

# Government Structure & Legal Framework



## Part 2

# GOVERNMENT STRUCTURE & LEGAL FRAMEWORK

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This section provides a brief overview of Myanmar and an orientation on core issues to consider for responsible investment, as well as signposting further resources. There is more detailed analysis of the national context surrounding certain issues particularly relevant to responsible investment in the O&G Sector in [Part 3](#) on Sector-Level Impacts and [Part 4](#) on Project-Level Impacts.

## A. Brief Background on Myanmar

Myanmar is the largest country in mainland Southeast Asia, at the cross-roads between India and China. Despite having the second largest economy in South-East Asia in the 1900's, it is currently one of the poorest countries in East Asia and the Pacific.<sup>31</sup> With a population of over 52 million, one of the lowest population densities in the region, fertile lands, significant untapped agricultural potential, a rich endowment of natural resources, and a long coastline, Myanmar has the potential to re-establish itself as a growing and dynamic economy in the region. If managed well, some have estimated it could quadruple the size of its economy, from \$45 billion in 2010 to more than \$200 billion in 2030.<sup>32</sup> The challenge will be addressing the growing inequality in Myanmar's multi-ethnic society and ensuring that growth is inclusive and reaches the neglected rural and border areas and not just a privileged few. With the opening of the country, there is a risk of rising

<sup>31</sup> Myanmar is currently ranked 150 out of 195 on the [Human Development Index](#) and is considered a Least Developed Country by the UN.

<sup>32</sup> McKinsey Global Institute, "[Myanmar's moment: Unique opportunities, major challenges](#)" (2013).

expectations leading to popular frustration and disillusionment if these important opportunities are missed, or worse, squandered.

Myanmar has a long and rich history dating back into the Bronze Age, with the rise and fall of numerous empires. More recently it was a British colony until independence from British rule in 1948. Since then, the country has been consumed by long-running civil wars, which are currently being addressed through a comprehensive peace process.<sup>33</sup> Myanmar was ruled by successive military governments starting with a 1962 coup led by General Ne Win who pursued an isolationist "Burmese path to socialism" that included nationalisation of the economy and severing links with the outside world. While some of the country's self-imposed isolation ended following Ne Win's resignation in 1988, when the State Law and Order Restoration Council (SLORC) took power, the Government's continued suppression of political opposition resulted in a broad range of sanctions by Western governments.

In March 2011, a new Government headed by former general U Thein Sein came to power articulating a policy framework for people-centred and sustainable development, giving "priority to improving the quality of life of ordinary citizens, and specially poor citizens"<sup>34</sup> and fulfilling the basic needs of the people.<sup>35</sup> He began talks with opposition leader Daw Aung San Suu Kyi, who had been freed from house arrest one week after the November 2010 elections. Her party, the National League for Democracy (NLD), contested the April 2012 by-elections and won 43 parliamentary seats. The next general election is expected to take place in late 2015.

The country is going through a "triple transition": first, from an authoritarian military system to democratic governance; second, from a centrally directed economy to a market-oriented economy, and; third, from 60 years of conflict to peace in its ethnic group, border areas.<sup>36</sup> The transitions take place against the backdrop of integration among the Association of South-East Asian Nations (ASEAN) toward one economic community, which should provide an important opportunity for Myanmar's re-entry and integration to the sub-regional, regional, and global economies.<sup>37</sup> Myanmar is seeking to leave behind decades of isolation, fragility and conflict, but faces enormous capacity constraints in the face of such an ambitious agenda. Long-term reforms are needed to improve governance.

President Thein Sein's March 2011 inaugural speech to the Pyidaungsu Hluttaw (Union Legislative Assembly), outlined economic reform as a key priority of his Government. Much of the recent economic growth has been in extractive industries (in particular mining and natural gas). However the agriculture sector accounts for the largest share of the

<sup>33</sup> See further [Myanmar Peace Monitor](#).

<sup>34</sup> U Myint (Chief Economic Adviser to the President and Chief of the CESD-MDRI), "Myanmar and the FDI Issue" (20 October 2012), pg. 6, citing: New Light of Myanmar, "[President U Thein Sein calls for more efforts in reform process for national development](#)", (12 May 2012). and New Light of Myanmar, "[Priority task of government is to satisfy desire, fulfill requirements of people](#)" (13 May 2012).

<sup>35</sup> Eleven Media, "[People-Centred Development Tops Government's Agenda](#)" (11 August 2013).

<sup>36</sup> World Bank, "[Myanmar Overview](#)" (accessed 15 July 2014).

<sup>37</sup> ADB, "[Myanmar in Transition: Opportunities and Challenges](#)" (Aug 2013).

economy and provides livelihoods for more than 70% of the population.<sup>38</sup> The President has repeatedly called for responsible investment as part of the renewed emphasis on economic reform.

## B. Union, State/Region and Local Government in Myanmar

### Government Structure

Under the 2008 Constitution, the Union of the Republic of Myanmar is organised into seven States and seven Regions (formerly known as Divisions), six Self-Administered Zones and Self-Administered Divisions and one union territory containing the capital Nay Pyi Taw and surrounding townships.<sup>39</sup> Ethnic minorities live mostly in the seven States that are along the border of the country, and the ethnic majority Burman/Bamar people live mostly in the seven Regions which, with the exception of Tanintharyi and Sagaing Regions, mainly run through the middle of the country.

The population is organised into the following levels of administration, starting with the lowest administrative level: the village, with several grouped together into village tracts; urban wards; towns, with several grouped together into townships (where the lowest levels of government offices are generally located); townships are then organised into districts; several districts then comprise a region or state.<sup>40</sup> Regions and States are constitutionally equivalent.

Currently, the President appoints a Chief Minister for each State and Region. Each State/Region has a unicameral legislative assembly (Hluttaw), but laws passed by the Union Legislative Assembly (Pyidaungsu Hluttaw) are superior to those passed at the Regional/State level.<sup>41</sup> The areas in which they can pass laws are limited to the eight sectors listed in Schedule Two of the Constitution.<sup>42</sup> The powers to legislate on “Energy, Electricity, Mining, and Forestry” are quite limited, for example, to power generation that is off the national grid, and do not include any matters related to O&G. The Region /State assemblies can legislate on matters of land revenue, municipal taxes on buildings and land and the sale, lease and other matters involving property of the Region or State.<sup>43</sup> On the other hand, revenues from the exploitation of the natural resources of a Region or State are to be paid to the Union Fund, and not the Region or State Fund.<sup>44</sup>

<sup>38</sup> World Bank, “[Myanmar - Interim strategy note for the period FY13-14](#)” (Oct 2012).

<sup>39</sup> For a discussion of local governance, see MDRI and the Asia Foundation, “[State and Region Governments in Myanmar](#)” (Sep 2013). The six self-administered territories are the zones of Naga in Sagaing Region, Danu, Pa-O, Palaung, Kokaung, and the Self-Administered Division of Wa (all in Shan State).

<sup>40</sup> See MDRI and the Asia Foundation, above.

<sup>41</sup> Bingham Centre for the Rule of Law, “[Constitutional Awareness Myanmar](#)” (Oct 2013).

<sup>42</sup> Constitution of Myanmar, Art. 188. See also, MDRI and the Asia Foundation, above, p v; 12; pp 62-64; pp 86-87. See Appendix I for a translation of Schedule Two of the Constitution.

<sup>43</sup> Constitution of Myanmar, Schedule Two, Articles 1, (c, e, g). See also, MDRI and the Asia Foundation, above.

<sup>44</sup> Article 231 of the Constitution provides that all taxes and revenues not listed in Schedule 5 to be collected by regions or states are to be paid into the Union Fund. Schedule 5 of the Constitution does not include revenues from natural resources, save land.

The Region/State Hluttaws have so far passed very few laws. Moreover, the effectiveness of these legislatures is further circumscribed by capacity issues at the local level. The Union Government does not need approval from state or regional governments for large-scale investments in their local jurisdictions, although they must be informed, and their views are sought as part of the evolving ESIA process and on foreign lease of land in their area. Local governmental authority is still quite limited, as is its capacity to take on some of the more technical dimensions of natural resource management such as geological assessments or negotiating contracts.<sup>45</sup>

Before the new Government came to power in 2011, regional military commanders had absolute authority in their areas, as they served both as military chiefs and as heads of regional governments. Currently serving military generally play no formal role in Region/State administration other than on security issues.<sup>46</sup> However, of the 14 Region/State Chief Ministers, most are former military officers. The Region/State Border and Security Affairs Minister is a military-appointee, although other Ministers are appointed by the Chief Minister.

### The Union Legislative Assembly (Pyidaungsu Hluttaw)

The Union Legislative Assembly, elected in November 2010, was convened in early 2011 and has shown a degree of independence from the executive branch, though it is dominated by the Union Solidarity Development Party (USDP), established by the previous Government, and the military. 25% of both the upper and lower Houses are reserved for serving military officers and appointed by the Commander-in-Chief, and the USDP won most of the other parliamentary seats in the 2010 elections, widely believed to have been neither free nor fair.

A major priority has been a rapid programme of updating its laws (one source notes 68 laws enacted since autumn 2011, with 20 in the first three months of 2014 alone).<sup>47</sup> While there is justifiable urgency to the programme to update its laws, the lack of experience and expert knowledge of most legislators, the very ambitious legislative agenda, and the speed with which legislative decisions are being taken raises questions about the effectiveness and coherence of some of the new legislation. Due to the tendency to rush through legislation, there has been little effective consultation with the public, which is a serious deficiency. Not only does consultation develop a sense of participation and buy-in, it would improve the legislative process. Presently, the Parliamentary Rule of Law, Peace and Stability Committee, chaired by Daw Aung San Suu Kyi, is tasked with reviewing existing legislation and recommending changes. The Attorney General's Office also plays a role in checking draft laws, including for conformity to the country's international commitments and consistency with existing laws. The International Bar

<sup>45</sup> Thet Aung Lynn and Mari Oye, "[Natural Resources and Subnational Governments in Myanmar: Key considerations for wealth sharing](#)" (June 2014), pg. 31.

<sup>46</sup> International Crisis Group, "[Myanmar's Military: Back to the Barracks?](#)" (April 2014), pg. 8

<sup>47</sup> See, Myanmar Legal Services: "[Doing Business in Myanmar](#)" (April 2014); "Myanmar Laws Enacted in 2014" and "[Overview of Legal and Regulatory Regime, Sanctions, Cross-border Projects and ASEAN Integration 2015](#)" (April 2014).

Association recommended a law reform commission, in order to make reforms as consistent and efficient as possible.<sup>48</sup>

The scope for the President to block the enactment of a bill passed by the Union Legislative Assembly is very limited. Under the Constitution, the President is obliged to enact into law any bill passed.<sup>49</sup> If the President withholds signature, the bill is deemed to become law on the day after the end of the period prescribed for the President to sign the bill.<sup>50</sup>

Constitutional amendments are currently under discussion in Myanmar after a Joint Committee for Reviewing the Constitution was formed in July 2013 and nationwide consultations took place. The Committee submitted its report to Parliament on 31 January 2014 and another committee was formed in Parliament to take the amendment process forward. Key issues which opposition politicians have identified for reform include: 25% of seats in parliament reserved for non-elected serving military; requirements to become President (which currently would exclude Daw Aung San Suu Kyi from running for President); the extreme difficulty in amending the constitution<sup>51</sup>; broad Presidential powers to declare a state of emergency; and the need for more region/state government control over local resources and local governance.<sup>52</sup>

### Separation of Powers

The Constitution puts in place a governance structure that, to some extent, gives effect to the separation of powers principle. It provides for a system that permits reciprocal checks and balances, and requires that members of the executive and judicial arms of government cannot at the same time be members of the legislature.<sup>53</sup> A Constitutional Tribunal can determine whether measures taken by the executive authorities of the Union, States, Regions and self-administrative areas are in conformity with the Constitution.<sup>54</sup> This judicial review may be triggered by representatives of the Hluttaws,<sup>55</sup> the Chief Justice of the Union, the President or the leader of the executive government of a Region, State or self-administrative area.<sup>56</sup> It may also be triggered where a dispute arises over the constitutionality of a law in a hearing of a case before any court.<sup>57</sup>

<sup>48</sup> International Bar Association, “[The Rule of Law in Myanmar: Challenges and Prospects](#)” (Dec 2012).

<sup>49</sup> Articles 105 and 106, Constitution.

<sup>50</sup> Articles 105(c) and 106(c), Constitution.

<sup>51</sup> Aung San Suu Kyi is currently not permitted to be President because her two sons have British rather than Myanmar nationality. Over 75% of parliament must vote for a constitutional amendment to change this. For an analysis of the constitutional amendment process, see Bingham Centre for the Rule of Law “[Constitutional Reform in Myanmar: Priorities and Prospects for Amendment](#)” (Jan 2014).

<sup>52</sup> Ethnic minorities are particularly concerned about resource and power-sharing in the seven ethnic minority states.

<sup>53</sup> This also applies to Defence Services personnel.

<sup>54</sup> Article 322(c), Constitution.

<sup>55</sup> These are the Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw, Amyotha Hluttaw, the Region or State Hluttaw, or representatives numbering at least 10% of the Pyithu or Amyotha Hluttaw. Articles 325 and 326, Constitution.

<sup>56</sup> Articles 325 and 326, Constitution.

<sup>57</sup> Article 323, Constitution. The court hearing the case must then refer the dispute to the Constitutional Tribunal, whose resolution of the matter is final and conclusive and must be applied to all cases. Articles 323 and 324, Constitution.

However, the Constitution makes an incursion into the separation of powers principle by entrenching the military in both the executive and legislative arms of government and placing the armed forces outside of the oversight of the executive, legislature and judiciary.<sup>58</sup> As noted above, currently 25% of seats in the Union Legislative Assembly,<sup>59</sup> and in the State and Region Assemblies<sup>60</sup> belong to unelected members of the military. At the same time, members of the military are mandated or permitted to occupy positions in the executive arms of the Union, States and Regions. The military personnel for all these positions must be nominated by the Commander-in-Chief of the Defence Services. The reality is that the military's influence over the legislature is not limited to just the 25% of seats, as it has considerable influence over non-military Hluttaw representatives. Stability in government and prospects for further reforms that advance the rule of law and human rights are therefore, according to the Constitution, dependent to considerable extent on the military's will and restraint.

## C. Myanmar's Legal Framework

### Myanmar's Legal History

Myanmar inherited a common law system from Great Britain as implemented in colonial India with few updates of the laws after the 1950's, until the recent changes in 2011.<sup>61</sup> Since the 1950s, legal precedent has not been used, nor significant case law developed. As such, many outdated and repressive laws from the colonial era remain on the books, including the Penal Code. The main sources of law in Myanmar, codified under the "Burma Code" (13 volumes, enacted 1841 – 1954), are still in force today, unless specifically superseded.

While many new laws relating to investment have been enacted since 2011, including the 2012 Foreign Investment Law, lawyers have noted that these laws provide for large discretionary powers for decision-making bodies, which could result in a lack of legal certainty. Flaws in a number of laws and in the justice system itself present major risks to companies operating in Myanmar.

### The Myanmar 2008 Constitution

After the 1974 constitution was suspended in a September 1988 coup d'état to suppress mass nationwide pro-democracy demonstrations, the military government ruled by decree

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<sup>58</sup> Firstly, the Defence Services has the right to not only independently administer all affairs of the armed forces, it also has the right to independently adjudicate on all such affairs (Art. 20(b), Constitution). Secondly, a "Courts-Martial" is established under the Constitution to "adjudicate Defence Services personnel" (Art. 319, Constitution). Its powers and activities are unfettered by the Constitution, and it is given complete independence from the Supreme Court (Art. 56, Constitution). Thirdly, the autonomy of the Defence Services may go beyond the exercise of military duties and functions; relevant provisions around military courts are vague and could be interpreted to confer on the Courts-Martial jurisdiction over acts committed by Defence Services personnel even outside of their military duties and functions – this is especially problematic due to the military's extensive record of human rights violations and corruption.

<sup>59</sup> Articles 109(b) (in relation to the Pyithu Hluttaw) and 141(b) (in relation to the Amyotha Hluttaw), Constitution.

<sup>60</sup> Article 161(d), Constitution.

<sup>61</sup> The courts in Myanmar adjudicate criminal and civil cases under the provisions of the Criminal Procedure Code, the Civil Procedure Code and the Evidence Act.

for over two decades. A new constitution was drafted with very little public participation and was approved in a flawed constitutional referendum held just days after Cyclone Nargis in May 2008. Many people who organised “Vote No” anti-referendum campaigns were arrested and imprisoned during that time.

The 2008 Constitution contains a range of aspirational, though unenforceable, statements of principle related to business and economic development, including around: equitable valuing of “peasants” agricultural produce; the rights of workers; a changeover from manual to mechanised agriculture; facilitating industrial development; reducing unemployment; a number of free market-type principles including not nationalising economic enterprises or demonetising currency in circulation; and affirming certain property rights.

The Constitution provides that “[t]he Union is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union” and therefore sets the approach for the Government’s management of O&G resources. As various CSOs have pointed out, the Constitution does not grant citizens the right to a clean and healthy environment, nor are there any clauses granting freedom of information. There is no obligation for the revenue from natural resources to be subject to equitable sharing among the citizens.

The 2008 Constitution provides enforceable guarantees that relate to a range of rights, some of which apply to citizens only and some of which are more broadly applicable. Moreover, most of these guarantees do not fully reflect international human rights standards, due to the wide qualifiers and caveats they contain.<sup>62</sup>

#### Box 7: Constitutional Rights of Citizens and Non-Citizens

Some Constitutional rights/ guarantees are specifically designated to “**all persons**”, which on their plain wording should apply to both citizens and non-citizens, including broadly the right to:

- equality;
- life and liberty (security of the person is not recognised in the Constitution);
- freedom from forced labor and servitude
- work

While others are specifically designed to “**citizens**” **only**, including broadly the right to:

- freedom from discrimination
- privacy
- freedom of movement
- property
- freedom of expression
- freedom of assembly and association
- elect and be elected
- socioeconomic development of “less developed national races” (including education, health, economy, transport

<sup>62</sup> Of the rights covered by enforceable guarantees, only the following stand without qualification: the right to enjoy equal rights before the law and equal protection of the law, the prohibition on slavery and trafficking, the prohibition on being re-tried for the same crime after legitimate conviction or acquittal, and the prohibition on retroactive application of penal law. Notably, even the right to life and personal freedom comes with a wide caveat: “[n]othing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person.”



- and communications)
- health
- education
- just and fair conditions of work
- participate in cultural life

## Access to Justice

Reforming the rule of law in Myanmar has been a major focus of the administration under President U Thein Sein. The Government’s “Framework for Economic and Social Reforms” notes “the lack of effectiveness and predictability of the judiciary”.<sup>63</sup> The judicial system is widely considered to be “under-resourced, politically influenced and lacking in independence.”<sup>64</sup> However, reform will take a long time, and substantial resources, and not least, changes in attitude to the rule of law, starting from the bottom up with attention to legal education. The legal education system has been eroded by decades of under-investment, and the legal profession targeted by long-term political restrictions, leading to a major shortage of lawyers taking up cases.<sup>65</sup>

Judicial independence in Myanmar to date has been essentially non-existent,<sup>66</sup> with judges accustomed to acting “as administrators rather than arbiters, basing decisions on state policy, instead of legal reasoning and the application of precedent.”<sup>67</sup> While there are basic principles of separation of powers integrated into the Constitution, it is not complete. The broad power of the President to appoint the judges of the Constitutional Tribunal, the Supreme Court of the Union, and the High Courts of Regions and States is problematic. The President’s nominees must be approved by the relevant Assembly “unless it can clearly be proved that the person does not meet the qualifications prescribed...”.<sup>68</sup> A recent report by the parliamentary Rule of Law and Stability Committee, led by Daw Aung San Suu Kyi, found “continued intervention by administrative officials in the judicial system.”<sup>69</sup> This indicates that structural changes will be required to put in place a rigorous separation of powers. There is no Ministry of Justice.

Systemic corruption in the administration of justice is a major concern, manifesting itself through bribes, delays, and obstructions,<sup>70</sup> with a widespread local perception that the courts in Myanmar are corrupt and unfair.<sup>71</sup> As a result, many would “[resort] instead to

<sup>63</sup> “[Framework for Economic and Social Reforms - Policy Priorities for 2012-15 towards the Long-Term Goals of the National Comprehensive Development Plan](#)”, (Jan 2013) (Final Draft – Submitted to the First Myanmar Development Cooperation Forum), para 116.

<sup>64</sup> OECD, “[OECD Investment Policy Reviews: Myanmar 2014](#)” (March 2014), pg. 27.

<sup>65</sup> See: International Commission of Jurists, “[Right to Counsel: The Independence of Lawyers in Myanmar](#)”, (Dec 2013).

<sup>66</sup> Human Rights Resource Centre, “Rule of Law for Human Rights in ASEAN: A Baseline Study” (May 2011), pg. 163, citing Asian Legal Resource Centre, Amnesty International, “[Myanmar: No Law At All – Human Rights Violations under Military Rule](#)” (1992).

<sup>67</sup> International Bar Association’s Human Rights Institute, “[The Rule of Law in Myanmar: Challenges and Prospects](#)” (Dec 2012), 56.

<sup>68</sup> Articles 299(c)(ii), 299(d)(ii), 308(b)(ii) and 328, Constitution.

<sup>69</sup> The Irrawaddy, “[Interference in Judicial System Harming Burmese People: Lawmakers](#)” (14 August 2013).

<sup>70</sup> See: International Commission of Jurists, above.

<sup>71</sup> See: USIP, “[Burma/Myanmar Rule of Law Trip Report](#)” (June 2013), pg. 5 and 34.

local-level dispute resolution mechanisms they perceive to be more reliable, accessible and affordable.”<sup>72</sup> These local-level mechanisms generally involve village leaders and/or elders’ councils. Although the village leader has an obligation to inform the police about serious crimes, smaller issues and petty crimes can be settled by the village leader and/or the elders’ council, a small group of respected men within a village. If one party to the problem does not agree with the solution reached, they can take the matter to the township level, but this rarely happens because it is seen as being too expensive, considering both the administrative legal costs and bribes that would have to be paid. In addition, there is currently little in the form of a legal aid system in Myanmar, making it impossible for many to afford the time and cost commitments of using the court system. In conflict areas, the issue would be taken to the head of the controlling armed group.<sup>73</sup>

In addition to the courts, other bodies responsible for the administration of justice, including the police, lack the training and capacity to enforce the rule of law (though the EU has been providing training to improve the human rights performance of Myanmar’s police).<sup>74</sup>

### Judicial and Non-Judicial Mechanisms

With respect to the court system, according to the Constitution, Courts of the Union include: the Supreme Court of the Union; High Courts of the Region; High Courts of the State; Courts of the Self-Administered Division; Courts of the Self-Administered Zone; District Courts; Township Courts; other Courts constituted by law; Courts-Martial; and Constitutional Tribunal of the Union. As in most countries, the Supreme Court is the highest Court in the country, though it does not have jurisdiction over the powers of the Constitutional Tribunal or the Courts-Martial. There is no jury system in Myanmar. Cases are normally tried by a single judge (though in special cases the Chief Justice of the Supreme Court can instruct to form a panel of judges).

The Government has also taken a number of actions to provide non-judicial grievance mechanisms to the public in the absence of a fully functioning judiciary (see Box 8 below). However, these mechanisms are already overloaded with complaints and hindered by limited mandates.

Many businesses commonly seek to incorporate safeguards into their investment contracts by ensuring access to international – rather than domestic – arbitration tribunals in the event of an investment dispute.<sup>75</sup> Myanmar acceded to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards in April 2013, which entered into force July 2013.<sup>76</sup> This solidifies the ability of foreign investors to submit disputes with Myanmar Government and commercial partners to international arbitration. The Myanmar legislature is now reportedly considering a new law based on the 1985

<sup>72</sup> See: USIP, above, p. 5.

<sup>73</sup> See: USIP, above, p. 34.

<sup>74</sup> EU Delegation to Myanmar, “[EU Crowd Management Training Supports Reform of Myanmar Police Force](#)” (Feb 2014).

<sup>75</sup> More recently, the EU and Myanmar have begun discussions on an investor-state dispute settlement mechanism with Myanmar. See for example: Herbert Smith Freehills, “[Myanmar and the European Union to enter into an investment protection agreement](#)” (13 March 2014).

<sup>76</sup> [New York Convention on the Recognition of Foreign Arbitral Awards](#) (1958) (accessed 15 July 2014).

UNCITRAL Model Law on International Commercial Arbitration to replace the 1944 Arbitration Act, which would enable Myanmar courts to recognise and enforce international arbitral awards.<sup>77</sup>

An equivalent assurance of access to remedies for most Myanmar people affected by private sector operations is still a practical impossibility. Accountability in Myanmar is a new phenomenon and one that will take time to take root. It is particularly important in these circumstances that companies provide operational-level grievance mechanisms for those working in or affected by their projects as they have few effective alternatives for remedy.

#### Box 8: Existing Non-Judicial Grievance Mechanisms in Myanmar

- Daw Aung San Suu Kyi was appointed to head up the new **parliamentary Rule of Law and Stability Committee** formed in August 2012 to serve as a mechanism for the general public to lodge complaints about government departments. In one month it received over 10,000 complaint letters regarding courts within the Yangon Division alone.<sup>78</sup>
- The **President's Office opened a public access portal** for people to submit opinions and complaints directly to the President.<sup>79</sup>
- A non-judicial **labour dispute settlement system** to resolve disputes between employers and workers is in place, but implementation is still weak due to lack of adequate knowledge about the newly enacted labour laws.
- There are a number of mechanisms to hear land disputes, including a **parliamentary committee on land confiscation inquiry**, but without a mandate to give binding decisions. (See [Part 4.3](#) on Land)
- The **Myanmar National Human Rights Commission (MNHRC)**. While the MNHRC was established in September 2011, the MNHRC Law was only enacted on 28 March 2014. The MNHRC has a broad mandate of promoting and monitoring compliance with human rights. It is empowered to investigate complaints and contact the concerned person, company or government department and can recommend action. It can also make its recommendations public. It can undertake inquiries and will prepare an annual report to the President and Parliament. It is also mandated to consult different stakeholders including CSOs. The President selects members after proposals by a selection board. While the law provides that proposed members should have expertise or knowledge in different areas relevant to human rights including from civil society, it does not guarantee pluralism, nor a total independence from the Executive, in accordance with the Paris Principles.<sup>80</sup> It received over 1700 complaints in its first 6 months of operation, a majority of which involved land grabbing cases.

<sup>77</sup> Singapore International Arbitration Blog, "[Draft Arbitration Bill in Myanmar](#)" (June 2014).

<sup>78</sup> Regarding the various bodies noted, see further: Hnin Wut Yee, "[Business & Human Rights in ASEAN – A baseline study: Myanmar chapter](#)" (April 2013).

<sup>79</sup> "[Framework for Economic and Social Reforms - Policy Priorities for 2012-15 towards the Long-Term Goals of the National Comprehensive Development Plan](#)", (Jan 2013) (Final Draft – Submitted to the First Myanmar Development Cooperation Forum), para 114.

<sup>80</sup> OHCHR, "[OHCHR and NHRIs](#)" (accessed 15 July 2014).

- The **ILO and Myanmar Government have agreed a complaints mechanism** to allow victims of forced labour an opportunity to seek redress/remedies from government authorities in full confidence that no retaliatory action will be taken against them.<sup>81</sup> The October 2013 report by the Myanmar Liaison Officer notes that there has been an increasing number of complaints about forced labour in association with land confiscation, with people either losing their livelihoods completely or being required to work on land which they have traditionally occupied.<sup>82</sup>

## D. Relevant Areas of Law Underpinning Responsible Business Conduct

Responsible business conduct is often underpinned by many areas of law at the international and national level and covering a range of issues (see [Part I.C](#) above). Where international laws or standards are incorporated into domestic law this can provide a predictable and familiar reference point, at least for international businesses who may be familiar with the standards from other countries of operation, and also provides a level playing field among operators. However, international standards may be partially or poorly transposed into domestic law. More detailed analysis of alignment between the international standards and national law is necessary (together with other areas of legal due diligence).

This section of the Report addresses two main areas:

- Myanmar's accession to **international human rights instruments**, as this provides some indication of areas the Government considers priorities, as well as providing standards that business and civil society can point to in holding the Government to promises of action to protect human rights;
- the **Foreign Investment Law** and the **Citizens Investment Law**, to highlight provisions in the laws that either require or at least support responsible business conduct or undermine such conduct by prohibiting or limiting such an approach.

Similar analyses could usefully be made of other business laws applicable to the sector. [Part 3.A](#) of this Report discusses more specific O&G laws.

### International Human Rights Instruments in Myanmar

Myanmar has a relatively low level of accessions of international human rights treaties. The Government reportedly has not conducted any assessment of the compatibility of its existing laws with its obligations under international law.<sup>83</sup> Domestic courts cannot directly invoke the provisions of global or regional human rights instruments to interpret national

<sup>81</sup> ILO, "[Forced Labour Complaint Mechanism](#)" (accessed 15 July 2014).

<sup>82</sup> Section 6, ILO, "[Update on the operation of the complaint mechanism in Myanmar, report of the ILO Liaison Officer to ILO Governing body](#)" (319th Session, Geneva, 16-31 October 2013), GB.319/INS/INF/2.

<sup>83</sup> DLA Piper et al, "[Myanmar Rule of Law Assessment](#)" (Mar 2013), pg. 27.

norms unless such norms are incorporated into national legislation.<sup>84</sup> While it is not unusual for international law not to be automatically incorporated into domestic law, one implication of this is that Myanmar's judiciary cannot have recourse to international human rights law to circumscribe the wide discretionary powers that Myanmar's laws confer on the executive branch.

### Box 9: Myanmar's Accession to International Human Rights Instruments

#### Myanmar has acceded to:

- the Convention on the Elimination of Discrimination Against Women (CEDAW)
- the Convention on the Rights of Persons with Disabilities (CRPD)
- the Convention on the Rights of the Child (CRC) & the Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
- 3 out of 8 of the Fundamental Conventions of the ILO:
  - ILO Forced Labour Convention (ILO Convention 29);
  - ILO Freedom of Association and Protection of the Right to Organise Convention. (ILO Convention 87);
  - Worst Forms of Child Labour Convention, No 182 (entering into force December 2014);
- 19 out of 177 of the Technical Conventions of the ILO, including the ILO Hours of Work (Industry) Convention
- the Convention against Transnational Organised Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children & the Protocol against the Smuggling of Migrants by Land, Sea and Air; supplementing the United Nations Convention against Transnational Organised Crime
- the UN Convention against Corruption
- Myanmar is also a State Party to Geneva Conventions, I, II and III

#### Myanmar has not signed the following international human rights treaties:

- International Covenant on Economic, Social and Cultural Rights (ICESCR) & the Optional Protocol to the ICESCR (OP-ICESCR)
- International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the ICCPR (ICCPR-OP 1), and the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty (ICCPR-OP 2)
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- Optional Protocol to the Convention on the Elimination of Discrimination against Women (OP-CEDAW)
- Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT) and the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (OP-CAT)

<sup>84</sup> UN General Assembly, "[Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 \(b\) of the annex to Human Rights Council resolution 5/1, Myanmar](#)", A/HRC/WG.6/10/MMR/2 (15 Nov 2010), para. 5.

- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (OP-CRC-AC)
- Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)
- Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD-OP);
- International Convention for the Protection of All Persons from Enforced Disappearance (CED)
- Geneva Convention IV (Related to Rights of Civilians in Armed Conflict)

**Myanmar has also not signed 5 out of the 8 ILO Fundamental Conventions:**

- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Equal Remuneration Convention, 1951 (No. 100)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Minimum Age Convention, 1973 (No. 138)

Nor has it signed 158 out of the 177 Technical Conventions, and none of the 4 Governance Conventions<sup>85</sup>

Myanmar has been the subject of annual resolutions at the UN Human Rights Council for over two decades.<sup>86</sup> The former Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, in his final report in March 2014 at the end of his six-year mandate, highlighted the strong progress that had been made during the reform since 2011, most notably the release of over 1,100 political prisoners. However, he also cautioned that “[a]ddressing the impunity for human rights violations in Rakhine State together with the marginalisation and discrimination against the Rohingya community remain the two fundamental challenges that the Government seems unwilling to address”.<sup>87</sup> The new Special Rapporteur, Lee Yanghee, took up the mandate in April 2014 and made a first visit in July 2014.<sup>88</sup>

### The Foreign and Citizens Investment Laws and MIC Permitting Process

The 2012 Foreign Investment Law (“FIL”)<sup>89</sup> sets out certain key points relating to foreign investment in Myanmar. It provides a new set of incentives and prohibitions for investors who choose to apply for the optional investment permit from the Myanmar Investment Commission (MIC) (though a permit from the Directorate for Investment and Company

<sup>85</sup> ILO Normlex, “[Up-to-date Conventions not ratified by Myanmar](#)” (accessed 15 July 2013).

<sup>86</sup> In 1992 the Commission on Human Rights passed Resolution 1992/58, noting the seriousness of the human rights situation in Myanmar, and mandating the appointment of a Special Rapporteur. There are currently 14 country rapporteurs.

<sup>87</sup> See: OHCHR, “[UN expert’s final report: ‘Prospect of a brighter future for the ethnic groups of Myanmar is real’](#)” (March 2014).

<sup>88</sup> OHCHR, “[Statement of the Special Rapporteur on the Situation of Human Rights in Myanmar](#)” (26 July 2014).

<sup>89</sup> Pyidaungsu Hluttaw Law No. 21/2012.

Administration (DICA) is required to establish a business vehicle).<sup>90</sup> Foreign-owned companies and foreign joint ventures with FIL permits, while subject to the same principles of company law as local companies, will have the advantage of certain benefits and preferential treatment to those foreign investors who choose not to obtain a FIL permit, including: (i) protection against state expropriation; (ii) repatriation of profits and invested funds; (iii) security of tenure through long-term use or lease of land with terms of up to 50 years (extendable twice to a maximum of 70 years); (iv) and a means to enforce the terms of their contracts through the dispute settlement mechanism.<sup>91</sup> Companies 100% owned by Myanmar citizens can apply for an MIC permit under the 2013 Citizens Investment Law (“CIL”).<sup>92</sup> As the 1913 Burma Companies Act is in the process of being changed, it was not reviewed.

The MIC is the main administrative body for the granting of investment permits under the FIL. The FIL and Foreign Investment Rules (“FIR”) do not indicate what terms and conditions may or may not be set out in an MIC permit. The basic investment permit process is set out below.<sup>93</sup> However, DICA, MOECAF and MOGE are still working through the sequencing of this approvals process for O&G Production Sharing Contracts (PSCs), and the process described below has not been followed for the current round of onshore PSCs:

- Investor submits a Proposal Form, with E(S)IA documents and relevant draft agreements. If the proposed investment is extractives-based, the proposal is submitted to the MIC through the Ministry of Energy or Ministry of Mining. However in practice, the recent onshore PSCs have been submitted to MIC for approval in advance of being signed and in advance of the commencement of an ESIA, which is a more logical order.
- DICA, as the MIC’s secretariat, will submit requests to the relevant Region or State government for their recommendations on the acceptability of the proposal, but the Union Government does not need approval from state or regional governments for large-scale investments in their local jurisdictions; they only need to be informed.<sup>94</sup> It is therefore unclear, and probably unlikely, that Region or State governments currently consult locally with those potentially affected by incoming investments but this would be one avenue for engaging local communities in decisions on natural resource investments.
- DICA will also submit requests to MOECAF for its comments on the proposed measures to prevent or mitigate adverse environmental and social impacts.

<sup>90</sup> The FIL is implemented through Notification 1/2013 which sets out the permitted activities for foreign investors and the activities which require a joint venture, and Notification 11/2013 which details the process for applying for a MIC permit, the use of land, transfer of shares, remittance of foreign exchange and the taking of security on land and buildings. See: Clifford Chance, “[Myanmar: Foreign investment rules in practice](#)” (March 2013), 1.

<sup>91</sup> Jones Day Commentary, “[Myanmar’s New Foreign Investment Legal Regime](#)” (April 2013).

<sup>92</sup> Pyidaungsu Hluttaw law No. 18/2013. DICA is reported to be considering combining the 2012 Foreign Investment Law and the 2013 Citizens Investment Law to level the economic playing field between local and foreign investors and make the investment regime more economically attractive. Myanmar Times, “[DICA confident of hluttaw approval on combined investment law](#)” (15 December 2013).

<sup>93</sup> Article 20(b), 2012 Foreign Investment Law; Rules 32-49, 2013 Foreign Investment Rules.

<sup>94</sup> Transnational Institute/Burma Centrum Netherland, “[Access Denied: Land Rights and Ethnic Conflict in Burma](#)” (May 2013).

- DICA will submit the proposal and relevant recommendations and assessments received to the MIC for consideration at its next meeting.
- The MIC will scrutinise the proposal and accompanying documents. If accepted, the permit will be issued, and copies sent to the relevant Union Ministries. There is a statutory time limit of 90 days from date of receipt for a proposal to be processed.
- Following approval, MIC is also responsible for undertaking inspections of the construction and subsequent implementation of the business and would also presumably verify if any conditions attached to the MIC permit are being followed.

#### **Box 10: The Myanmar Foreign Investment Law, Citizens Investment Law and Human Rights**

##### **How the FIL aligns with or supports fulfilment of international human rights standards:**

- by requiring the hiring and training of local workers and submission of annual capacity development plans
- by promoting local labour development as all jobs that do not require skilled labour must be given exclusively to Myanmar citizens<sup>95</sup>
- by offering incentives for investments in less developed regions through tax exemptions and relief and lease rights for longer periods
- by requiring environmental and social impact assessments (ESIAs) for certain activities, including “the exploration, drilling and production of oil and gas”
- by requiring compliance with national labour laws, in particular ensuring equivalent salaries between local and foreign employees with equivalent experience
- by protecting “religious lands” and regions designated by the Government as regions of cultural or natural heritage
- through MIC supervision of land lease rates paid by foreign investors and a prohibition on resettlement if the people living in the location “do not wish to vacate”.<sup>96</sup>

##### **How the FIL, CIL and MIC regime potentially undermines human rights:**

- The FIL provides expansive investment protections that do not require an equivalent and corresponding set of responsibilities on investors.
- MIC can approve a restricted or prohibited investment without MOECAP approval.<sup>97</sup>
- Apart from requiring public consultations when MIC is asked to approve restricted or prohibited investments, the only other provision for transparency is for MIC to submit a bi-annual performance report to the National Assembly. At a minimum, there should be public notifications not just, as at present, of which companies have been granted MIC permits, but also the nature of those investment projects, including the approved period of the investment’s

<sup>95</sup> The FIL also contains additional local content requirements for skilled workers: for all jobs requiring skilled labour, foreign investors must meet specified local employment quotas, which substantially increase over a specified period of time, by the end of which at least 75% of skilled jobs must belong to Myanmar citizens.

<sup>96</sup> DICA, “[Notification 39/2011](#)”, Art. 28.

<sup>97</sup> Article 47 of the 2012 Foreign Investment Law.



construction and operation, and other key terms and conditions on which the permit was granted.

- The lack of harmonisation between requirements of the FIL and CIL regarding investments prohibited on environmental and social grounds.<sup>98</sup>
- The preclusion of appeals to court by those potentially affected to contest a MIC permit.
- A lack of any requirement to ensure that investors' "corporate social responsibility programme" respond to social impacts.
- The express provision in the FIL that in the event of conflict between its provisions and an international treaty or agreement, the provisions of the latter should prevail. While this could be useful if it is interpreted to improve human rights or environmental protections around investments in line with international treaties, it may also (and more likely) be interpreted in line with international trade and investment agreements which commonly contain obligations that constrain policy-making and administrative action in protection of human rights and environmental protection.

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<sup>98</sup> Under the CIL, it is not possible to approve prohibited investments under the CIL that can be approved under the FIL.