

## Governing the Gemstone Sector: Considerations for Myanmar

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Ongoing reforms present an unprecedented opportunity to improve management of Myanmar's multi-billion-dollar jade and gemstone industry, and reorganization of the sector may proceed most effectively if it is informed by the experience of other gemstone-producing countries. Based on a review of international policies and practices, as summarized in NRG's report *Governing the Gemstone Sector: Lessons from Global Experience*, this briefing highlights ten areas that the Myanmar government may consider as priorities for the country's reform process:

- 1 Develop a jade and gemstone policy.
- 2 Revise the legal framework.
- 3 Reform gemstone institutions.
- 4 Strengthen the licensing process.
- 5 Formalize citizen miners.
- 6 Adjust fiscal terms.
- 7 Amend the valuation process.
- 8 Support domestic beneficiation.
- 9 Facilitate traceability in the supply chain.
- 10 Improve transparency.

## 1. DEVELOP A JADE AND GEMSTONE POLICY

Myanmar stands to gain from formulating a national jade and gemstone policy, which should reflect open consultation with all stakeholders, identify shared priorities for sustainable development of the country's finite gemstone resources, and shape revision of the legal and institutional framework. The multi-stakeholder committee being set up to support this process may benefit from exchange with other countries, such as Pakistan,<sup>1</sup> that have pioneered similar approaches to strategy development.

We recommend that the government:

- **Sequence reforms appropriately.** A national jade and gemstone policy should precede and inform changes to the Myanmar Gemstone Law. Strategy development under the Ministry of Natural Resource and Environmental Conservation (MoNREC) will be most advantageous if it is closely coordinated with ongoing review of the legal framework by the Union Parliament. (See consideration 2.)
- **Undertake necessary assessments.** Policy discussion regarding the jade and gemstone sector is constrained by a scarcity of available and reliable data. Expert geological surveys, market studies, and other evaluations may be commissioned to support national planning.
- **Initiate broader stakeholder dialogue.** Beyond the necessary involvement of regional and local government, companies, and community representatives, the participation of actors with *de facto* control over jade and gemstone-producing regions—most notably the Myanmar military and Kachin Independence Army—is essential to crafting a workable management strategy. As in Sierra Leone, gemstone policy development should be linked to the process of national reconciliation.<sup>2</sup>

1 See Pakistan case study (p. 37-38) in Paul Shortell and Emma Irwin, *Governing the Gemstone Sector: Lessons from Global Experience* (Natural Resource Governance Institute: May 2017).

2 See, for example, description of the Diamond Area Community Development Fund (p. 45) in Shortell and Irwin, *Governing the Gemstone Sector*.

## 2. REVISE THE LEGAL FRAMEWORK

The Myanmar Gemstone Law (1995; amended 2003 and 2016) remains critically flawed, while additional reforms under discussion in the sitting Union Parliament<sup>3</sup> do not meaningfully address serious weaknesses in the governing framework. The government has historically relied on regulations, internal directives and contracts to establish key policies; however, these have not been publicly disclosed.

We recommend that MoNREC and the Union Parliament:

- **Consider adopting a single mining code (covering minerals, jade and gemstones).** Unlike most countries, Myanmar separates laws, regulations, and contracts for jade and gemstones from those for other minerals. This system has created legal ambiguity, increased coordination challenges, and resulted in the uneven enforcement of standards. These negative effects would be further exacerbated by the passage of separate laws for jade and other colored gemstones, as recently proposed by the American Gem Traders Association.<sup>4</sup>
- **Address remaining gaps.** The Myanmar Gemstone Law, including recent and proposed amendments, do not link to a gemstone or mining policy (see consideration 1) or adequately address the structure and mandate of gemstone sector institutions (consideration 3), the licensing process (consideration 4), mining conducted by citizens (consideration 5), production monitoring, taxation (consideration 6), the valuation process (consideration 7), rough marketing and sales, beneficiation (consideration 8), community grievance mechanisms, anti-corruption measures, and transparency and accountability mechanisms (consideration 10).
- **Harmonize existing laws.** Further review is needed to clarify inconsistencies between the Myanmar Gemstone Law and other current or proposed laws, including those regarding environmental conservation, investment, land rights, labor standards, state-owned enterprises, and taxation.

3 At the time of writing reforms have been submitted to the Parliament in the form of a “2017 Myanmar Gemstone Law,” which amalgamates 2003 and 2016 changes to the 1995 law along with additional modifications proposed by the Natural Resource Committee of the Amyotha Hluttaw.

4 See Erin Murphy, Peter Kucik, and Zachary Harris, *Step by Step: Myanmar Gem Industry Emerges from Isolation and U.S. Sanctions* (American Gem Traders Association: 2016).

### 3. REFORM GEMSTONE INSTITUTIONS

The Myanmar Gems Enterprise (MGE) does not yet meet international criteria for good governance of state-owned companies. MGE's principle functions, which include participating in joint ventures on behalf of the state, managing regular emporiums (auctions) and serving as the principle regulator for the jade and gemstone industry, have been undermined in practice by its vague mandate, limited capabilities, and the undue influence of the private sector over sector management.

We recommend that MoNREC and the Union Parliament:

- **Revisit MGE's role.** There remains significant ambiguity and overlap between MGE's responsibilities and those of the Department of Mines, Department of Geological Survey and Mineral Exploration, Environmental Conservation Department, Central Gemstone Central Supervisory Committee (see Chapter 10 of the 1995 Myanmar Gemstone Law), and the Working Committee for Issuing Permits, Inspecting and Supervising Gemstone Blocks (see MGE Licensing Directives). The scope and limitations of MGE's authority should be clearly defined in law, and steps should be taken to separate its commercial functions as a joint venture partner from its regulatory responsibilities.
- **Eliminate conflicts of interest.** Legislators should reconsider recent amendments to the Myanmar Gemstone Law that reserve seats for MGJEA on the Gemstone Central Supervisory Committee, an entity serves as the ultimate valuation body (consideration 7) and is responsible for tendering advice on sector regulation. MGJEA's role in overseeing jade and gemstone emporiums and managing certain associated revenues also merits scrutiny, particularly in light of recent allegations that association members embezzled approximately USD 100 million in emporium funds.<sup>5</sup>
- **Increase institutional capacity.** MGE currently employs approximately half the number of staff it is authorized to hire, and many key officers are appointed with little or no experience related to the gemstone sector. Its administration should be brought in line with best international practices, including by hiring or promoting technically skilled professionals to management positions, publishing detailed annual reports, and undergoing regular public audits.

5 See Chan Mya Htwe, "Tribunal to investigate gem association embezzlement claims" *Myanmar Times*, 2 June 2016.

#### 4. STRENGTHEN THE LICENSING PROCESS

Although Myanmar distributes extractive rights via a bidding process, the competitiveness of license allocation has been reduced by a lack of transparency and collusion between officials and companies. Approval of permits has outstripped government institutions' ability to monitor operations, contributing to widespread violations of license terms. Myanmar is unusual in prohibiting foreign investment in gemstone mining, and this policy may have further slowed the diffusion of modern mining techniques and standards for environmental and social management.

We recommend that MoNREC and the Union Parliament:

- **Set limits on license allocation.** The approval of an unusual high number of jade and gemstone mining licenses—totaling more than 20,000 as of early 2016 (prior to the current ban on licensing)—has allowed for the rapid depletion of gemstone deposits and eroded government oversight of mining operations. Myanmar may follow the example of other countries, such as Sri Lanka,<sup>6</sup> in setting licensing targets that preserve resources for the future and support effective monitoring.
- **Reconsider license and contract terms.** Myanmar grants permits for mechanized gemstone mining at a smaller scale (one acre for privately operated blocks) and shorter tenure (typically three to five years) than is generally observed in other countries. The sector is also highly mechanized, with approximately one backhoe in operation for every two acres licensed for production.<sup>7</sup> The terms of gemstone mining licenses should be adjusted to encourage extraction at an appropriate pace and with adequate investment, robust assessment and mitigation of environmental, social, and health impacts, construction of necessary infrastructure and responsible disposal of wastes, and the formal participation of citizen miners. (See consideration 5.) A comprehensive assessment of Myanmar's model joint venture contract is needed to bring its agreements in line with international standards.
- **Modify bidding processes.** Extractive rights should be allocated in a clear, open, and competitive manner based on equal treatment of companies. Authorities and the public should be able to know the identities of individuals who ultimately own and control bidding companies. In the case of mechanized mining projects, the government should establish technical criteria for license allocation and thoroughly assess applicants against potential conflicts of interest, evidence of past criminal activity, and record of contract violations or other grievances.

<sup>6</sup> See Sri Lanka case study (p. 19-20) in Shortell and Irwin, *Governing the Gemstone Sector*.

<sup>7</sup> Based on data provided by the Myanmar Gems Enterprise (MGE).

## 5. FORMALIZE CITIZEN MINERS

As in other countries, the influx of citizen miners to Myanmar's jade-producing regions has been accompanied by an uptick in disease and drug use, increased crime, and unsanctioned incursions into company concessions. International experience indicates that these challenges cannot be mitigated simply by strengthening the rule of law; augmenting the presence of military or security personnel is unlikely to deter illegal mining but may increase the incidence of human rights abuses and corruption.

We recommend that MoNREC and the Union Parliament:

- **Establish a clear legal basis for citizen mining.** Unlike most other countries, Myanmar's governing framework effectively excludes citizens from legally participating in gemstone extraction. The government should lay out a path for formalization that closely aligns with the capabilities of citizen miners, for example by establishing artisanal gemstone mining licenses, encouraging the organization of mining cooperatives, and/or piloting a local or web-based mining registration system for miners and traders.
- **Provide citizen miners access to resources.** The rights of citizen miners *vis-à-vis* mining companies should be clarified in law. Depending on local geology, specific tracts may be set aside for citizen mining (see, for example, Tanzania<sup>8</sup>) or companies holding permits may be encouraged to subcontract citizen miners organized in cooperatives (see, for example, Brazil<sup>9</sup>).
- **Strengthen exchange between investors, citizen miners and local communities.** The government should facilitate sustained dialogue between investors and local populations, which in cases such as Tanzania's Mwadui Community Diamond Partnership<sup>10</sup> has led to the development of shared approaches to addressing company concerns and community needs.

8 See Tanzania case study (p. 28-29) in Shortell and Irwin, *Governing the Gemstone Sector*.

9 See Brazil case study (p. 26-27) in Shortell and Irwin, *Governing the Gemstone Sector*.

10 Ibid 8.

## 6. ADJUST FISCAL TERMS

Myanmar taxes the gemstone sector at significantly higher rates than other countries, and there is evidence that this has contributed widespread underreporting by companies. Key revenue streams include license fees (which in Myanmar is understood to cover signature bonuses as well as administrative fees), the state's production share from joint ventures (25 percent for certain companies), royalties (20 percent of the value or rough production), commercial tax (a 5 percent general tax plus a 15 percent special commodity tax for rough gemstones or a 5 percent special commodity tax for polished gemstones), corporate income tax (25 percent for domestic companies), and service fees (1 to 3 percent). Much of the country's jade is reported to be subject to further informal taxation by the Myanmar military and/or Kachin Independence Army.

We recommend that MoNREC, the Union Parliament and the Ministry of Planning and Finance (MoPF):

- **Clarify the fiscal framework.** Ambiguity in the Union Tax Law and Myanmar Gemstone Law, especially vague tax exemptions in the latter (see section 27(b) of the 1995 version), undermine effective tax administration. Coordination remains weak between MGE, the Internal Revenue Department, and other agencies involved in revenue collection.
- **Set rates that encourage participation.** Myanmar levies royalties at rates 2 to 20 times greater than those in most countries, and also charges unusually high commercial tax on the sale, import and export of gemstones. The government may benefit from establishing special rules for citizen miners, which tend to generate special challenges for revenue collection.<sup>11</sup>
- **Rebalance revenue collection.** Unlike most countries, Myanmar captures a large share of gemstone revenues through license fees (including signature bonuses), which may not secure the state a good deal for its resources and can encourage the unsustainable allocation of extractive rights. The government does not appear to collect its fair share of royalties (see consideration 7), which are a primary source of gemstone revenue for many other nations.
- **Improve incentives to sell via the emporium.** Official data indicates that around 70 percent of MGE's total revenues are collected at emporiums held jointly with MGJEA,<sup>12</sup> yet industry sources estimate that 75 percent or more of all jade and gemstone transactions occur outside of this channel. Myanmar may consider adopting certain fiscal incentives to increase participation at the emporium given its outsized role in revenue generation. Additional scrutiny of emporium transactions also appears warranted, as less than half of sales agreed at events held since 2013 were concluded.<sup>13</sup>

11 See, for example, Sierra Leone and Guyana case studies (p. 43) in Shortell and Irwin, *Governing the Gemstone Sector*.

12 Based on data provided by the Myanmar Gems Enterprise (MGE).

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## 7. AMEND THE VALUATION PROCESS

Myanmar's jade and gemstones are assessed by valuation bodies consisting of no fewer than nine persons, including three representatives from MGE, four from other government institutions, one from MGJEA and one external expert. For the fiscal years between 2011/2012 and 2015/2016, the Government received royalties of MMK 337 to MMK 450 (worth less than USD .50) per kilogram of jade declared and MMK 13 to MMK 18 (worth USD .01 to .02) per carat of gemstone declared.<sup>14</sup> These figures suggest that Myanmar's resources have been routinely valued well below the fair market rate.

We recommend that MoNREC and MoPF:

- **Toughen oversight.** Current rules open the door for clientelism by allowing the chairman of the valuation body (an MGE officer) ultimate discretion in determining gemstones' official value, whereas many other countries seek to safeguard the valuation process by holding auctions, commissioning third party valuers, or requiring checks against reference prices.<sup>15</sup> While MGE employs a number of skilled assessors, it is unclear whether other members of the committee possess the requisite gemological and market knowledge to independently verify the government assessor's valuation.
- **Conduct audits.** Carrying out randomized physical and financial audits and imposing appropriate penalties may encourage accurate declarations by companies. Investigations are most effective when they supported through investments in necessary infrastructure (such as gemstone laboratories in mining areas) and acquisition of experienced staff (for example, those with knowledge of gemstone valuation methods and/or accounting practices).

14 Based on data provided by the Myanmar Gems Enterprise (MGE).

15 See country case studies (p. 47-48) in Shortell and Irwin, *Governing the Gemstone Sector*.

## 8. SUPPORT DOMESTIC BENEFICIATION

Myanmar stakeholders increasingly recognize the potential benefits of developing a domestic value-added gemstone processing industry. Leadership by key industry actors has helped catalyze important policy changes, including the establishment of a first gemstone laboratory and the revision of certain tax rates. Yet it is important to recognize that the outlook for beneficiation remains challenging; Myanmar borders the world's three leading markets for gemstone processing (China, India, and Thailand) but currently lacks the economic fundamentals or policies needed to compete with these neighbors.

We recommend that MoNREC, MoPF and MGJEA:

- **Develop a plan for the midstream and downstream value chain.** Assessments are needed to determine specific needs and potential areas of comparative advantage for the cutting and polishing industry. It may be advantageous to begin by developing expertise in lower-value gemstones such as amber, peridot, and spinel, that are produced in significant quantities in Myanmar but have not been a primary focus for Chinese, Indian and Thai cutters. Borrowing from the experience of Sri Lanka,<sup>16</sup> Myanmar should capitalize on its reputation for high-quality jade, ruby, and sapphire by developing a national branding strategy.
- **Support skill development and technology transfer.** A scarcity of skilled and productive labor remains a key impediment to developing a robust midstream industry; Myanmar's leading jewelry companies overwhelmingly import polished gemstones from overseas, while significant domestic value-added processing operations either operate at a loss or depend on foreign workers. The state can support domestic beneficiation by establishing international-quality laboratories and training centers, especially in gemstone-producing regions.
- **Adjust trade and taxation policies.** Most beneficiation hubs, including Myanmar's neighbors, benefit from liberal trade policies and provide various forms of financial support for the gemstone processing sector.<sup>17</sup> Myanmar remains at a disadvantage in terms of export tariffs (it levies a 15 percent tax on rough gemstone exports and 5 percent tax on polished gemstone exports), taxation of gems and jewelry companies (it lacks significant tax breaks or lending facilities), and external promotion (the government does not regularly participate in international gem fairs).

<sup>16</sup> Ibid 6.

<sup>17</sup> See, for example, Thailand case study (p. 54-55) in Shortell and Irwin, *Governing the Gemstone Sector*.

## 9. FACILITATE TRACEABILITY IN THE SUPPLY CHAIN

Burgeoning demand for jewelry that is “responsibly sourced” in accordance with certain standards—for example, those that are produced without the use of child or forced labor, unsafe working conditions, ties to conflict or corruption, or significant impacts on the environment, indigenous groups or other vulnerable communities—has increasingly prompted retailers to demonstrate the provenance of their gemstones. As a consequence, countries and companies that can certify their production are increasingly favored by global (especially Western) markets. Traceability in Myanmar remains limited by gaps between operating practices and international standards, and the informal nature of relationships throughout the supply chain.

We recommend that MoNREC, MoPF and the Ministry of Foreign Affairs:

- **Strengthen international cooperation.** Much of Myanmar’s jade and gemstones production is trafficked illegally into China and Thailand. Improved collaboration with law enforcement, customs authorities, and industry associations in these countries is needed to combat prevalent smuggling.
- **Comply with OECD guidance.** The government should take steps to harmonize the legal framework with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,<sup>18</sup> and support Myanmar stakeholders in conforming to and documenting their compliance with relevant standards.
- **Identify potential for certification mechanisms.** Myanmar may work towards adopting certification systems for colored gemstones in coordination with emerging international initiatives.<sup>19</sup> In the case of jade, this process may be partially informed by Tanzania’s experience developing the Tucson Tanzanite Protocols, as both resources originate from a confined region in a single country.

18 For more, see p. 61-62 in Shortell and Irwin, *Governing the Gemstone Sector*.

19 For more, see p. 60-61 in Shortell and Irwin, *Governing the Gemstone Sector*.

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## 10. IMPROVE TRANSPARENCY

Myanmar scores poorly in terms of transparency in NRGi's Resource Governance Index.<sup>20</sup> Although a growing body of independent research has helped to elevate the quality of public debate around jade and gemstone governance, the government yet to release key information related to the sector.

We recommend that MoNREC, the Union Parliament and the Myanmar Extractive Industries Transparency Initiative (MEITI):

- **Publish relevant laws and contracts.** The Myanmar Gemstone Law, related amendments, and accompanying regulations and directives are not currently accessible to stakeholders and the general public. Following the example of countries including Cameroon, Democratic Republic of Congo, Guinea, Liberia, Malawi and Sierra Leone, Myanmar should disclose gemstone mining contracts.
- **Expand scope of MEITI disclosures.** While Myanmar's participation in the Extractive Industries Transparency Initiative (EITI) has shed unprecedented light on the extractives sector, the multi-stakeholder group must work to strengthen reporting on the jade and gemstone industry. The country's first EITI report, focusing on the 2013/14 fiscal year, was limited to only 30 companies (out of approximately 900 active in the sector) and covered just 35 percent of these entities' combined payments to government.<sup>21</sup> Myanmar should continue working within the framework of EITI to develop a publicly-available license cadaster and publish beneficial ownership information pertaining to the gemstone sector.
- **Allow for independent monitoring.** To support ongoing reform and strengthen public accountability, access to gemstone-producing areas should be protected for academics, civil society, international organizations and the media.

20 The 2013 Resource Governance Index is available at: <https://resourcegovernance.org/resource-governance-index>. The 2017 Resource Governance Index will be launched in Summer 2017.

21 Based on analysis of Myanmar Extractive Industries Transparency Initiative: *2013/2014 Myanmar EITI Reconciliation Report* (January 2016) and *Scoping Study for the First Report* (September 2015).