

22 October 2019

Chairman
Joint Bills Committee
Pyidaungsu Hluttaw
Naypyidaw

Dear Chairman,

COMMENTS ON THE DRAFT EXPLORATION, PROSPECTING, DEVELOPMENT AND PRODUCTION OF PETROLEUM BILL

Thank you for asking for our comments on the draft Exploration, Prospecting, Development and Production of Petroleum Bill (the Petroleum Law). I apologise that these comments are in English. Aung Kyaw Soe from MCRB can present them orally in Myanmar language to the Committee if that would be useful.

As you are aware, the Myanmar Centre for Responsible Business published a Sector-Wide Impact Assessment on Oil and Gas (SWIA) in September 2014. Copies in Myanmar language have been supplied to the Committee.¹ The SWIA included suggested changes to the model Production Sharing Contract (PSC) (see Annex to this letter).

To some extent, our proposed changes to the PSC reflect the issues we believe the Law should also cover. Alternatively, or additionally, these issues could also be addressed in an updated model PSC. It is also important that the Law and revised PSCs are consistent.

To date, we understand that our recommendation to insert a requirement on Permit Holders to comply with the IFC Performance Standards was taken up in some of the last PSCs for offshore to be signed. This requirement to comply with recognised international standards should now be moved into the Law to provide a firm legal basis. However, a number of the other provisions we proposed, such as those on liability and transparency, are not yet included in the Law.

Our additional comments below are provided to

- Ensure consistency of the draft Petroleum Law with other relevant laws
- Ensure clarity with required compliance with existing law
- Clarify requirements on liability
- Reflect important Myanmar policy objectives in the Petroleum Law such as SEE reform, transparency and equity

¹ Available here: <https://www.myanmar-responsiblebusiness.org/pdf/SWIA/Oil-Gas/my/00-Myanmar-Oil-and-Gas-Sector-Wide-Assessment.pdf>

Ensure consistency of the draft Petroleum Law with other relevant laws

There are important new Myanmar laws which the draft Petroleum Law should be consistent with, and where relevant, cross-reference. These include:

a) *The 2016 Myanmar Investment Law and 2017 Myanmar Investment Rules*

- Article 53 makes clear that in addition to a Permit from MOGE, anyone engaged in Petroleum Activities must secure a permit under the Myanmar Investment Law as well.
- It would be helpful to recognise this in the Petroleum Law and clarify:
 - the sequencing of the Permitting process between the two laws;
 - that in addition to the requirements under the MOGE tendering process (s. 16), that Petroleum Activity Permit Holders will also need to meet the requirements on responsible business conduct and on reporting set out in the Investment Law (s. 65).

b) *The 2012 Environmental Conservation Law, the 2014 Environmental Conservation Rules, the 2015 Environmental Quality Standards and the 2015 EIA Procedure*

- The Law, Rules and Procedure use different terms concerning EIA, ESIA and EIA/SIA, but the 2015 EIA Procedure makes clear that “Environmental Impact Assessment (EIA)” covers environmental social, health and other impacts. We suggest that to ensure consistency, the draft Petroleum Law S.11(g) says
“Ensuring that the Petroleum Activity Permit Holder carries out the necessary impact assessments in accordance with existing laws”;
- S.16(b)(vii) appears to require the bidder to ‘perform an environmental impact assessment and social impact assessment’ prior to bidding and submit this as part of the bid. This **should be deleted**, as an EIA (or IEE as appropriate) should only be conducted following a successful bid.
- S.32(e) gives authority to the Inspector-General relating to EIA compliance. This is the responsibility of ECD/MONREC and not Ministry of Energy and **should be deleted**.
- S.35(a) should be more explicit about the legal obligations of the Permit Holder relating to the environment, for example through a reference to the abiding by the conditions in the Environmental Compliance Certificate issued in accordance with the Environmental Conservation Law
- Additionally, Parliament should be aware that
 - It would be useful for MoEE, MONREC and DICA to jointly agree and publish the sequencing of MoEE, MIC and ECC permitting as this has previously been a source of confusion.
 - The MONREC/MoEE draft EIA guidelines for the oil and gas sector developed with support from the Norwegian Government’s Oil for Development programme should be made consistent with this Law as well as the 2012 ECL/Rules/Procedure.
 - Either the Petroleum Law or the PSC should include a reference to Permit Holder obligations to contribute to the – as yet to be established - **Environmental Conservation Fund** foreseen under the 2012 Environmental Conservation Law.

c) *The 2019 Occupational Safety and Health Law*

- S.35(b) should be explicit that the Permit Holder should comply with obligations under the Occupational Safety and Health Law
 - Parliament should be aware that detailed oil and gas sectoral requirements will be adopted under the 2019 OSH Law

d) *The 2018 Amended Virgin Fallow and Vacant Law*

- Parliament should be aware that, in the mining sector, the Ministry of Agriculture Livestock and Irrigation (MOALI) is interpreting the amended VFV Law in a manner which is inconsistent with the temporary nature of mining exploration. The Exploration stage (e.g. surveys and seismic) for both mining and onshore petroleum is temporary, and should not require companies to obtain VFV Land Use Permit, not least as this might unnecessarily affect the rights of other land users.
- It might therefore be useful to clarify in the Petroleum Law (either S.8 or Chapter IX) that it shall not be necessary to obtain VFV Permits for Blocks subject to Exploration.

Ensure clarity with required compliance with existing law

Currently the Law seems to allocate all enforcement power to the MoEE (see for example s.34). The Law should make clear that monitoring and enforcement actions should be carried out by relevant authorities (such as MoNREC in the case of environmental laws).

Section 48 introduces uncertainty about the application of other relevant laws, such as environmental laws, to the petroleum sector by suggesting that the Petroleum Law overrides these.

Clarify requirements on liability

S.29(a) makes clear that the Permit Holder should comply with existing laws. A specific requirement that the Permit Holder is responsible for compliance by its sub-contractors **should be added**.

In addition, there are no specific **liability** provisions for Permit Holders. Article 35 is very general and it is not clear what the “stipulations” refer to.

There should be a requirement to have environmental insurance.

Breach of laws on environment or health and safety do not appear subject the Permit Holders to requirements to carry out remediation of environmental damage or to compensate for damages. There are only financial penalties (Chapter XVII) but those are unreasonably low for oil & gas operators and will likely not have the desired effect of discouraging non-compliance with environmental and health and safety laws.

The more substantive tools to prompt compliance (temporary suspension, revocation, etc. (Art. 33(b)) apply to only a more limited set of requirements. The Law needs greater clarity on these issues which should not be left to secondary regulation.

It is also important to ensure that costs spent on remediation and compensation for damages are not considered recoverable costs or counted as social investment costs.

Reflect important Myanmar policy objectives in the Petroleum Law such as SEE reform, transparency and equity

Relevant Myanmar policy objectives from the Myanmar Sustainable Development Plan (MSDP) include:

- a) State Economic Enterprise reform (2.5)
- b) anti-corruption and transparency (1.4)
- c) equitable and conflict-sensitive socio-economic development throughout all States and Regions (1.2)

This means:

(a) **Clarifying the role and responsibilities of MOGE**

MSDP Strategic Outcome 2.5 requires SEEs to 'operate on commercial principles, with independence, transparency and accountability'. The draft Law does nothing to clarify the nature of MOGE as an 'operational SEE' and instead leaves it with dual operating and regulatory functions. For example, s.54(c) permits MOGE to 'issue any necessary orders and directives'. This dual role involves inherent conflicts of interest.

Chapter VI contains no Obligations for MOGE, only Rights. In particular, it contained no obligations concerning governance or transparency of MOGE.

(b) **Aligning the Law with Myanmar's EITI obligations**

To reflect Myanmar's participation in the Extractives Industries Transparency Initiative (EITI), we suggest an additional objective relating to transparency and the fulfilment of Myanmar's international commitments be included in Chapter II.

In Chapter III, an additional role for the Committee could be to ensure that the contracting and licensing procedures are transparent and consistent with Myanmar's international commitments.

In addition, the 2019 EITI Standard² includes new requirements that are relevant to the Petroleum Law, including provisions on compulsory disclosure of licensing criteria, a register of licenses, contracts, and beneficial ownership (Section 2 of the Standard). The 2019 EITI Standard is applicable immediately, although some of the provisions have a transition period.³

To ensure that Myanmar is prepared to implement the updated EITI Standard, we suggest an analysis of the Standard to see where its provisions need to be reflected in the Petroleum Law.

(c) **Ensuring that prescribing and allocating blocks reflects sustainability and equity**

Chapter IV of the draft law appears to envisage a more systematic coordination process to plan for future tender rounds. While a cross-government Committee is useful for this role, to take

² <https://eiti.org/document/eiti-standard-2019>

³ <https://eiti.org/document/eiti-standard-2019-transitional-arrangements>. From 1 January 2020 onwards, only the 2019 EITI Standard will apply.

into account potentially competing interests, we believe that it should have a strategic role, focussed on s.5(a) to (d).

It is particularly important that it should exercise oversight and guidance of the way in which the Ministry identifies and prescribes Blocks (Chapter 4), and ensure that these decisions minimise negative environmental and social impacts, and maximise the sustainable and equitable economic development of the sector.

This could include roles for the Committee such as:

- Determining the most effective timing and approach to tendering for new blocks, taking into account the global and Myanmar investment climate so as to maximise interest from serious investors.
- Establishing a clear prohibition on the allocation of blocks in Protected Areas and decisions on block allocation in other environmentally sensitive areas
- Considering how block allocation would affect the rights and entitlements of local people living in the region (s. 8(b)). This could be based on active consultation of local people by government, rather than just the raising of public awareness foreseen in s.8(a).

Conclusion

MCRB believes that it is essential that a clear and effective Petroleum Law is adopted, since this will underpin sustainable investment in a sector that generates 50% of Myanmar's export revenue. We therefore recommend that the draft law is open up to systematic public consultation and expert input.

We note that there are ongoing discussions between the Government (ECD/MONREC and MoEE) and the Government of Norway about the potential to conduct a **Strategic Environment Assessment** (SEA) for Myanmar's offshore gas sector in 2020. The quality of the final Petroleum Law would be enhanced by using the findings of the SEA to support increased and responsible investment in Myanmar's petroleum sector, as well as Myanmar's wider reform process under the 2018-2030 MSDP.

The SEA process should engage a wide range of stakeholders who have not yet been consulted in the preparation of the draft Petroleum Law, including those involved in marine planning.

The SEA could support the adoption of an overall Offshore Gas Policy framework. This could be used for decision-making to offer and award blocks and manage the sector environmental impact. It would promote effective and efficient collaboration between Ministries, relevant Region/State governments and other stakeholders and establish clarity around the total Myanmar legal framework relating to oil and gas, and importantly, identify regulatory gaps and ensure that they are addressed where appropriate in the Petroleum Law.

Such a Policy would also provide the basis for decisions such as:

- Demarcation and exclusion of blocks
- Setting standards for environmental performance that can be used in EIAs for exploration and permits
- Guidance on conducting EIA / IEE for seismic exploration, and for exploration drilling:

- Guidance on conducting EIA / IEE for exploitation, transport, oil spill contingency plans, waste management, pipelines etc.
- Guidance for onshore installation, site selection, access to sites, etc.

An SEA would also provide – as in the case of the Hydropower Strategic Environment Assessment for Myanmar, supported by the IFC – the opportunity to undertake joint baseline studies in key areas where there will be multiple O&G activities, such as offshore seismic exploration. This would help to identify and map areas of potential cumulative impact. It would also be more efficient, and avoid repeated consultations with the same stakeholders, such as fishing communities.

Finally, MCRB also understands that significant concerns have been raised by existing operators in the sector about the uncertainty that the law creates for their investments which potential total billions of dollars. We encourage Parliament to engage with the private sector to understand their concerns.

In view of the above, and the current investment climate, MCRB therefore believes that it would be better to take the time to develop a quality law that supports responsible petroleum investment and economic reform, including reform of Myanmar's most important SEE, and that such an approach will generate long-term benefits for the country.

Yours faithfully,

A handwritten signature in black ink that reads "Vicky Bowman". The signature is written in a cursive, flowing style.

Vicky Bowman
Director, MCRB

Annex to the SWIA Recommendations

Suggested Changes to the Model PSC

The suggestions below cover proposed revisions to the Myanmar model Production Sharing Contracts (PSC) to strengthen environmental, social and human rights requirements to achieve the Myanmar government's desire for investment to meet international standards. They are presented in two groups – high priority and lower priority. Within each group the suggestions are presented in the order in which they appear in the model PSC. The capitalised terms below are defined in the PSC.

High Priority Changes

1. **Require more specific standards on employment. (section 15 & 17.2 u)**

- Require that all workers hired or employed by the Contractor or its sub-contractors in connection with the Petroleum Operations, including temporary workers, are employed in accordance with relevant Myanmar law and relevant international standards (or their equivalent) – i.e. [IFC Performance Standard 2](#) (which is aligned with specified ILO and UN conventions) and IFC Environmental, Health and Safety Guidelines for [Offshore Oil & Gas Development](#) or [Onshore Oil & Gas Development](#)

2. **Revise the provision on security so that MOGE is not arranging or requiring payment for security protection.**

- Security protection will be a very sensitive subject for most O&G companies. The PSC should provide flexibility on how security protection is arranged, and to do so in a way that permits companies some control over the arrangements for security protection where needed. Companies should be explicitly permitted to have their own security guards. Ideally the PSC should also refer to the [Voluntary Principles on Security and Human Rights](#).

3. **Require compliance with recognised and identified international standards on environmental and social performance. (clause 17.2) and 17.2 ee).**

The PSC currently contains numerous references to “international petroleum industry practices” without specifying a source organisation(s) (international organisation or industry association). References to more specific standards will assist the parties to clearly understand what is required of the Contractor.

- Require adherence to identifiable standards, namely: [IFC Performance Standards](#) and IFC Environmental, Health and Safety Guidelines for [Offshore Oil & Gas Development](#) and [Onshore Oil & Gas Development](#) (as appropriate).⁴

4. Require Contractors to commit to applying the UN Guiding Principles on Business and Human Rights and where applicable, the OECD Guidelines on Multinational Enterprises (see also the OECD Recommendations below). (clause 17.2 e)

- It should be clear from the PSC provisions that MOGE is equally bound by those same standards.

5. Revise the local content provisions to provide for more specificity. (clause 17.2 o)

The PSC requires Contractors to give preference to goods and services which are available in Myanmar and from Myanmar nationals as a method of spreading the economic benefits of Petroleum Operations. Given the need to build the capacity of local businesses to meet appropriate quality, environmental, health and safety standards and to provide incentives to Contractors to restructure procurement over time, more targeted provisions are required.

- Include realistic but specific targets over time on local content.
- The current (informal) practice of providing Contractors with a list of MOGE-approved companies for certain services e.g. food and beverages, should be abandoned as it is a barrier to entry to the market for new food and beverage companies, and reduces transparency.

6. Include clear allocation of responsibility and assignment of liability. (clause 17.2 w)

The PSC currently only *excludes* certain types of liability for the Contractor but does not clearly specify what the Contractor is liable for. Existing laws do not provide a clear basis for holding companies responsible for environmental damage, nor does the PSC. In the interim, until an appropriate regulatory framework, is in place, the PSC should address these issues, and can be made applicable on a transitional basis until the relevant national laws are in place.

- Clearly state that the Contractor is responsible for the actions or omissions of its sub-contractors.
- Exclude costs to remedy non-compliance with relevant standards or compensation for harm to third parties as a recoverable cost.

⁴ Note that the 24 December 2013 draft of the EIA Procedure makes a similar suggestion with respect to addressing indigenous peoples and involuntary resettlement: "Projects involving resettlement or potentially affecting Indigenous People shall additionally comply with separate procedures issued by responsible ministries, *and in the absence of such procedures all such Projects shall adhere to international best practice* on Involuntary Resettlement and Indigenous People." (clause 7)(emphasis added).

- Ensure that costs to restore the environment, individuals, communities or workers to baseline conditions are not included as part of the social investment costs.
- Provide for specific penalties for non-compliance with the IFC Performance Standards highlighted above and indicate conditions in which serious or repeated non-compliance would be considered a material breach of the PSC.

7. Include references to specific international standards on EIAs and ensure that social issues are covered in the EMP. (clause 17.2 bb)

- Revise the PSC to require that the EIA, SIA and the development of the EMP as specified in the PSC are carried out in accordance with the [IFC Performance Standards](#).
- Clarify that social issues should be included in the Environmental Management Plan.
- As conditions can change over the course of operations, require that EIAs are conducted (or updated) when there are major changes in operations, which may include moving from one phase of operations to another; at the moment, the PSC seems to require only a 1-time EIA, completed in the Preparation Period (clause 3.2).

8. Revise the “CSR” requirements of the PSC, requiring a social investment programme within the Work Programme. (clause 17.2 dd)

- Allow expenditure on social investment programmes to be cost recoverable but on condition that it is specified in the Work Programme budget.
- Specify that social investment programmes, or relevant elements of them, should be developed together with the local communities impacted by exploration and development.
- Require an annual budget that is communicated to the local communities and is clearly identified in its reports to MOGE. This should include capacity building for the community in managing their participation in the social investment programme – such as prioritising, administering, budgeting, planning; and should not include expenditures to remedy environmental and social harms which should be met separately by the Contractor.
- Include clear provisions for when a Contractor fails to live up to its social obligations. This might include a specific grievance mechanism that is accessible to the community. One option for structuring this is through a separate “community development agreement” that specifies obligations of both side – the Contractor and the community - which provides some recourse for failure or poor performance.⁵

9. Exclude identifiable changes in the social and environmental legal framework from coverage under the stabilisation clause. (clause 27.7)

The PSC currently contains an economic equilibrium stabilisation clause that permits adjustments to maintain the economic benefit if laws, decrees, rules and regulations, amendments or reinterpretations affect the economic benefit of the PSC. Myanmar is in the process of a very

⁵ EI Sourcebook, “[Good Practice Note on Community Development Agreements](#)” (2011).

wide ranging revision of its legal framework (some of it dating back to the last century), with a whole list of laws relevant to the O&G sector that will shortly be adopted, including in particular new laws in the environmental area, new health and safety laws, and other social laws. Compliance with such laws should be an expected and normal cost of business in an extractive operation.

- Exempt current and forthcoming environmental, social and human rights laws from the scope of the stabilisation provision; or
- At a minimum, set a floor on the stabilisation commitments stating that they apply only to the extent that the new Myanmar laws impose requirements that are stricter than accepted international environmental and social standards – i.e. [IFC Performance Standards](#) and IFC Environmental, Health and Safety Guidelines for [Offshore Oil & Gas Development](#) and [Onshore Oil & Gas Development](#) (as appropriate).

10. Require that all arbitration hearings and decisions concerning PSCs are open to the public that decisions are made publicly available and third party interventions will be permitted. (clause 22.2)

The model PSC provides for UNCITRAL arbitration. The new UNCITRAL Rules on Transparency, which came into effect on April 1, 2014, provide for a significant degree of openness throughout the arbitral proceedings.

- Specify that the Government wishes to opt-in to the new UNICTRAL Rules on Transparency to ensure that any arbitral proceedings under a PSC are open to the public, in the public interest.

11. Require environmental insurance to bring the PSC in line with the new environmental laws.

The Environmental Conservation Law (Chapter X) requires that any business that requires prior permission, (which includes O&G operations), must have insurance cover for impacts on the environment.

- The PSC should cross-reference this requirement from the Environmental Conservation Law and make it an explicit requirement of the PSC.

12. Strengthen the anti-bribery and corruption provisions in accordance with the newly adopted law on anti-bribery and corruption

- The Government recently ratified the UN Convention against Corruption (UNCAC) and adopted an Anti-Corruption Law. The current PSC has only very limited provisions on bribery and corruption; these should be strengthened to bring them in line with UNCAC and the EITI Standard. For example, clause 17.2 q) permits the parties to waive international tendering

requirements, without any limitations on what procedures should be used to replace international tendering or how transparent they must be.

13. Add provisions on monitoring & reporting on environmental, social and human rights issues.

The model PSC does not require the Contractor to specifically monitor and report on its environmental, social and human rights performance, apart from what might be generally covered in the Work Programme.

- Require reporting on a regular e.g. annual basis against the EMP (which should cover both environmental and social issues and incorporate human rights issues), including relevant activities of sub-contractors that provide goods and services as part of the Petroleum Operations.
- Require that the reports are made available in an accessible way to the local communities and wider general public.

14. Require that companies put operational level grievance mechanisms in place.

In the short term, Myanmar will have neither regulatory / inspection authorities throughout the country nor a readily accessible and well-functioning judicial system in place to hear complaints about O&G operations.

- Require Contractors to put in place operational level grievance mechanisms that provide an early warning system that should permit actual or potential adverse impacts to be addressed and remediated early. They should guarantee non-retaliation and be based on relevant international standards – i.e. [UN Guiding Principles on Business and Human Rights](#) (principles 29-31).

Further suggestions

15. Permit the training funds to be spent on a wider group of Government departments involved with Petroleum Operations (clause 15.2)

The model PSC contains useful requirements on training to improve the skills of Myanmar national staff and MOGE personnel.

- A certain percentage of funds should be allocated to providing training for the wider range of Government personnel who are involved in regulating Petroleum Operations, including MOECF and regional and local government authorities.

16. Require clear and specific limits on use of other resources within the Contract Area.

- The Work Programme should specify the proposed quantities of resources to be used in the Contract Area – eg water, land and construction materials and should be in line with predicted use and impacts covered in the EMP. Where additional use is made of local resources, these should be compensated for. Where the EMP has indicated that these resources are used by local communities, specific mitigation measures should be put in place to ensure that local communities retain access to necessary resources.

17. Specify the access to and use by the public to non-operation specific infrastructure.

- The PSC should specify what types of infrastructure will be accessible to local communities and the terms for their use -- eg free and unfettered, at a cost, none, who regulates access, etc.

18. Exclude strikes by the employees of the Contractor or his subcontractors from the definition of force majeure. (clause 20.2)

- Force majeure provisions should only deal with unpredictable issues genuinely beyond the Contractor's control; the clause should not deal with employer-employee disputes and strikes involving the Contractor as this does not provide any incentive to resolve such disputes quickly and effectively.