase” – such as the value added tax (VAT), excise taxes, corporate income tax, personal income tax, etc. This is especially important to establish VAT system to place a mechanism for increased tax revenues from economic growth.
- Part of the reform in addition to lowering tariff rates generally to ASEAN levels should be to eliminate exemptions and raise those duty rates which are excessively low by international standards rates; these actions will increase tariff revenues.
- With simpler and lower tariffs, customs collections would be easier and more goods would come through customs points because the high profit incentives for smuggling from high import duties and other import restrictions would have been substantially reduced or eliminated.

Liberalising Myanmar’s trade regime – especially by simplifying and lowering tariffs and eliminating import bans and restrictions – is essential for integration into the world economy in general and the WTO in particular. In addition, such reforms would be a tremendous spur to exports and Myanmar’s development as an industrialised, modern country.

3.2.10 Easier access to foreign exchange

Foreign exchange is the life-blood of foreign trade, and foreign and domestic investment to the extent that production equipment, production components, technology, spare parts and other inputs must be obtained from abroad. Without access to foreign exchange, as a practical matter, an enterprise has no access to international markets for needed imported inputs and technology; this is often especially true for enterprises producing manufactured exports. Without access to foreign exchange, a foreign investment project cannot survive very long. This is also true of many domestic investment projects which need to license technology and/or import equipment, spare parts, and production components. In short, easy and certain access to foreign exchange by both foreign and domestic enterprises is essential for access, in turn, to international markets.

The current system of foreign exchange controls, however, means that in Myanmar investors cannot obtain foreign exchange without allocations from the Government. At the same time, the Central Bank sets foreign exchange rates rather than allowing the rate to be set by the market. Where the foreign exchange rate for the Kyat is set too high relative to the market, shortages in foreign exchange inevitably will occur as a natural result of the law of supply and demand. Under these circumstances, the Government cannot possibly guarantee investors that sufficient foreign exchange will always be available. Indeed, a drastic shortage of hard currency has forced the Central Bank of Myanmar to renege on foreign currency repayment guarantees, leaving foreign and Central-owned enterprises without enough cash to pay outstanding loans and bills.

Accordingly, as a result of the foreign exchange control policy now followed, many if not most potential foreign investors are afraid to invest in Myanmar. This is one of the major reasons for the recent drop in levels of foreign investment, according to Myanmar and international lawyers and accountants. As new investors stop investing, even less foreign currency will flow into Myanmar, thereby worsening the foreign exchange shortage even more.

The official response has been to impose more controls by requiring enterprises to sell 80% of their foreign exchange to the banks per decision. Enterprises which fail to sell will have the amount automatically purchased from their foreign currency accounts by the banks. Then, when foreign exchange is needed, enterprises must purchase the foreign exchange back from the bank usually at higher rates. Promulgation of these regulations in itself is a strong sign that the exchange rate for the Kyat is overvalued by being set too high relative to foreign currency and that, as a result, the banking system is running short of foreign exchange.

The regulations also are likely to be counterproductive – at least in the medium and long-term if not in the short-term – because: (1) they will further frighten potential investors, thereby further reducing the amount of possible future foreign exchange flows into the country; and (2) companies will find ways in fact not to sell their foreign exchange holdings to the banks, which already appears to be happening, or they may simply keep money from coming into the country at all to the extent possible. There have been reports that the tighter regulations are driving more foreign exchange trade “onto the streets where the government has no control” and away from the official market in the banks.

Additionally, obtaining a foreign exchange allocation is one more piece of the red tape that investors complain that they have to contend with in Myanmar.

Even important SEEs are having difficulties obtaining foreign exchange needed for their operation. Several private businesses say they are not able to buy enough hard currency to pay their import deferred payment and are urging banking officials to find ways to help them. A recent Government policy asked businesses subsidised by the state to sell all surplus hard currencies to banking institutions and the banks will sell them hard currencies when they need them. However, businesses report that banks are failing to provide them with enough hard currency for their transactions plans, and several companies have asked the State to consider allowing them to keep their hard currencies in bank accounts.

If large SEEs are having difficulties obtaining foreign exchange, it is virtually certain that small and medium enterprises (SMEs) who have relatively much less influence must have at least equal or even greater difficulties in gaining access to foreign exchange through official sources, especially private sector enterprises. Policy actions should be taken and necessary legal documents prepared which will provide easier, more certain access to foreign exchange for all enterprises – including SEEs, foreign-invested enterprises and private enterprises for international trade, investment and technology transfer transactions.

3.3 Improve and Protect the Functioning and Efficiency of the Market

The foregoing Part 3.3 of this paper dealt with urgently needed measures to improve access to the market and to the factors of production for private enterprises of Myanmar's economy.

This part 3.3 addresses measures to improve the working of the market mechanism itself to allow the economic multiplier to work well in order to generate self sustaining dynamic economic growth, employment and prosperity.

3.3.1 Clarify and improve the rules of contracts

Contract is the essential legal mechanism of the market which greatly expands economic activity by allowing for the future transfer of property rights and by allowing market actors to make their own law as between them for each transaction. A “contract” is an agreement between parties which sets forth the rules governing the transaction or relationship between them which the Central will enforce – either administratively or, as is the case in most market economies, by the courts when requested by one or both parties to do so. In a market economy, it is important that the basic principles of contract be as clear, coherent and certain as possible. Currently, however, the law governing the field in Myanmar is the Contract Act 1872.

In most Common law jurisdictions, the case laws set out general provisions applicable to all civil transactions which includes business, commercial, and economic transactions, unless otherwise provided by specific laws. In Myanmar, however, the doctrine of binding precedence is not allowed, therefore the evolution of the interpretation is hampered and its not clear what the relationship is between the past case and written.

To resolve these problems and create clarity and certainty as to interpretation and the making of an enforceable contract, it is respectfully recommended that consideration be given to the following measures:

- a) Amend a law to clarify the rules of contract which would modernise the Contract Act.
- b) Adhering to the Vienna convention on the International Sale of Goods (CISG): this will give international traders confidence in dealing with Myanmar, because they will then not have to worry about exactly what Myanmar's law of contracts is. Conversely, Myanmar traders would not have to worry about the law of their trading partners. This would be true in many cases even for traders who are from countries which have not themselves adhered to the CISG. Because of its prestige and renown, many international traders often include in their contracts a provision to agree that the CISG will be the applicable law governing their contract.

3.3.2 Improve judicial, arbitration and other mechanisms

For a market economy to work properly, commercial contracts freely made and entered into, property rights and other legal rights must be enforceable. In turn, this requires that there be a court or other Central institution able, willing and empowered to enforce property rights and contracts quickly and effectively. Moreover, few matters are more important to encouraging investment than providing investors with confidence that their disputes ultimately could be settled by an independent, impartial, and competent tribunal in a timely, effective manner according to clear, predictable rules of law and procedure.

In the field of dispute resolution, Myanmar needs to take the following actions:

- Establishing the economic courts as part of the court system to resolve commercial disputes between State-Economic enterprises (SEEs)
- Establishing the Labor and Administrative courts also as part of the court system
- Issuing Government decrees to establish arbitration centers and a center for resolving

international commercial disputes under the auspices of the Myanmar Chamber of Commerce and Industry

- Adhering to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) and issuing an Ordinance to implement the convention

With regard to these important issues, it is respectfully recommended that the following points be kept in mind:

- a) The Civil Procedure code should be modernised with a view to ensure speedy and effective enforcement of contracts and other legal rights by providing for:
 - 1) Clear, simple, and fair procedures which give each party fair and adequate notice of proceedings and a fair and equal opportunity to be heard and present their case and all relevant evidence
 - 2) Clear, fair and comprehensive rules for the introduction of evidence to be considered by the court in adjudicating disputes
 - 3) Full powers for courts to provide complete and adequate provisional and long-term remedies including:
 - (A) Preservation of assets at the outset of the dispute where there is a reasonable possibility that a party may destroy or dispose of assets needed to fulfill a legal obligation or which constitute evidence of the creation or violation of legal rights
 - (B) Injunctions, that is, orders to cease conduct in violation of the law
 - (C) Specific performance of certain contract or other legal obligations
 - (D) Compensation for all damages including losses from inflation due to delayed payment
 - (E) Adequate powers for courts and sufficient police powers for civil judgment enforcement officers to enforce judgments including collecting money and seizing and selling assets
 - (F) Clear rules providing for the enforcement of foreign judgments

Myanmar has not provided for enforcement of foreign arbitral awards related to the 1958 New York convention on the Recognition and Enforcement of Foreign Arbitral Awards and promulgating implementing legislation. Therefore, as yet there are no provisions providing for the recognition and enforcement of foreign judgments. Enactment of such provisions would greatly enhance the confidence of the international investment and financial community in Myanmar.

- 4) Specifically including provisions to discourage parties from intentionally delaying cases by:
 - (A) Awarding full compensation to contract obliges and those whose property rights have been infringed for losses from inflation
 - (B) Awarding full attorney's fees and other litigation costs to the winning party in cases where rights and obligations are clear
 - (C) Awarding effective sanctions to parties injured by frivolous delaying tactics
 - (D) Providing for penalties for delayed payment at least equal to bank interest rates on savings deposits
 - (E) Requiring courts to award summary judgment to a party where the other party has no evidence of a substantial claim or of a substantial defense
 - (F) Allowing appellate courts discretion to decline appeals, rather than requiring all appeals to be heard in full
 - (G) Limiting first level appeals to questions of law rather than also reviewing facts
 - (H) Reducing or eliminating rights to introduce new evidence and new theories on appeal
 - (I) Restricting appellate courts to matters raised on appeal
 - (J) Clearly empowering appellate level courts to reach final judgment on the first appeal
- b) The arbitration system should:
 - 1) Provide for arbitration of both domestic and international commercial and economic disputes in Myanmar by enacting a law or ordinance adapted from the United Nations Commission on International Trade Law (UNCITRAL) Model Law. Many other countries have successfully used the UNCITRAL model law as the bases for their own legislation to govern both international and domestic arbitration proceedings and enforcement of awards. By following their example, Myanmar would take a major step toward integration into the world economic and financial system and provide an important incentive for foreign investment.
 - 2) Ensure that the parties are free to select any arbitrator or arbitrators they wish by any procedure they choose so long as it is fair, rather than requiring them to accept a specific arbitration institution or procedure or list of arbitrators.
 - 3) At the same time, provide good default rules for arbitration which will apply to issues where the parties do not agree otherwise. Again, the UNCITRAL rules have proven effective and fair and are well-known.
 - 4) Also allow the parties to select any law they agree to as the law governing their relationship, even if both parties are Myanmar. Many other countries allow this. It is

especially important in the case of Myanmar since Myanmar's legal framework is not yet complete and lacks the clarity required by foreign and international investors and lenders. This step would also provide strong encouragement to foreign investors.

- 5) Ensure that arbitration awards can and will be enforced by the courts. Currently, although government provides for arbitration through UMFCCI, there is no legal basis for enforcing the awards of those centers or other domestic arbitration proceedings. Paradoxically, since Myanmar has adhered to the 1923 Geneva Protocol on Arbitration Clauses but chose not to be a party of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, there is weak legal basis to enforce foreign arbitration awards in Myanmar and obviously, this situation should be corrected.
- 6) Specifically adopt, for purposes of both the ordinance and implementation of the 1958 New York convention, the broad definition of "commercial" set forth in the UNCITRAL Model Law which covers virtually any economic or business transactions.

3.3.3 Eliminate unexpected regulation changes

One of the most important features of a well-functioning legal framework for market-driven economic development are clear and detailed provisions for regular review and comment by the public on draft normative legal documents proposed to be issued by concerned ministries or administrative agencies. In many countries, government ministries and agencies are required to publish proposed draft regulations long before enactment, and all interested parties including the private sector – along with the public generally – are invited to provide input through written comments or testimony at public hearings.

In Myanmar currently, there is no regularised process for persons who could be affected by a draft regulation to review it in advance and provide input. This only occurs on an ad hoc particularised basis where the SPDC decides, but very seldom in the case of legal documents issued by ministries and agencies. On occasion, a ministry may ask a particular law firm or business executive for comments on a draft legal document. Most often, however, there is no opportunity at all for any such review before the proposed regulation is issued. Very seldom are draft regulations circulated for review to the public.

Thus, all too frequently, investors and business executives are "surprised" or "shocked" by sudden unexpected changes in regulations which affect the cost of doing business, such as the ability to obtain foreign currency or the basis for calculating taxes. These shocks to the market are harmful to business confidence and undermine the stability and predictability which the rule of law should

bring to the market place. Such shocks and surprises could be avoided by requiring ministries and agencies to publish draft regulations well in advance and offering all interested persons the opportunity to comment on them before promulgation.

Institutionalised and regularised procedures and opportunities for public input on proposed regulations before they are issued is also a very useful tool of Central management. For one thing, such a process generates useful feedback to help the Government reduce the chances of mistakes creeping into the laws or regulations as finally promulgated and reduce the chances of passing laws with unintended consequences or embarrassment. In addition, by involving the public in the law and rule-making process, the Government goes far towards gaining their commitment to new economic laws, regulations and institutions. Moreover, better knowledge and understanding about new laws and regulations and their rationale before enactment should mean faster and better compliance after enactment. Most important, however, such procedures help provide stability and predictability in the regulatory environment for business and investment while affording the opportunity for needed changes.

It is therefore respectfully recommended that “shocks” to the market by sudden, unexpected regulations, decisions, directives of State and local government agencies should be eliminated by promulgating regulations under the Article 23 of Burma General Clauses Act or by enacting new legislation which would require procedures similar to those listed below to be followed in issuing new legal documents by administrative agencies:

- a) Publication in the mass media of proposed regulations at least 60 days in advance of *promulgation together with the reasons therefore.*
- b) Providing all members of the public the opportunity to comment on the proposed regulations during such period in writing and by means of at least one public hearing.
- c) Publication of a report summarising at least the main points of public comments made and the agency’s response therefore.
- d) Publication of the legal document as adopted in the Official Gazette or the mass media at least 30 days before the effective date of the legal document.
- e) In very urgent cases, the SPDC could authorise emergency regulations to be issued on a temporary basis provided that public comments were taken and publicly responded to thereafter within specified time limits, and that the permanent regulations would be made effective only after such an opportunity for public review and comment. Failure to obtain public comment within a specified time period of, say, 90 days would result in automatic

repeal of the regulations.

Such measures also would greatly help implement democracy by giving the people the chance to provide input on all laws, regulations and normative legal documents issued by the authorities under the principle enunciated by the SPDC that “the development should be achieved by Myanmar citizens.”

3.3.4 Improve state management over market players

An urgent need for Myanmar is to promulgate and implement rules requiring improved minimum accounting standards based upon International Accounting Standards, public financial reporting and annual audits by qualified independent auditors in respect of all enterprises of public significance. In Myanmar, these would include all SEEs, all foreign-invested enterprises, and all enterprises which seek to mobilise funds from the public through obtaining deposits – such as banks or savings institutions – or through selling shares of stock or other securities such as joint stock companies, as well as limited liability companies and other enterprises over a certain size. Early adoption of new standards based upon International Accounting Standards (IAS), however, is respectfully recommended as a means to rapidly gain the confidence of the international investment and financial communities. To achieve Myanmar’s goal of international integration, such a step is as almost as essential as implementation of WTO agreements.

It is respectfully recommended that the necessary legal documents be issued and implemented in an effective manner to require SEEs, banks and other institutions seeking deposits from the public, and companies offering shares and securities to the public:

- 1) To use International Accounting Standards (IAS) for all business and financial transactions.
- 2) To undergo annual or more frequent external audits of their financial reports and accounting and financial books and records by qualified independent auditors in accordance with international standard auditing practices and procedures. As noted, external audits already are required of banks and credit institutions under the 1992 Regulations for Financial Institutions, and this requirement should be extended to cover all SEEs as well.
- 3) To publish complete and accurate annual financial reports prepared and audited by qualified auditors in accordance with international standards and to issue interim financial reports on a quarterly or semi-annual basis to an official institution which will make them available for public inspection. This already is required of SEEs and credit institutions by the laws governing them, but need implementation.

International accounting standards, periodic audits by qualified independent auditors and published financial reports are the most important tools of proper State management of enterprises. Without these tools being put in place and made operational on a routine basis, neither the state, nor its tax collectors, nor the banks, nor investors, nor the public can ever have any means of knowing the true financial condition of an enterprise.

Many, if not most, of the foreign-invested enterprises, however, do issue audited financial reports prepared from accounting books and records in accordance with both international and Myanmar accounting standards -both joint ventures and 100% foreign-owned enterprises.

Since the State is the owner of the SEEs, the people have the right to know their true financial condition and performance. Therefore, all such enterprises should be required to publish annual financial statements prepared from books and records accurately maintained in accordance with adequate and complete accounting standards – preferably international accounting standards- and audited by qualified independent auditors in accordance with international standards.

To the extent that enterprises do not have independently audited financial statements prepared in accordance with international standards, banks and other lenders have no way to ascertain with any precision the risk of whether their loans will be paid back based on the true financial condition and performance of borrower enterprises. If banks are to make prudent loans without independently audited financial statements, they have little choice but to require adequate or excessive collateral or guarantees as security. Similarly, without international standard auditing and accounting, tax collectors have no way to accurately assess profits for tax purposes.

Finally, once a stock market is implemented, the only known way of truly protecting the investing public is to provide a means for the public to obtain reliable information about the true financial position of any company with which it is dealing. In virtually all countries with well-regulated stock markets and stock exchanges, this is accomplished through public disclosure of financial statements showing a company's financial position based on accounts maintained in accordance with a well-formulated set of generally-accepted accounting standards, and audited by qualified auditors in accordance with proven auditing standards. The law should clearly provide that failure to honestly disclose the true position of a company would lead to liability for any damages for those responsible and, where such failure arises from an intent to deceive, would lead to criminal liability as well.

3.3.5 Strengthening dissemination of the legal information

Informing judges, lawyers and the public about laws is as important a task as making them. Predictability of the legal consequences of economic transactions is essential for the healthy development and functioning of the business sector. And predictability in turn depends upon those affected having ready access to the relevant laws, decrees and applicable court judgments and a reliable, well-organised means of finding them after they are promulgated.

Similarly, for purposes of effective law-making and implementation, government agencies and courts also need a reliable, well-organised means of finding all relevant laws, decrees and applicable court judgments. Thus, a legal information system is required which will effectively, completely and easily transmit knowledge of the laws relevant for business and investment to local and foreign businessmen and investors, Government officials, lawyers, judges and the public.

Fortunately, Myanmar has maintained the basic ingredients for a periodical legal information and law finding system including an ad hoc publications by AGO in which relevant laws, ordinances and other legal documents of central state agencies are to be published. There are a number of problems, however. One is that publication of the Official Gazette is currently halted. The other is almost impossible mean to obtain the legal documents at the level of ministerial decision, directive or circular. As a result, many legal documents – including treaties – are not published. Lawyers mention that the AGO publication publishes only a fraction of what is needed and that there are innumerable legal documents in the form of decrees, circulars, decisions, official letters and regulations which are never published.

Another major difficulty is that there is currently no central library, register or computer database where investors, government officials, lawyers, judges and the general public can be sure of finding all effective laws, regulations, and other normative legal documents issued by the central government – much less provincial and municipal governments. Moreover, because of the lack of comprehensive, detailed and cumulative indexes, there is no efficient and effective means of determining all the laws and regulations which apply to a specific subject. Finally, because no judicial decisions are published at any level, it is difficult to determine how the laws are being applied by the courts.

Consequently, more needs to be done to provide an effective and complete law finding system by the following means:

- a) Requiring all laws, ordinances, treaties, decrees, directives, circulars and other legal documents to be published in the Official Gazette before their effective date as a condition of legality and deposited in a central library and/or compute database from which they would be made easily available to the public.
- b) Requiring all decisions of the Supreme Court and appellate decisions of the Provincial Courts to be published.
- c) Developing a comprehensive, well-conceived and complete index with cross-references covering the Official Gazette and other laws and regulations.
- d) Publishing laws and regulations in loose-leaf form instead of bound volumes so that they can easily be organised by subject and quickly and effectively updated.
- e) Converting official publication of all newly-issued laws, ordinances, decrees, directives, circulars and other legal documents in the Official Gazette to printing from a database created by full-text entry of all newly-issued laws, decrees and court decisions. In this way, at least all future laws, decrees and court precedents will already be entered into a full-text database.
- f) Create a full-text database for all past laws, decrees and court decision which would be integrated with the official publication database described in sub-paragraph (e) above utilising.
- g) Distribute laws and other legal documents from the database electronically by the Internet or by using CD-ROM, or comparable technology. Such technology would allow easy and timely updating and dissemination to government agencies and the public of current laws and regulations in both hard copy and computer disk form.
- h) Adopt or develop “user-friendly” software which will allow lawyers, judges, officials and the public to access the database for legal research purposes similar to Lexis and Westlaw programmes developed in the United States, that is, on the basis of full text search and retrieval.
- i) When laws or regulations are amended, having them reissued in full as amended in two versions: the first would be a “clean” version of the law in full as currently effective; and the second, a “redline” version showing the amendments to the law with strikeouts and underlining or boldface type so that the reader understands exactly what changes were made.
- j) Undertaking a programme to develop, staff and equip libraries and/or compute databases in key locations each of which would contain a complete collection of all of Myanmar’s published laws, regulations, treaties, and eventually court decisions to ensure that judges, lawyers, investors and the public have easy access to Myanmar laws and regulations. Alternatively, provide such access through on-line computer connection to a central database through the Internet or an intra-net using Internet protocols.

3.3.6 Economic laws to protect effective market functioning

To ensure fair and efficient operation of the market mechanism in promoting broad-based economic development, many countries have found it necessary to introduce legislation to protect their market mechanisms from forces which could impede fair competition or undermine consumer or investor confidence in their integrity. In this regard, such countries have enacted anti-monopoly laws against restrictive and monopolistic trade practices, conflict of interest laws to protect the market from undue political influence as well as consumer protection laws to protect consumers and the market from, for example, unfair, deceptive, and unconscionable trade practices or lack of minimum essential information needed to make informed choices through labeling requirements for certain products.

There are a number of gaps in Myanmar's legislative framework for protecting market mechanisms and fair competition. For example, currently, there is no comprehensive legislation against monopoly and monopolistic practices or restrictive trade practices in Myanmar. Similarly, although the Code of Civil Procedure contains general provisions imposing liability for fault, i.e. tort liability which could be used by a party injured by faulty products or unfair or contain general injunctions against cheating in the market, more modern and comprehensive consumer protection legislation appears to be required.

For example, effective enforcement of competition and consumer protection laws calls for a flexible array of administrative and civil enforcement mechanisms in addition to criminal penalties. In this regard, some countries have found it useful to establish a specialised agency which is independent of existing ministries with well-trained staff. Such an agency need authority to break up monopolies, as well as ban, seize and prevent the distribution of goods which are not adequately labeled or are unsafe or unsanitary or are being sold using deceptive advertising or other unfair trade practices. Where misleading advertising is discovered, the enforcement agency should have power to require the false advertiser to run corrective advertising for a sufficient period of time to correct the false impression created.

In protecting consumers, guarding against monopoly and promoting fair competition, great care must be take to guard against over-regulation which interferes with, rather than protects, market mechanisms and competition. Distinctions must be made, for example, between those consumers who have been cheated due to fraud or clearly deceptive advertising and those who are simply unhappy with their purchase. Similarly, distinctions must be made between aggressive but free competition on the one hand, and wrongful predatory efforts to crush competition or sabotage

market mechanisms on the other, that is, between genuine victims who have been squeezed out of the market due to monopolistic or restrictive trade practices aimed at eliminating competition, and those who themselves have simply failed to compete successfully in the free market.

In addition, to operate effectively to protect consumers and to attract new investors, a market should be free of undue political influence as well as economic influence. Equally important, the market must be perceived to be free of such influence. For these reasons, many countries have enacted strong legislation to reduce or eliminate conflict of interest as between Government officials and their public duties on the one hand, and their private business interests on the other. At their narrowest, such laws generally forbid government officials, or relatives to a certain degree, from having a financial interest in businesses and matters in areas which are within the ambit of their Government responsibilities. Such laws may also forbid Government officials from holding any outside employment or at least regulate closely the limits of such outside employment.

Conflict of interest laws may also forbid former Government officials from accepting either favour during office or employment or business from firms and businesses which they were charged with regulating for a period of years after separation from Government service. Such laws are an effort to ensure that some competitors do not receive an unfair advantage as a result of favouritism and conflict of interest.

Another form of conflict of interest arises when a government ministry or agency has primary duties which conflict with other duties. For example, a ministry of trade whose primary concern is trade promotion would be less concerned with regulating competition or consumer protection than an independent agency which had those duties as its only objective. Some countries have dealt with this form of conflict of interest by shifting market regulation functions to independent commissions, and away from line ministries and agencies whose main aim is to operate or promote certain sectors and industries.

Based on the foregoing, it is recommended that consideration be given to undertaking a thorough review of all existing laws and regulations in the areas of competition, consumer protection and conflict of interest, and that comprehensive legislation be prepared and enacted with the aim of protecting competition and the consumer as follows:

- a) Enact comprehensive consumer protection legislation which would supplement and/or

subsume existing laws and regulations and would achieve the following goals:

- 1) Protect consumers by prohibiting unfair, deceptive, fraudulent and unconscionable trade practices such as misleading advertising and practices;
 - 2) Provide consumers with specified minimum essential information regarding certain products in the market to enable them to make informed choices through labeling requirements for certain products;
 - 3) Define and set minimum required quality standards and specifications;
 - 4) Protect consumers' health and safety from dangerous or potentially dangerous products;
 - 5) Establish a suitable range of effective enforcement mechanisms such as inspections, cease and desist orders, penalties, etc.
 - 6) Provide appropriate remedies for injuries suffered;
 - 7) Provide safeguards against using consumer protection laws to aid purchasers who have not been truly harmed by wrongful conduct but who simply have become unhappy with their purchase for personal reasons.
- b) Enact legislation to promote competition by reducing and regulating monopoly power and by outlawing restrictive trade practices. Such legislation would amalgamate or supplement provisions already contained in other laws and add provisions outlawing restrictive and monopolistic trade practices. Such legislation should contain safeguards to ensure that it is not used against aggressive but fair competition by international standards by those who have not been harmed by truly wrongful predatory conduct but have simply failed to compete effectively themselves.
- c) Enact comprehensive new laws and regulations prohibiting and regulation conflict of interest of individual government officials.
- d) Reduce the chances of ineffective regulation due to conflicts of interest by shifting market regulation to independent commissions, and away from ministries and agencies whose main aim is to operate or promote certain sectors and industries. Such commissions could be responsible directly to the SPDC depending on the degree of independence felt to be needed. Independent commissions could be considered for the following fields:
- 1) As is already the case, securities and stock market regulation
 - 2) Competition, unfair trade practices and consumer protection
 - 3) Banking and Finance (Central Bank)
 - 4) Environmental Protection

3.3.7 Environmental protection

Myanmar has no comprehensive Environmental Protection Law other than Protection of Wild

Life Act and there is an urgent needs to elaborate it. What remains to be done is the following:

- a) Promulgating a comprehensive Environmental Protection Law. In this regard, care should be taken to establish a set of standards which is realistically compatible with the capacity of the concerned agency or agencies to enforce them.
- b) Requiring all new projects to incorporate effective measures and technology to reduce adverse impacts on the environment from the beginning of construction to save the high costs of correcting such adverse impacts after construction; regular inspections by well-trained inspectors should be carried out during project construction and later during project operations to ensure continuing compliance.
- c) Effective and comprehensive land use and zoning laws and regulations are needed to ensure that manufacturing projects, for example, are only located in areas already zoned for industrial purposes. Similarly, hotels and other tourist projects would be required by such laws and regulations to be constructed in a manner least disturbing to the neighborhoods or scenic areas in which they would be located.

4. Summary

4.1 Summary of Measures to Increase Transparency

Many of the measures recommended above will substantially increase the “transparency” of Myanmar’s legal and economic system. Foreign investors and foreign and international donors often complain about the “lack of transparency” in Myanmar or that Myanmar’s legal and economic system and procedures are “opaque”. This means that foreign investors find it difficult to determine what the rules are that govern economic transactions and difficult to uncover relevant information about other market actors to protect their legal rights and encourage the economic transactions which will increase the wealth of the country. Greater transparency will substantially encourage investment and other productive economic activities and, at the same time, will serve to discourage corruption, fraud and deception in the market place. In this way, these measures are vital tools for improving State management of the economy.

Summarised, the measures recommended throughout this report to improve transparency, are as follows:

- a) Requiring all laws, ordinances, treaties, decrees, directives, circulars and other legal documents to be published as a condition of legal effectiveness and deposited in a central library and/or computer database from which they would be made easily available to the public.(See Section 3.3.5)
- b) Requiring all decisions of the Supreme court and appellate decisions of the Provincial courts to be published. (See Section 3.3.5)
- c) Requiring all draft legal documents to be published in time to give the public an opportunity for comment before final promulgation and publish the promulgated decree at least 30 days in advance of its effective date. (See Section 3.3.3.)
- d) Providing for a centralised computerised national register for enterprises which is easily accessible to all members of the public. (See Section 3.2.2.)
- e) Providing for a centralised computerised national register for pledges and mortgages which is easily accessible to all members of the public. (See Section 3.2.7.1.)
- f) Providing for modern unified registers for land and buildings at the local level easily accessible to the public. (See Section 3.2.6.)
- g) Requiring all companies which have issued shares or other securities to the public as well as all state-owned enterprises and state banks, to publish annual financial statements prepared according to international accounting standards and audited by qualified independent auditors

in accordance with international auditing standards. (See Section 3.3.4.)

4.2 Summary of Measures to Eliminate Bureaucratic Obstacles

As already noted in the introduction to this paper, rapid, self-sustaining economic growth is best achieved where market mechanisms and the economic multiplier are allowed to work freely with minimum bureaucratic interference except as necessary to protect health, safety, the environment and to keep the market itself clean and free of restrictive, unfair and fraudulent trade practices. As noted in the introduction, the legal framework must foster the smooth and efficient operation of the economic multiplier to maximise the speed and extent of economic development. Throughout this paper, recommendations have been made to reduce or eliminate the significant bureaucratic obstacles to the efficient operation of the economic multiplier in Myanmar. These recommendations are listed and summarised as follows:

- a) Replace review and approval of company establishment by MIC with simplified automatic registration carried out by a lower level specialised agency and permit registered companies to do business immediately upon registration without the need for additional licenses, except for a few highly-regulated businesses such as banking, food processing, health, etc. (See Section 3.2.1)
- b) Streamline foreign investment approval procedures by replacing review and approval with simple registration, except for a few activities clearly set forth on a short and specific negative list. Changes in the capital, location or the product mix of the investment would be affected by notice to the competent state authority rather than review and approval, except in cases specified on the negative list. (See Section 3.2.3.)
- c) Replace case-by-case review and approval of the establishment and exercise of land use rights with automatic procedures and registration. (See Section 3.2.6.)
- d) Allow workers to be freely recruited and hired subject to notification to the competent state authority. (See Section 3.2.3.)
- e) Streamline and improve the system and procedures for mortgages, pledges and secured transactions generally. (See Section 3.2.7.1.)
- f) Further liberalise trade by reducing tariffs and tariff classifications to levels similar to other ASEAN countries and eliminate import/export restrictions. (See Section 3.2.9.)
- g) Liberalise foreign exchange controls so that foreign exchange can be freely obtained by those who need it from those who have it, without the need for case-by-case review and approval of the Central Bank. (See section 3.2.10.)
- h) Streamline entry visa procedures and issue visas upon arrival at a port of entry. (See Section

4.3 Summary of Measures

Myanmar seeks to integrate into the world and regional economies in part to promote its own economic development. In this regard, Myanmar has important advantages which will enable it to integrate into, and compete in the world economy. These significant advantages include comprehensive legal documents which are lacking in certain other Asian countries. In addition, Myanmar has ready access to some of the most important national sea lanes as well as natural riches such as oil and gas. Myanmar's most important resource is its people who are highly literate and well educated by world standards. Many international investors interviewed by the author have commented on the remarkable qualities of the Myanmar people including their intelligence, creativity, resourcefulness, ability to learn fast, and their willingness to work very hard.

Despite these significant advantages, it appears that, at the present time, Myanmar as a country is not internationally competitive as evidenced by declining foreign investment, rising unemployment, decreasing exports and a continuing flood of smuggled goods into the country. A major reason is that costs imposed in large part by the current policy and law implementation make Myanmar too expensive as a base for industry relative to other countries.

Many of the measures recommended in this paper will substantially improve Myanmar's international competitive position relative to other Asian countries by reducing or eliminating the costs of investment and technology transfer. Such measures will promote Myanmar's integration into the world and regional economies and will make Myanmar once again an attractive destination for both foreign and domestic investors. These measures are summarised as follows:

- a) Substantially devalue or float the Kyat. Devaluation or floating the Kyat will be a considerable stimulus for Myanmar exports and will greatly encourage foreign investment. (See Section 3.2.10.)
- b) For corporate income tax, eliminate arbitrary collection of income tax. The best tax incentive for investment is a relatively low and predictable corporate income tax rate applied to all companies. In addition, require the tax department to stop the practice of disallowing expenses honestly made which make the tax a gross instead of a net income tax. (See Section 3.2.4.)
- c) Reduce the charges for international phone, fax and the Internet to levels prevailing in the ASEAN region. (See Sections 3.2.3. and 3.2.5.)

- d) Eliminate the dual pricing system for utilities, electricity, water, internal transportation and other costs. (See Section 3.2.3.)
- e) Continue to reduce costs for land to levels comparable to other countries in ASEAN. (See Sections 3.2.3. and 3.2.6.)
- f) Reduce transaction costs and the potential for corruption and its costs by streamlining procedures as suggested in this paper and summarised in Section 3.2.3 above. (See Sections, 3.2.1, 3.2.3, 3.2.5, 3.2.7.1, 3.2.7.2, 3.2.9 and 3.2.10)

5. Focus Areas

5.1 Priorities

All of the recommended measures should be carried out in order to start generating rapid and sustained economic growth, promote integration into the world economy and build a state ruled by law. Since implementing these recommendations all at once is not feasible, priorities should be selected. Following is the recommended priority areas for carrying out the actions proposed in this report:

Business Entities

Revise Company Act – Section 3.2.1.

Revise Registration Act together with a national, centralised computerised register for all enterprises open to all members of the public – Section 3.2.2.

Tax

Income Tax Law Reform – Section 3.2.4.

Foreign Exchange

Easier access to foreign exchange – Section 3.2.10

Foreign Investment

Foreign Investment Law Revision – Section 3.2.3.

Economic Integration

Trade law liberalisation to meet WTO and ASEAN standards, increase exports and improve access to markets and materials for all Myanmar enterprises – Section 3.2.9

Secured Transaction

Comprehensive legal framework for secured transactions including a centralise, computerised, public register at the national level for mortgages and pledges – Section 3.2.7.2

Financial Sector

Banking regulations to provide a framework for prudential banking practice – Section 3.2.7.2

Deposit insurance and bank secrecy laws – Section 3.2.7.3

Negotiable Instrument

Clear and complete rules for negotiable instruments and improved check regulations – Section 3.2.7.2

Technology Transfer

Improve Science and Technology Promotion Law and related regulations to encourage

technology transfer – Section 3.2.5.

Enforcement of Contract

Enhance Civil Procedure and Civil Judgment Enforcement legislation to assure prompt, effective enforcement of contracts and legal rights – Section 3.3.1.

Insurance

Upgrade legal framework for insurance – Section 3.2.7.2

Administrative Procedure

Legislation to reduce conflict of interest by government agencies by shifting market regulation to independent commissions from line ministries and agencies whose main aim is to operate or promote certain sectors and industries – Section 3.3.6.

Comprehensive review and legislation on reducing conflict of interest for individual Government officials – Section 3.3.6.

Arbitration

Review Arbitration Law for domestic and international commercial arbitration and accede to New York Convention on Foreign Arbitral Awards – Section 3.3.2.

Predictability

Regulations requiring advance publication of all draft legal documents and notice and opportunity for public comment before finalisation and promulgation – Section 3.3.3.

Legal Information Legislation requiring publication before a legal document can have legal effect – Section 3.3.5.

Accounting

Rules requiring the use of International Accounting Standards (IAS), annual audits by qualified independent auditors, and publication of externally audited financial reports in accordance with international standards – Section 3.3.4.

Capital Market

Enactment of Securities Market Regulation (stock exchange) – Section 3.2.8

Land Property

Revision of the Land Laws to provide for a modern system of publicly open land registers and an improved system to resolve land disputes – Section 3.2.6.

Contract

Clarify Contract Laws and Rules – Section 2.2.1.

Consider adhering to the Vienna Convention on the International Sale of Goods – Section 3.3.1.

Technology Transfer

Streamline entry visa procedures for foreigners to encourage technology transfer –

Section 3.2.5.

Consumer Protection

Draft Consumer Protection Legislation – Section 3.3.6.

Fair Competition

Legislation to promote competition by reducing or regulating monopolies and restrictive trade practices appropriate to Myanmar conditions – Section 3.3.6.

Court Arbitration

Create specialised divisions and train judges for commercial matters – Section 3.3.2.

Environment

Complete environmental protection standards – Section 3.3.7.

5.2 Timing

For Myanmar to achieve its goal of becoming an industrialised, modernised country, the basic legal framework recommended above should be put into place soon – within no more than the next five years. Laws take time to come up with the effect for economic development. Officials, judges and market actors must get used to them. Inevitably, mistakes must be corrected and gaps filled in.

Countries equipped with transparent legal systems and better regulation (such as Hong Kong and Singapore) can guide the economy much efficiently. By paying the most attention to keep its legal system, both legislation and institutions such as the courts, up-to-date and efficient, brings big rewards in economic development and standards of living during good economic times and are helps to maintain them in more difficult economic times.

While Myanmar stays behind other neighboring countries in terms of normal law-making schedules, the fact is that the basic elements of a proper legal system for a market economy and state management thereof are established, and currently, Myanmar, if wishing so, has access to legal experts from Japan and neighboring countries to help it rapidly adjust to the needed legal framework. With the assistance and the growing knowledge of its own experts, Myanmar has the great advantage of modernising legislative and institutional solutions for each subject of the economic legal framework. In this regard, Myanmar should be careful not to get locked into legal mechanisms which have been shown to be outdated and inefficient. Moreover, considering the existence of basic substantive and procedural laws indicates that the few years time frame for legislative accomplishment is achievable, although technical knowledge should be introduced into current law-making procedures.

6. Conclusion and Suggestions

In this paper, the author tried to find the solutions to overcome the unstable business environment by analysing and classifying several legal instruments surrounding the private sector business in Myanmar.

By pursuing development of private sector activities, private enterprises will acquire larger self-determination rights in return of being responsible for consequences over their business activities. Larger self-determination rights means at the same time, the business risk will also be increased. There is a need for acquiring know how and skills to bear the risks. In addition, there are also needs to recognise and understand the change in the legal framework at the changing business environment.

The legal basis to regulate the market economy in Myanmar is not yet in its sufficient form. Even after the change of applicable law from inherited common law to SPDC laws, actual private sector laws are still premature to back up the future development of the market economy.

This means that for those enterprise managers there is a requirement not only to cope with the managerial risk but also to cope with the market risk caused by unstable legal system in evolution. The path toward lifting up of the state intervention and therefore to withdraw from interdependent relationship, enterprises should contribute to establish the practical market rules as the main players of the market economy. The emerging private enterprises will play a principal role in the market. Therefore, who are able to contribute more to the establishment of the rule based market are those emerging private enterprises. Those private enterprises should actively develop recommendations to the government as the key players of the market instead of waiting and asking for special or preferential treatment. The legal development in those developed market economy nations is marked by demand from the actual players of the market economy on rule making and enforcement and the establishment of market regulation by the government responding to such an action.

The law should be transparent and reliable worth of compliance by the people and should not only be the instrument of the state control. We can't forget that the major rule makers should be the market and its players. The managers of private enterprises should be determined, not only to learn from the practical business environment but also to carry on their role of adapting the legal framework suitable for the actual market environment.

We should recognise the difference of the perception between the objective of Myanmar private business management and the expected legal mechanism by the foreign market approach. Only after understanding such a different perception, design of fair and efficient private sector legal system will be possible.

The actual search for consistent, uniform and reliable legal environment for private enterprises should be pursued thoroughly and consistently.

Appendix

List of Legal Documents Collected and Studied

Appendix I

Some of the existing Laws, enacted prior to the present Liberalized Market Oriented Economic System of Myanmar, either directly related to commercial cases are as follows:

- (1) Contract Act, 1872.
- (2) Negotiable Instrument Act, 1881.
- (3) Trade Disputes Act, 1929.
- (4) Arbitration Act, 1944.
- (5) Arbitration (Protocol & Convention) Act, 1939.
- (6) Myanmar Companies Act, 1961.
- (7) Myanmar Special Companies Act, 1950.
- (8) Partnership Act, 1932.
- (9) Myanmar Copyright Act, 1914.
- (10) Myanmar Patents & Designs Act, 1945.
- (11) Myanmar Patents & Design (Emergency Provision) Act, 1946.
- (12) Sales of Goods Act, 1930.
- (13) Transfer of Property Act, 1882.
- (14) Transfer of Immovable Property (Restriction) Act.
- (15) Registration Act, 1909.
- (16) Registration (Temporary Provision) Act, 1947.
- (17) Payment of Wages Act, 1936.
- (18) Workmen's Compensation Act, 1924.
- (19) Myanmar Insolvency Act, 1920.
- (20) Myanmar Income Tax Act, 1922.
- (21) Land Custom Act, 1924.
- (22) Sea Custom Act, 1878.
- (23) Control of Imports and Exports (Temporary) Act, 1947.
- (24) Limitation Act, 1908, and Its Amendment Law, 1977.
- (25) Bill of Lading Act, 1856.
- (26) Myanmar Registration of Ships Act, 1841 and its Amendment, 1986.
- (27) Sea Going Vessels Navigation Act, 1952.
- (28) Myanmar Carriage of Goods by Sea Act, 1925.
- (29) Myanmar Carriage by Air Act, 1935.
- (30) Myanmar Aircraft Act, 1934

- (31) Myanmar Aircraft Rules, 1937.
- (32) Myanmar Airways Act, 1952.
- (33) Carries Act, 1865.
- (34) Railways Act, 1890.
- (35) Myanmar Five Star Shipping Corporation Law, 1964.
- (36) Merchandise Marks Act, 1889.
- (37) Merchant Shipping Act, 1894.
- (38) Land Acquisition (Mines) Act, 1885.
- (39) Urban Rent Control Act, 1952.
- (40) Foreigners Act, 1864.
- (41) Foreigner's Extension Act, 1949.
- (42) Registration of Foreigners Act, 1949.
- (43) Registration of Foreigners Extension Act, 1949.
- (44) Succession Act, 1925.
- (45) Lower Burma Town and Village Lands Act, 1898.
- (46) Upper Burma Land and Revenue Regulation, 1889.
- (47) Foreign Exchange Regulation act, 1917.
- (48) Foreign Recruiting Act, 1874.
- (49) Revenue Recovery Act, 1890.
- (50) State Grant Act, 1895.
- (51) Hotel and Restaurant Tax Act, 1949 (enacted in Myanmar version).
- (52) Sales Tax, 1952 (enacted in Myanmar version).
- (53) Myanmar Income Tax Law, 1974.
- (54) Profit Tax Law, 1976.

Appendix II

To be in line with the liberalised economic policy, new laws were enacted in accordance with changing business environments.

1. The Union of Myanmar Foreign Investment Law (1988)
2. State Owned Economic Enterprise Law (1989)
3. Private Industrial Enterprise Law (1990)
4. Promotion of Cottage Industries Law (1991)
5. Myanmar Hotels and Tourism Law (1993)
6. The Forest Law (1992)
7. Commercial Tax Law (1990)
8. The Tariff Law (1992)
9. The Central Bank Myanmar Law (1990)
10. The Financial Institution of Myanmar Law (1990)
11. The Myanmar Agriculture and Rural Development Bank Law (1990)
12. Savings Bank Law (1992)
13. Laws relating to Fishing Rights Vessel (1989)
14. Laws relating to Acquaculture (1989)
15. Myanmar Marine Fisheries Law (1990)
16. Fresh Water Fisheries Law (1991)
17. The Myanmar Insurance Law (1993)
18. The Co-operative Society Law (1992)
19. Development of Border Areas Natural Places (1993)
20. The Science and Technology Development Law (1994)
21. The Insurance Business Law (1996)
22. The Myanmar Mines Law (1978)
23. Myanmar Citizens Investment Law (1994)
24. The Myanmar Accountancy Council Law (1994)
25. The Myanmar Gemstones Law (1995)
26. The Myanmar Pearl Industries Law (1995)
27. The Highway Law (2000)

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