

Myanmar EITI Beneficial Ownership Project

*Beneficial Ownership
Pilot Project Report*

1. Executive Summary

This report summarises the results of Myanmar's Beneficial Ownership (BO) Data Pilot and provides recommendations on expanding the pilot to meet the EITI BO Requirements by January 2020.

The pilot took place between January and July 2018, with the participation of 21 companies from the oil and gas, mining, jade and gems and forestry sector. The overall key findings are:

- The pilot was a useful step in the process of BO implementation, leading to significant learning outcomes to inform MSG's strategies for compliance. It was positively acknowledged by the EITI International secretariat.
- The majority of the volunteering participating corporations (17 out of 21) disclosed information on their legal and beneficial owners. So was the notion of politically exposed person (PEP) well understood by all participating companies, with 2 out of the 31 disclosed beneficial owners declared as such. Notably, all volunteering companies had before already participated in MEITI reporting processes, suggesting that the pilot benefited from that most companies were generally aware of EITI and BO procedures already.
- Challenges remain, however, in connection with the viability of BO disclosure without changes to the regulatory framework that would ensure compliance levels and provide legislative grounds to clarify and validate disclosed data.
- The approach taken by the pilot did broadly hold up to EITI requirements, but could benefit from refinements on the applied BO and PEP definitions, disclosure form and data protection and validation procedures.
- Going forward, adequate industry-guidance on BO definition and disclosure form, as provided during the pilot, will continue to be necessary for any scaled implementation to be successful. So will capacity-building activities for regulators remain to be necessary in regards to BO data collection, validation and management.

2. Background

The objective of the Beneficial Ownership (BO) Data Pilot has been to provide a significant learning opportunity in preparation of upcoming BO disclosure through the EITI in Myanmar. Working with 21 volunteering companies from the oil and gas, mining, jade and gems and forestry sector, the BO Data Pilot aimed to provide guidance on the BO definition and template, collect and summarize BO data in a comprehensible format, and outline obstacles encountered, lessons learnt and recommendations on expanding the pilot to meet the EITI BO Requirements by January 2020.¹

The 2015 and 2016 reconciliation reports from the Myanmar Extractive Industries Transparency Initiative (MEITI) already included BO disclosure on a voluntary basis.² However, with none of the 141 reporting companies returning the BO disclosure form, the approach taken did not yield satisfactory results. According to the Independent Administrators (IA), the lack of disclosure was mostly due to it not being mandatory, but also because little emphasis was put on BO during preparatory workshops. Facing a tight schedule to deliver the reports, neither were the BO concept and template adequately explained, nor were any incentives given to companies that are willing to go beyond the minimum EITI requirements and disclose their beneficial owners.

The scope and approach to the BO Data Pilot were designed after seeking broad consultations with relevant stakeholders including various government agencies, civil society and private sector representatives during an inception mission in January 2018. While there has been no legal requirement for companies to comply, participating companies were taking part in the BO Data Pilot on a voluntary

¹ 2016 EITI Standard, URL: <https://eiti.org/document/standard#r2-5>

² See MEITI website for recent reports, URL: <https://myanmareiti.org/en>

basis. This would not have been possible without the support of the Myanmar Federation of Mining Association (MFMA) and Myanmar Gems and Jewellery Entrepreneurs Association (MGJEA) which played an active role in ensuring the participation of some of their member companies.

The BO Data Pilot was carried out between January and July 2018 with the support of a consortium of consultants from Adam Smith International (ASI) and OpenOil (OO), which were engaged to advise and support the MSG, and Myanmar Stakeholders to implement the BO Roadmap in accordance with EITI Requirement 2.5. This engagement was made possible by a Grant Agreement between the Government of the Union of Myanmar and the World Bank for funding support to cover implementation of the MEITI Work Plan from 2017-2019.

3. Pilot Results

(a) Participating Companies

The BO Data Pilot engaged a total of 21 companies operating in Myanmar, including 9 mining companies, 5 oil and gas companies, 5 jade and gems companies, and 2 companies active in the forestry sector. Of these, 17 companies provided information on their legal and beneficial owners (see Annex II).³

(b) Duration and Activities of the Pilot

Preparation for the BO Data Pilot began in January 2018 in form of broad consultations with a variety of stakeholders in Myanmar. Following a number of awareness-raising activities, engagement with the volunteering companies then culminated at a pilot kick-off workshop in Yangon, May 14th, with about 70 participants including representatives from the volunteering companies and observers from Myanmar's MSG, various government agencies, civil-society and international organisations. The workshop reiterated key concepts, such as the definitions for beneficial owners and politically exposed persons (PEP), and participants were subsequently guided through the BO disclosure form. Before concluding the workshop with a group discussion, two group exercises were carried out that allowed participants to practice filling out the BO disclosure form using a real-world example and receive guidance on how to obtain information on the beneficial owners of a company.

Following the workshop, the BO disclosure form was shared with company representatives, who were requested to hand in the filled-out template within two weeks. Subsequently, the submitted information was reviewed by the BO Consultants together with the NCS and clarifying questions were raised whenever the submitted information seemed incomplete or not in line with the applied definitions. In addition, a number of data validation methods were tested, such as cross-checking the data with other available data sources, e.g. from the Directorate of Investment and Company Administration (DICA), or via simple internet research. Due to its voluntary nature, however, the pilot mostly relied on the attestation from participants to affirm that the disclosed data is genuine and there was no legal ground on which any of the disclosed data could be contested. Moreover, this meant that only little pressure could be put onto volunteering companies to provide clarifications, with only about half of the companies responding to such requests. This process – including first submissions, review, resubmissions, finalisation – lasted for six to eight weeks.

(c) Summary Results

With 17 out of the 21 volunteering companies providing information on their legal and beneficial owners, the BO Data Pilot largely led to satisfactory results. In total, these corporations stated 31 natural persons that hold 5% or more of the shares or voting rights, directly or indirectly, or exercise control over the respective participating companies via other means. Notably, a majority of the volunteering companies (11 out of 17) stated that their beneficial owners hold ownership in their companies directly. On average, these companies disclosed information of 3 beneficial owners per company, with only 2

³ A visualisation of the collected data can be found here: <https://onodo.org/visualizations/38418>

companies stating one sole beneficial owner. 3 out of 17 companies disclosed ownership information about indirect shareholders. With two exceptions, which stated voting rights as the determining factor, all other companies determined beneficial ownership based on shares only (10 out of 17) or as a combination of both voting rights and shares (5 out of 17).

Moreover, a majority of the participating companies provided additional information on their beneficial owners, such as date of birth, identity number, country of residence, residential or service address. All companies were also requested to disclose if any of the beneficial owners fall under the definition of politically exposed person. Of the 31 disclosed beneficial owners, two were declared as PEPs, namely U Nay Win Tun as shareholder in Ruby Dragon Mining Co Ltd and Ruby Dragon Jade & Gems Co Ltd and U Maung Ko as shareholder in Eternal Mining Co Ltd. Both were stated to be former Members of Parliament.

Of these 17 companies, however, 4 participants disclosed ownership information only up to the level of their legal owners. This might at least partially relate to unclarities in the applied BO definition, that fails to deal with the particularities of state-owned enterprises (SOEs) and publicly listed corporations, where ownership does not necessarily lie in the hands of natural persons (see lessons learnt section for more).

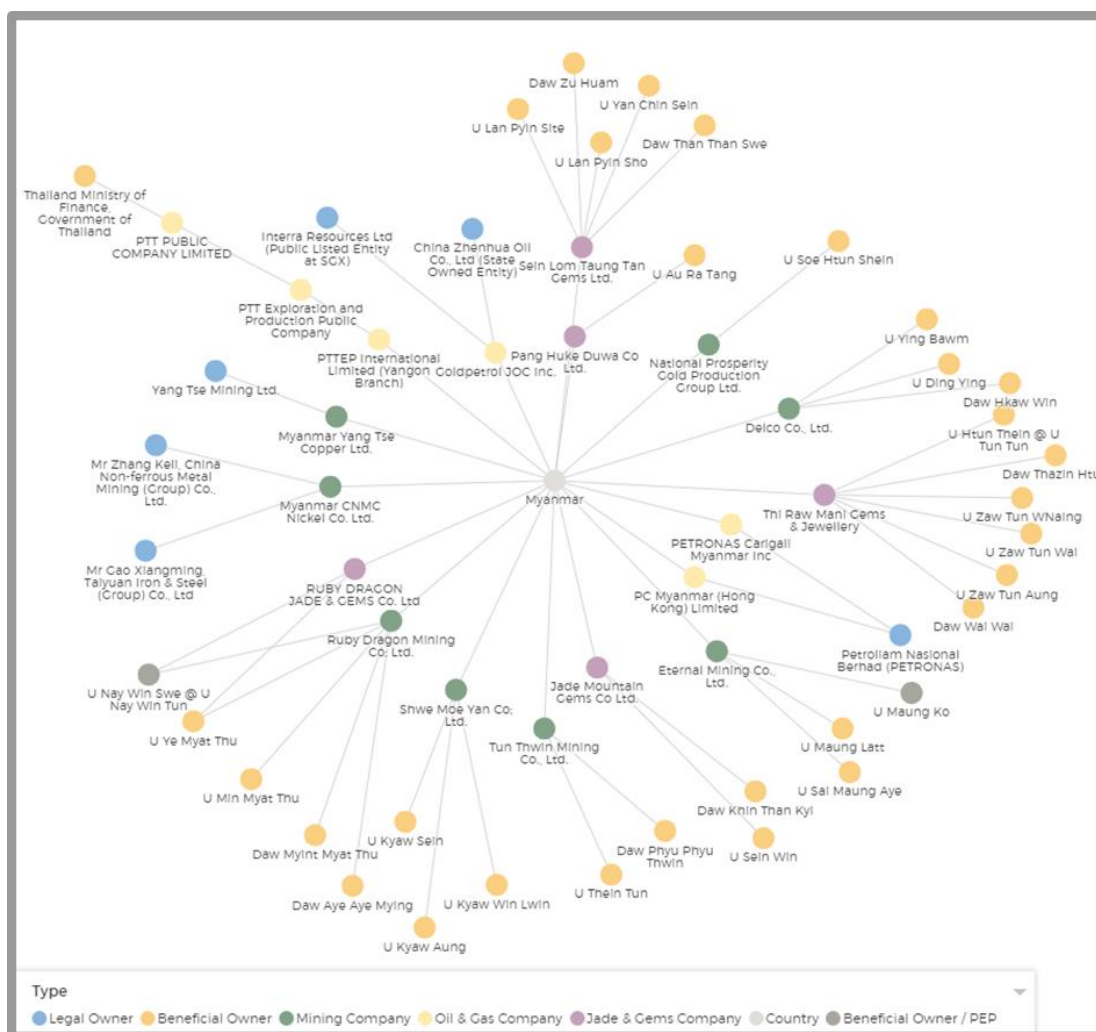


Chart 1: Myanmar's BO Data Pilot results

4. Lessons Learnt

This section outlines a few of the challenges that have emerged during the BO Data Pilot. It describes key issues, documents examples from the pilot and lists the main lessons learnt for future consideration.

(a) Establishing a Precedent

Conducting the BO Pilot was a positive learning step for BO implementation in Myanmar, as acknowledged by EITI International.. A majority of the participating corporations (17 out of 21) disclosed information on their legal and beneficial owners. Moreover, companies seemed to have no problems providing additional information on their beneficial owners, such as date of birth, identity number, residential address or whether their beneficial owners fall under the definition of politically exposed person. This needs to be understood in the context that all volunteering companies had already participated in MEITI reporting processes, and thus had the advantage over other companies in that they were generally aware of EITI and BO procedures. Whereas this is largely true for all oil and gas companies in Myanmar, the pilot only covered just over 3% of the gems and jade and about 11% of the mining companies operating in the country, according to MEITI estimates. Subsequently, the results of the BO Data Pilot suggest that BO disclosure is likely to be scalable and not overburdening oil and gas companies, but more challenging in regards to the gems, jade and mining sector. BO implementation needs to be accompanied with significant awareness raising and capacity building activities for these sub-sectors.

Moreover, it is important to note that the pilot rested on voluntary participation. This meant that there were limited grounds on which companies could be asked to validate or even clarify any of the disclosed information. For any scaled BO implementation to be meaningful, it will therefore be necessary to consider changes in the regulatory framework that would legislate disclosure requirements. At the same time, this process will also have to seek company feedback, as it was a clear demand from company representatives during the pilot workshop that BO legislation needs to be streamlined with existing law and keep administrative costs at a minimum.

(b) BO and PEP Definitions

The BO Data Pilot shed light on three gaps in the applied BO definition. The first gap relates to state-owned enterprises (SOEs), and in particular foreign ones. Since SOEs are typically controlled by dedicated government agencies rather than by individual shareholders, they are currently not covered in the BO definition, which assumes ultimate owners to be natural persons. Relevant examples from the pilot companies include Myanmar CNMC Nickel Co Ltd, Myanmar Yang Tse Copper Ltd, PC Myanmar (Hong Kong) Limited, PETRONAS Carigali Myanmar Inc, PTTEPI Myanmar, and Goldpetrol JOC Inc. Out of these companies, however, only PTTEPI Myanmar disclosed its links to a foreign government by stating Thailand's Ministry of Finance to be its ultimately controlling entity, whereas others only provided information up to the level of the holding SOEs. Amending the BO definition to deal with SOEs, however, will not imply excluding those domestic SOEs, that have been privatised, from reporting.

The second gap concerns publicly-listed companies. The 2016 EITI Standards (Requirement 2.5) states as the minimum that these companies have to disclose the name of the stock exchange and include a link to the stock exchange filings where they are listed. This provision is not reflected in MEITI's BO definition, however. Neither are listed companies excluded from reporting BOs, nor are the particularities of listed companies dealt with in any other form. This is particularly relevant due to the fact, that natural persons can still have significant stakes in listed corporations. An illustrative example from the pilot is that of Interra Resources Ltd, majority shareholder in Goldpetrol JOC Inc and traded in Singapore. As stated in Interra's latest annual report, the company's major shareholders include two Indonesian businessman, Edwin Soeryadjaya and Sandiaga Salahuddin Uno, both holding 13.54% of the company's shares.⁴ Applying the 5% threshold, as stated in Myanmar's BO definition, both

⁴ See Interra's 2017 annual report, URL: <http://www.interraresources.com/download/annualreports/2018-04-12%20Interra%20Resources%20Limited%20AR%202017.pdf>

individuals therefore count as beneficial owners, with the latter also falling under the definition of foreign PEPs in his function as Deputy Governor of Jakarta.⁵

A third gap in the applied BO definition regards the issue of confidentiality. While BO disclosure is globally welcomed as a means to fight tax evasion, money laundering and terrorist financing, commentators have repeatedly raised that any BO implementation will have to find the right balance between transparency and the right to privacy.⁶ For Myanmar, the practical implication is that it should be clearly defined what data will only be available to government agencies and parties with statutory obligations (such as banks and civil-law notaries), and what will be publicly disclosed. This particularly concerns any additional information provided on the identities of the beneficial owners, such identity number or residential address. The need to respect privacy laws should therefore be considered going forward.

The notion of PEPs seemed to be broadly understood by all participating companies, with 2 out of the 31 stated beneficial owners declared as such. There was some unclarity in regards to the application of the definition, however. While a range of public functions are specified in the definition, such as for example Cabinet Members or Members of Parliament, it was not clear to all participants if simply disclosing whether or not a beneficial owner falls under this definition is sufficient, or if in addition they also need to provide information on the respective political position of a beneficial owner.

BO and PEP Definitions - Recommendations:

→ Adapt MEITI's BO definition to explicitly deal with state-owned enterprises. To do so, SOEs should be required to disclose the state and administrative body controlling them (consider BO definition of the Subsoil Law of the Kyrgyz Republic, dated May 19 2018, or similar regulation).

→ To deal with listed companies, MEITI is recommended as a minimum to reflect Requirement 2.5.f.iii of the 2016 EITI standard in its BO definition, which states that publicly-listed companies are required to disclose the name of the stock exchange and include a link to the stock exchange filings where they are listed.

→ Clearly regulate that some of the collected data (e.g. identify numbers and residential address) are only available to government agencies and parties with statutory obligations, with everything else published.

→ Require PEPs to also disclose their public function and duration of their position.

(c) Timeliness, Comprehensiveness and Reliability of the Data

The BO Data Pilot produced satisfactory results in regards to data timeliness. Covering the period from 1 April 2017 to 31 March 2018, volunteering companies were requested to provide information on their beneficial owners for Myanmar's most recent fiscal year, leading to the disclosure of up to date information similar in its timeliness compared to typical disclosure regimes such as on stock exchanges.

In regards to data comprehensiveness, the BO Data Pilot applied a scope broadly in line with international best practice and the EITI requirements, but surfaced two areas which could be considered going forward. The first concerns the case of indirect ownership, where data on intermediaries could capture those companies that stand between the company operating in-country and their ultimate beneficial owners. Such data would allow authorities to better track revenue flows, for example in form of dividend payments, but also increase the government's ability to verify any stated beneficial owners. In the current EITI model BO template, however, the disclosure of intermediaries is only optional and only 2 out of the 21 pilot companies provided information on them.

⁵ https://en.wikipedia.org/wiki/Sandiaga_Uno

⁶ PWC, Considering Privacy on the Brink of Full Transparency, URL: <https://www.pwc.nl/en/assets/documents/pwc-considering-privacy-on-the-brink-of-full-transparency.pdf>

A second issue concerning the comprehensiveness of data lies in the absence of information on where intermediaries and parent companies are registered. This is particularly relevant to assess the applicable laws under which foreign companies are governed, but also from a taxation point of view. For example, to tackle tax planning issues, such as treaty shopping, would require the government to understand the countries of incorporation of an entity's immediate and ultimate parent companies. This knowledge would then allow authorities to assess if any favourable double taxation agreements (DTAs) apply, that would help the company to any tax reductions or exemptions, such in regards to withholding or capital gains taxes.⁷

Finally, in regards to data reliability, the pilot showcased that the data by itself only provides limited means to be validated. As a consequence, there is a need to install additional procedures that would help verify the correctness of the information provided by companies. This particularly relates to the issue of nominee shareholders, such as through an agent, custodian, or a trustee, the use of which can obscure the "real" beneficial owners of a company. As a minimum validation mechanism, the BO Data Pilot therefore already included an attestation component, meaning that companies had to certify the truthfulness of the BO disclosure form and provide the name and position of the signee. Additionally, international best practice to tackle this issue suggests for authorities to require the company to attach supporting documentation to the declaration form, e.g. articles of association, powers of attorney, or copies of shareholder registers.

Another confirmation approach could be to require that the company requests and provides a written confirmation from the beneficial owner directly, and / or require that the company provides a verification of the identity of the BO, e.g. by attaching a copy of proof of identity. While these approaches offer different levels of assurance, going forward, the government should consider applying a combination of

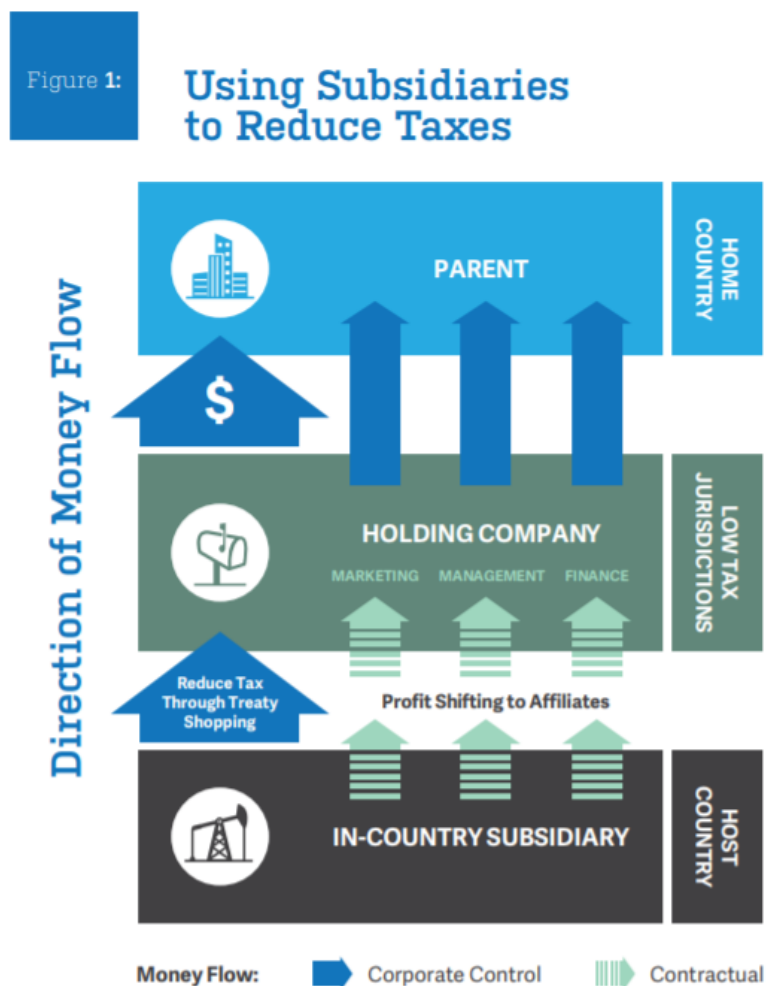


Figure 1: Using Subsidiaries to Reduce Taxes, Source: PWYP

⁷ PWYP, How Governments Fail to Secure a Fair Share of Natural Resource Wealth, URL: <http://www.publishwhatyoupay.org/wp-content/uploads/2017/07/PWYP-Report-ManyWaysToLoseABillion-WEB.pdf>

such measures combined with spot checks. At the same time, authorities will have to balance their validation approach with the administrative burden on companies.⁸

Data Timeliness, Comprehensiveness and Reliability - Recommendations:

- Ensure timeliness of data by requiring information to be provided as beneficial ownership changes or at regular fixed intervals.
- Consider the disclosure of intermediaries and country of incorporation to be mandatory.
- Design a workable mechanism for confirming and spot-checking provided information.

(d) Declaration Form and Additional Capacity-Building Needs

The pilot displayed that the model BO form designed by the EITI International Secretariat, slightly adapted to local circumstances, holds up to the requirements of successful BO disclosure in Myanmar and there have been no comments suggesting the need for any major revisions to the form. However, some minor changes could be useful to avoid common misunderstandings and simplify the disclosure process. This includes applying a numbering system to all fields in the template, which would allow for more targeted guidance that includes field by field descriptions. Here, one potential path forward could be in collaboration with DICA, which expressed their willingness to amend their data collection forms to include BO information. Moreover, it is recommended that the MSG works together with the EITI International Secretariat on drafting written guidelines to reporting entities, that will be shared with all companies upon sending the template. Such guidelines could also include a list of common misunderstandings. Notably, the difference between directors and shareholders, but also the above mentioned particularities of publicly-listed and state-owned companies could be explained in these guidelines. In addition, the fields related to PEP disclosure were repeatedly mistaken to either require the disclosure of the position of a BO within the company, which could be anticipated in the guidelines as well.

A key finding of the pilot, however, is that BO disclosure possible in Myanmar if companies receive sufficient guidance on the BO concept and template. Authorities in Myanmar will therefore need to continue providing such guidance, as provided in the pilot, in order to ensure comprehensive and useful disclosures. Again, collaborations with DICA, which expressed their willingness to support MEITI, will prove helpful for future-awareness raising activities. Moreover, this shall continue to include test-runs with industry members, and where possible, workshops with reporting entities are recommended. Moreover, there are additional capacity-building needs on the side of the regulators as well, which in particular should include support in regards to data validation, but could also aim to provide guidance on how the BO disclosure process can be utilised to mitigate tax evasion. Notably, this is already suggested in the draft MEITI BO workplan.

Declaration Form and Additional Capacity-Building Needs - Recommendations:

- Adjust model BO template to apply a numbering system to all fields.
- Work with EITI International to design written guidelines, including on common mistakes.
- Continue to provide guidance and capacity building for companies, including test-runs filling out on the disclosure form.

⁸ OpenOil, How to Improve Integrity Due Diligence in Mining License Management, URL: <http://openoil.net/2017/04/11/reputable-mining-investors-wanted-in-sierra-leone-how-to-improve-integrity-due-diligence-in-mining-license-management/>

NRGI, Tackling Hidden Company Ownership Through Myanmar's EITI Process, URL: <https://resourcegovernance.org/analysis-tools/publications/beneficial-ownership-tackling-hidden-company-ownership-through-myanmars>

→ Consider capacity-building for regulators in regards to improving their understanding of BO concepts, the process of BO data collection and management, confidentiality and data protection.

5. Conclusions

The BO Data Pilot also led to a great learning moment in regards to the implementation of BO disclosure and surfaced a range of lessons for future consideration. Notably, these lessons included necessary improvements and clarifications to the applied definitions, such as the need to deal with state-owned and publicly listed companies. Moreover, in terms of comprehensiveness, the pilot showcased avenues to allow authorities to better deal with tax planning issues by including the disclosure of intermediaries and country of incorporation. Whereas the provided data could only be partially verified, the pilot offered some learnings on future validation mechanisms, such as by requiring additional documentation or through spot-checks. Finally, a key finding of the pilot was that BO disclosure is only scalable in Myanmar if companies receive sufficient guidance on the BO concept and template, and that more capacity building will be necessary for both companies and regulators. To secure compliance, however, it will therefore be necessary to consider changes in the regulatory framework that would legislate disclosure requirements.

These lessons will provide guidance to the MSG, reporting entities, Independent Administrators, and regulators that are doing work on beneficial ownership. Moreover, stakeholders in Myanmar are encouraged to consult EITI's network to facilitate peer learning and sharing of experiences, so that beneficial ownership transparency can contribute to an improved investment climate and reduce risks around corruption and illicit financial flows.

Annex 1: BO definition agreed by MSG

Beneficial owner

A beneficial owner is a natural person(s) who, directly or indirectly, ultimately owns or controls a public or private company or corporate entity. A person is automatically considered to be a beneficial owner if they own or control 5% or more of the public or private company or corporate entity.

- The individual holds, directly or indirectly, 5% and above of the shares within reporting period which is 2014-2015 & 2015-2016 in the public or private company or corporate entity.
- The individual holds, directly or indirectly, the voting rights in the public or private company or corporate entity. Voting rights held by the public or private company or corporate entity, itself are disregarded for this purpose.
- The individual holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of the public or private company or corporate entity.
- The individual has the right to exercise, or actually exercises, significant influence or control over the public or private company or corporate entity.

Reference to “ultimately owns or controls” refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control. This definition should also apply to a beneficiary under a life or other investment.”

Politically Exposed Persons (PEPs)

PEPs are defined as individuals belong to one of the following categories:

- **Domestic PEPs:** individuals who are or have been entrusted domestically with prominent public functions, for example, Cabinet Members at Union level & State and regional level, Members of Parliament both Union level and state and regional level, senior government (Deputy Ministers, Permanent secretaries, DGs, DDGs, Directors, Auditor General, Central Bank, etc.) , judicial or military officials including Ethnic Armed Organizations’ senior leaders and officials, senior executives of state owned corporations, important political party central committee members and key influencers.
- **Foreign PEPs:** individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government officials, judicial or military officials, senior executives of state owned corporations, important political party officials and diplomats.
- **International organization PEPs:** persons who are or have been entrusted with a prominent function by an international organization, refers to members of senior management or individuals who have been entrusted with equivalent functions, i.e. directors, deputy directors and members of the board or equivalent functions, International Financial institution’s leaders and senior staffs.

PEPs shall also be defined to include:

- **Family members** who are related to a PEP in one of the categories above either directly (consanguinity) or through marriage or similar (civil) forms of partnership, to the second degree of relation.
- **Close associates** who are closely connected to a PEP in one of the categories above, either socially or professionally.

Annex 2: BO Pilot Data

See data table attached