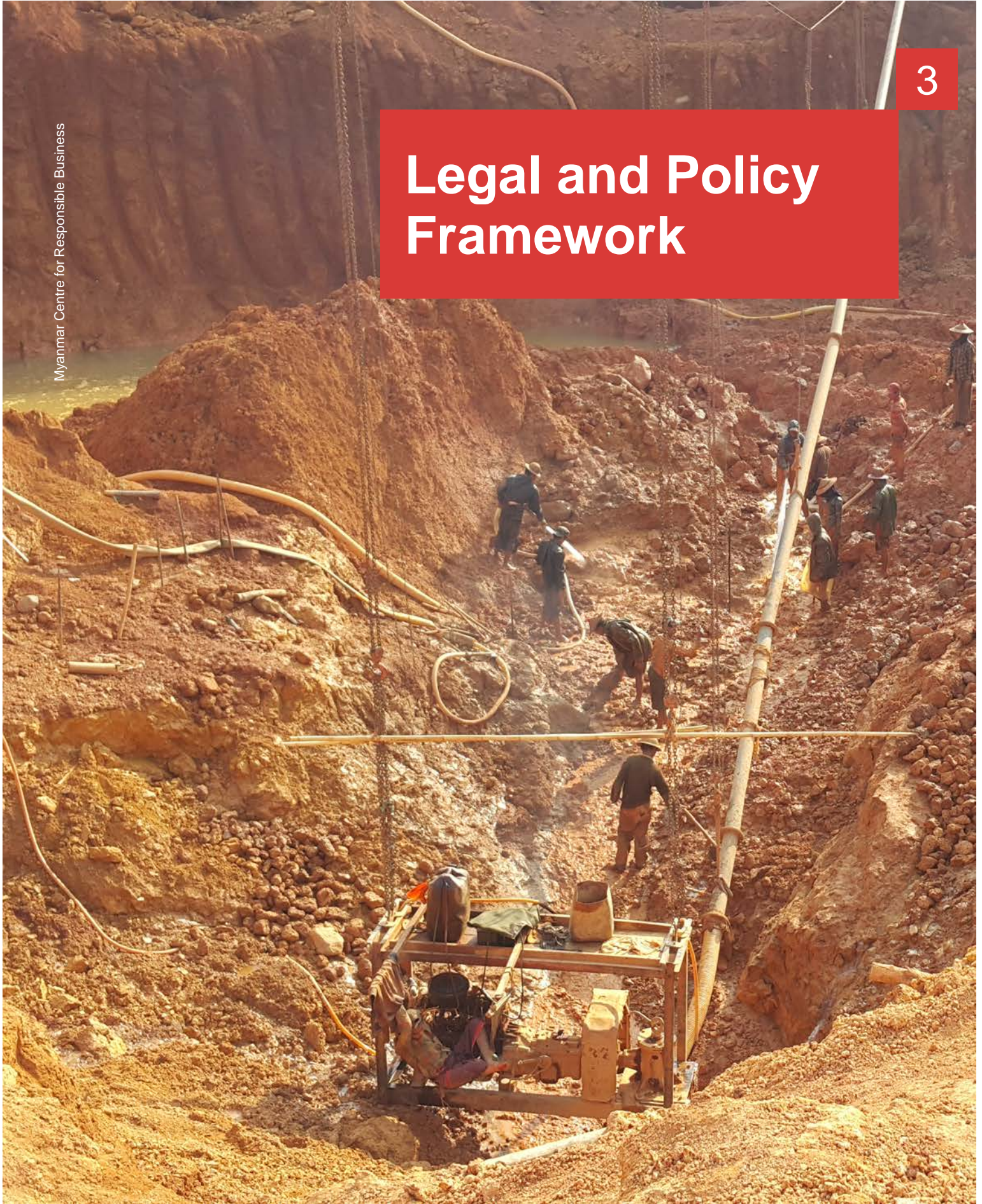


Legal and Policy Framework



Part 3

Legal and Policy Framework

In this section:

A. National Framework

- Myanmar Government policy and institutional framework relating to mining
- Ministry of Natural Resources and Environmental Conservation (MoNREC)
- The Role of State and Regional Governments
- Role of Parliament

B. Myanmar Legislation

- Myanmar Mines Law (2015), Mines Rules (2018), and Production Sharing Contracts
- Occupational Safety and Health
- Protection of the Rights of National Races (2015)
- Environmental Conservation Law and Rules and Environmental Impact Assessment (EIA) Procedure
- Myanmar Investment Law

C. International Frameworks

- Extractive Industries Transparency Initiative (EITI)
- International Council on Mining and Metals (ICMM) Sustainable Development Framework
- Voluntary Principles on Security and Human Rights (VPSHR)
- China Chamber of Commerce of Metals Minerals & Chemicals Importers and Exporters (CCCMC) Guidelines for Social Responsibility in Outbound Mining Investments
- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
- European Union Regulation on Conflict Minerals

The following sections outline some of the legal and institutional frameworks relevant to the protection of human rights in the mining sector. In Myanmar, these issues are closely related to conflict, and question of control over natural resources and federalism. A January 2018 report by Natural Resources Governance Institute (NRGI)⁹¹ on natural resources federalism analyses the Myanmar legal framework for sharing resource governance powers and responsibilities on a number of issues, including licensing, cadaster⁹² and land management, fiscal frameworks and revenue collection, environmental management, occupational safety and health, local content and artisanal and small-scale mining. It also identifies examples from other federal, unitary and mixed/decentralised mineral provinces in the Asia-Pacific region.

⁹¹ NRGI, [Natural Resource Federalism: Considerations for Myanmar](#), January 2018

⁹² The Burmese language does not have a word for 'cadaster' (which is generally defined as all activities linked with licensing, including the applications, registry, granting, issuing, management, mapping, and field delimitation of mineral rights. The concept is not included in Myanmar Mines Law.

A. National Framework

Myanmar Government policy and institutional framework relating to mining

Section 27 of Myanmar's 2008 Constitution grants the Union Government ultimate ownership of all land and all natural resources within the country's national territory, whether located above-ground, sub-soil or underwater and the ability to legislate for extraction of natural resources.⁹³ Ownership has not been delegated to state/regions, self-administered areas, or EAOs, but there is some limited delegation of legislative and taxation power, including, since 2015, for small-scale and artisanal mining. This increased delegation of power is included in Law 45/2015 Amending the Constitution⁹⁴ (adopted July 2015) and specifically in amendments to Schedule 2 (relating to devolved powers for legislation) and Schedule 5 (for devolved taxation powers).

Concerning the mining sector, Schedule 2 Section 4 (which deals with delegated powers for environment and natural resources) was amended to the state/regional right to legislate *'in accordance with the Laws enacted by the Union'* on: (g) small-scale and artisanal mining extraction; (h) mine safety, environmental conservation and restoration, (i) small-scale jewellery business and individual operators; and (k) environmental conservation, covering wild life protection, plants and land. Law 45/2015 also adds a clause (f) to Schedule 2 Section 4 concerning 'the ratio (sic) of natural resources production in states and regions' (the meaning is equally unclear in the original Burmese). Schedule 5 was amended to allow for collection of revenue from mining managed by State or Region, and tax levied on jewellery business managed by State or Region, both 'in accordance with the law enacted by the Union'.

To date, it is not clear how far, if at all, these increased powers have been used. It is also unclear whether laws are required at Union level to trigger the legislative powers of states/regions in these areas. The 2015 amendments to the Mines Law (see below) included some delegation of licensing for small-scale and artisanal/subsistence mining.

Myanmar does not yet have a stand-alone Mineral Resources Policy or other framework outlining the development priorities for the sector in detail (see Part 4: Sector-Level Impacts and Part 7: Recommendations).

Myanmar became an EITI Candidate country in July 2014 (see International Frameworks, below). MoNREC has also reconfirmed its plans to develop a mining cadaster and mineral licence registry which will make mining data publicly available, in line with EITI requirements.⁹⁵ The Ministry has announced plans to strengthen public-private partnerships (PPP) in the sector and for the Mines Departments to carry out surveying and research of Myanmar's geology and mineral resources in collaboration with the Coordinating Committee for Geoscience Programmes in East and Southeast Asia and the Japanese International Cooperation Agency (JICA).⁹⁶

⁹³ [2008 Myanmar Constitution](#)

⁹⁴ [Law Amending the Union of Myanmar Constitution Law 45/2015](#) (Burmese only)

⁹⁵ Berwin Leighton Paisner, [100-day plans of various Myanmar ministries](#), May 2016

⁹⁶ Ibid

The previous government also took steps to include and strengthen environmental and social safeguards including the promulgation of the first Environmental Conservation Law (2012) and Environmental Impact Assessment Procedure (2015). Under the NLD government the ministries responsible for environment and mining were merged, indicating a desire to strengthen the environmental management of the mining sector. An amended Environment Policy is expected in 2018, replacing the 1994 Policy.

The economic policies of the NLD government have not been fully communicated. However, 'Priority Sectors' for income tax benefits adopted in MIC Notification 13/2017 of 1 April under the new Myanmar Investment Law did *not* include mining.⁹⁷ This suggests that the new government is cautious about promoting the sector. A similar caution has been seen in the unofficial suspension of new mining licences since 2016 (see Table 1), and the reluctance of State/Region Ministers to approve new licences or the continuation of old ones.

Ministry of Natural Resources and Environmental Conservation (MoNREC)

Myanmar's mining sector is overseen and regulated by two departments within MoNREC and four mining SOEs, each with a specific mineral focus and all reporting to the Union Minister of Natural Resources and Environmental Conservation (see Box 5).

The SWIA's focus relates predominantly to Mining Enterprise No. 2 (ME-2), which oversees the production and marketing of both gold and tin. ME-2 maintains offices at the state and region-level in several states/regions. In those states/regions that are particularly rich in the minerals for which it is responsible, ME-2 has offices at the township-level in most townships. The production of limestone, the third commodity researched as part of the SWIA, was until 2015 managed under Mining Enterprise No. 3 (ME-3), which dealt principally with industrial minerals and aggregates. Since 2015, the mineral commodities overseen by ME-3 have been subsumed under the jurisdiction of other Mining Enterprises and limestone now sits within the remit of Mining Enterprise No. 1 (ME-1).

The 1994 Myanmar Mines Law assigned the mining, production and marketing of antimony, lead and zinc and several other mineral ores to ME-1. The 2015 amended Myanmar Mines Law no longer specifies the commodities governed by each SOE.

- The Department of Geological Survey and Mineral Exploration (DGSME) licenses prospecting and exploration stages of mine development and maintains three state/region offices but all licensing activity takes place in Naypyidaw.⁹⁸
- The Department of Mines (DoM) issues mining exploitation licences. It is also tasked with promoting investment in the sector, ensuring mine safety through inspections and regulation and enforcing mining laws and regulations.⁹⁹ It has five divisions:
 - Inspection
 - Conservation (Mineral and Environment)
 - Salt Division
 - Planning and Management Division

⁹⁷ Myanmar Investment Commission Notification 13/2017, [Classification of Promoted Sector](#), 1 April 2017

⁹⁸ International Growth Centre, [Natural Resources and Subnational Governments in Myanmar](#), 2014

⁹⁹ MEITI, [Myanmar First EITI Report](#), December 2015.

- Development Division (issues licences and collects royalties).
- Each of the four mining SOEs are responsible for the production and marketing of different commodities. They also carry out regulatory functions, such as the enforcement of laws and contracts and in the case of MGE licence allocation.¹⁰⁰

Box 5: Overview of State-owned Enterprises (SOEs) and their Responsibilities

Mining Enterprise (SOE)	Area of responsibility
No. 1 Mining Enterprise (ME-1)	Responsible for mining, production and marketing of antimony, lead, zinc, silver, iron, nickel and copper ores. Since the merger of ME-3 and ME-1 in early 2015 ME-1 is now also responsible for limestone.
No. 2 Mining Enterprise (ME-2)	Responsible for mining, production and marketing of gold, platinum, tin, tungsten, molybdenum, niobium, columbium, heavy mineral and gold ores.
Myanmar Gems Enterprise (MGE)	Responsible for mining and marketing of various precious gemstones and jade; and for licensing.
Myanmar Pearl Enterprise (MPE)	Breeding and cultivation of mother of pearl and pearl production.

The 1989 State-Owned Enterprises Law grants the Union Government the 'sole right' to carry out business in certain sectors. This includes all exploration, extraction and export of minerals, metals, pearl, jade and precious stones.¹⁰¹ Private operators and investors may, however, participate in the mining sector through contracts with the Government or by entering joint venture agreements with the relevant SOE. Such joint ventures operate on a production sharing basis, whereby the private partner is responsible for raising all capital for investment and production is shared with the relevant SOE in accordance with the terms and conditions set out in a negotiated Production Sharing Contract (PSC).¹⁰² While both production sharing split and other taxes and royalty payments vary depending on several factors, including the mineral and whether the operator is a foreign or Myanmar citizen investor, the ratio is typically in the range of a 70%/30% split to the private company and the mining SOE, respectively.¹⁰³ According to government officials, all mines today have been either privatised or are operating in a public-private joint venture, with no mining projects run solely by an SOE.¹⁰⁴

The Preliminary Diagnostic Report on the Myanmar Mineral and Gemstones Cadaster System Conceptual Design¹⁰⁵ identifies serious weaknesses with the present institutional organisation of MoNREC with implications for transparency and oversight of safe and sustainable mining practices. It notes that in relation to licensing mineral rights, the Ministry

¹⁰⁰ NRGI, [Gilded Gatekeepers: Myanmar's State-Owned Oil, Gas and Mining Enterprises](#), January 2016

¹⁰¹ [1989 State-Owned Enterprises Law](#), Chapter II, Article 1(4) and (8)

¹⁰² MEITI, [Myanmar First EITI Report](#), December 2015

¹⁰³ MCRB field research, 2016; MCRB desk review of mining sector PSCs, August 2016

¹⁰⁴ MCRB Interviews, 2016

¹⁰⁵ Submitted to the Ministry of Planning and Finance, under Contract No MEITI-CS 003/2017 by Enrique Ortega, November 2017 as amended January 2018, copy held on file by MCRB

does not fulfil the international standards of separation between monitoring of activities and granting of mineral rights. Consequently, there are potential conflicts of interest and it is not possible to guarantee objectivity, transparency, equity and fairness in decisions affecting the granting of mineral rights. This comment is applicable to the entire mining sector, but it is particularly relevant regarding gemstones, where the MGE commercial interests and responsibilities are intermixed with licensing and regulatory responsibilities.

The cadaster expert's preliminary diagnostic recommends that the only solution to correct these problems is to modify the present organisation of MoNREC so as to create a new unit named Mineral Rights Cadaster with exclusive responsibilities for licensing; including the reception and registration of applications, the verification of eligibility, checking overlapping, evaluating granting or submission to granting authority and maintenance of the mineral rights (renewal, transfer, extension, expiration, etc.). This would involve removing licensing activities from their present institutional position in DGSME, DoM and MGE, and transferring them to the new Mineral Rights Cadaster. Different procedures for the licensing of different mineral rights, including for exploration and mining rights, would still be applied, within a unified Mineral Rights Cadaster.

The role of State and Regional Governments

Delegated approval of small-scale and subsistence mining

Under the 2015 amended Mines Law (Section 10), issuance of small-scale and subsistence permits is delegated to regional governments. To facilitate this, Mines Plot Scrutinizing and Permit Granting Boards at the state/region-level were introduced by the 2015 amended Law. These Boards exist to review permit applications and may, after obtaining comments from the Union Ministry, grant permits for prospecting, exploration, feasibility studies and small- or subsistence-scale production and processing, buying and selling within the region or state. It is not clear whether State/Regional Boards are in place yet. The DGSME/DoM has expanded and established regional offices in Kachin, Karen, and Shan State (North and South), as well as Sagaing, Mandalay and Yangon Regions. These branch offices would support the establishment of the regional Scrutinizing Boards.¹⁰⁶

In current practice, small-scale companies may choose to apply for mining licences directly with DoM in MoNREC, Nay Pyi Taw, or to go through the state or regional government in which their desired concession is located. If the second approach is chosen, prior to issuing a permit, current practice is that DoM requires 'recommendations' from the state/regional government, recommendations from respective Township GAD, Township Land Records Department, Township Forestry Department, Village Administrator and villagers who would be affected by the project.¹⁰⁷ During MCRB field research it was also observed that in some states/regions there was a township-level requirement for the project proponent to be able to document 'consent' of the local community. Often acting through the village administrator, or GAD, the project proponent may meet this requirement by collecting 10 signatures of 'village respected persons'. Some field research observed that costs associated with obtaining these signatures were charged to the companies' 'CSR' budget.

¹⁰⁶ Communication from DoM to MCRB, November 2016

¹⁰⁷ Ibid

The consequence of delegating permitting of small-scale and subsistence mining, particularly in the absence of an online cadaster, is that, although regional Mines Plot Scrutinizing and Permit Granting Boards are required to seek the Union Ministry's views on applications, there is no complete and updated register of all mine permits awarded at the state/region and national level (i.e. a unified cadaster). This could be a source of conflict between large and small-scale/subsistence operators with overlapping tenements.

Role of state/regional government in large and medium-scale mining

It is clear that states/regions currently have no legal power to approve large/medium-scale mining projects without reference to Naypyidaw. However, state/region governments, parliamentarians and civil society groups, as well as local stakeholders, are all important, and in some cases newly created, stakeholders for a mining company in Myanmar.

Current practice is that mining companies are expected to obtain a recommendation letter from the State/Region Government, even at the early prospecting and exploration stage. It is not clear where this requirement arises from, and it is not explicit in the Mines Law or Mines Rules. Nor is it clear whether a state/regional government has the legal power to block a licence by withholding such a letter.¹⁰⁸ The actual process for obtaining a recommendation is also unclear. Local practice differs, including between townships in the same state. This lack of regulatory clarity raises major concerns for companies, including increased corruption risk.

Figure 1 shows the experience of a foreign company applying for a so-called 'integrated permit' (covering prospecting to feasibility phases). The company was seeking at this point to undertake prospecting to narrow down options for Exploration, and consequently was seeking a permit to prospect in a wide area. The complexity of the permission process the company was required to follow at this stage may arise from a reading of the requirement to obtain permission from landowners and a variety of authorities for use of different types of land at feasibility/production stage (see Part 5.3: Land).

The processes and documentation required at each level (region/state, township and village) appeared to be ad hoc depending on the official concerned, and in all cases far more extensive than was required at this stage of the mine lifecycle. In one case they were required – in writing – to pay a 'production tax' to a township tax office, even though no specific legal basis for this could be demonstrated.

In some areas, the company was required to obtain significant amounts of data about tree girth, presence of monasteries etc., township by township, and village by village.¹⁰⁹ Each such request, in addition to the direct cost incurred to both government and company, raises the risk of demands for facilitation payments ('tea money').

Given that the prospecting and exploration phases of the mine lifecycle involves the progressive narrowing down of a large area to one or more smaller targets, it is important that the baseline data and community engagement required in each stage is proportionate.

¹⁰⁸ See NRGI, [Natural Resource Federalism: Considerations for Myanmar](#), Jan 2018 for an analysis of how subnational permissions, consents and veto powers can be arranged under difference governance systems

¹⁰⁹ MCRB SWIA consultation and interviews, 2016

There is a probability of 0.001 or less that prospecting in an area will ever lead to an actual mine. The gathering of significant amounts of data from a wide area at this stage is therefore disproportionate. It is more appropriate for the feasibility stage, when the resource location is identified, and the area of survey significantly narrowed down.

Since the election, some new Chief Ministers have taken a close interest in the sector particularly in Sagaing and Tanintharyi Regions, where civil society is opposed to mining due to a long history of negative impacts. In July 2016 the Tanintharyi Chief Minister suspended two large tin mines over non-compliance with environmental regulation and causing environmental damage.¹¹⁰ The Regional Government appears to have decided to not support renewal of existing permits or issue new mine permits until environmental issues have been addressed in operational mines.¹¹¹ It has formed a mines scrutinising group led by the Tanintharyi Region Minister for Natural Resources and Environmental Conservation.

As mentioned previously, Myanmar does not yet have a National Mineral Resources Policy. If adopted, the National Mineral Resources Policy could be complemented by Region/State Mineral Resources Strategies which could set out local objectives, including the local appetite to receive mining investment, and any incentives or additional restrictions such as no-go areas that the state/region imposes.

¹¹⁰ Myanmar Times, [Two controversial tin mines suspended in southern Myanmar](#), 21 July 2016

¹¹¹ Myanmar Times, [Tanintharyi tightens mining oversight](#), 17 August 2016

Company Case Study: Integrated Permit for Prospecting, Exploration, and Feasibility (Valid for 5 years, with possibility of an additional extension of 4 + 2 years)

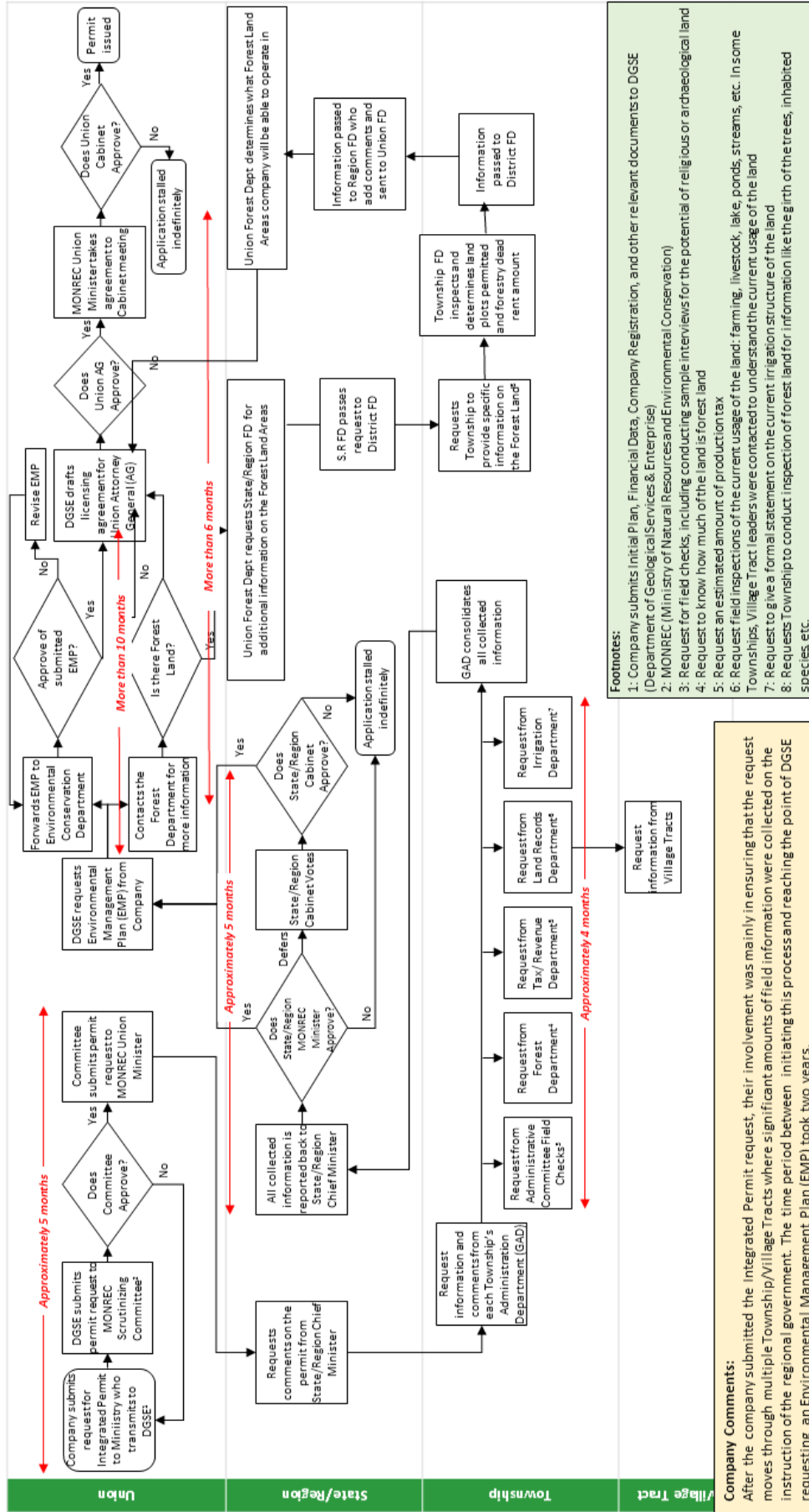


Figure 1: Company experience of applying for an integrated permit

Local administrative oversight functions

In addition to local DoM branch offices, there are also subnational branches of the Forestry Department as well as the Environmental Conservation Department, all under MoNREC, operating at the state and region level. The opening of ECD branch offices appears to be aimed at localising certain activities such as inspections. Many mining-related government functions at local levels are carried out by the General Administration Department (GAD), a department under the Ministry of Home Affairs, which operates at both the region/state level and at the township level. Officials from GAD will often work collaboratively with the local Forestry Department and the village administration, typically the village tract or village leader, and sometimes a group of respected village elders. In areas where branch offices of a mining SOE exist, these often have a dual commercial and regulatory function, sometimes even collaborating with township-level law enforcement agencies to curb illegal mining.¹¹² Regardless of permitting authority, formal income currently accrues to central bodies. Thus, while state and region government level officials must exercise oversight, they do not receive income from mining to pay for them to do so.

Role of Parliament

Parliament at both Union and State/Region level has shown a strong interest in mining. A Mineral, Natural Resources and Environmental Conservation Committee was formed by the Amyotha Hluttaw, the Upper House of Parliament, superseding the Minerals and Natural Resources Management Committee of the out-going Government. The Committee has announced its intention to attempt to limit illegal mining activities and associated environmental damage.¹¹³ The Lower House Pyithu Hluttaw has a Natural Resources and Environmental Conservation Committee.

B. Myanmar Legislation

Myanmar Mines Law (2015), Mines Rules (2018), and Production Sharing Contracts

The 2015 amended Myanmar Mines Law is the main piece of legislation governing the mining and minerals sector in the country.¹¹⁴ It sets out the mining licensing framework, the respective roles and responsibilities of MoNREC officials at the Union- and state/region-levels, the fiscal regime and royalty rates for minerals, as well as the objectives of mine inspections and penalties for non-compliance with the Mines Law. The 2015 amendments to the Law were adopted following three years of Parliamentary debate, much of it led by MPs with mining business interests. While the amended Law includes some improvements, it maintains many of the weaknesses in the 1994 Law, including its structure, scope and approach. It has been criticised by various stakeholders, including business and civil society.¹¹⁵ Inter alia, it lacks basic requirements for effective mining regulation found in other countries' mining laws, such as a mineral cadaster.

According to the Constitution, bye-laws should be passed within 90 days of the law to which they are an auxiliary. Although the 2015 amended Mines Law was enacted in December

¹¹² MCRB field research, 2016

¹¹³ Myanmar Times, [Amyotha committee takes aim at resource extraction](#), 22 February 2016

¹¹⁴ [Law Amending the Mining Law](#) (Burmese only), Pyidaungsu Hluttaw law 72/2015 of 24 December 2015

¹¹⁵ Stephenson Harwood, [Myanmar Mines Law Amendments](#), 14 March 2016

2015, Rules were only adopted by Cabinet in February 2018. At the time of SWIA publication, they were with Parliament for consideration. In the meantime, the 1996 Myanmar Mines Rules remained in force.¹¹⁶ Industry stakeholders as well as CSOs working to improve the fiscal, social and environmental management of Myanmar's mining sector had hoped that there would be transparent public consultation on the draft Rules, something which was lacking in the adoption of the Mines Law.¹¹⁷ In February 2016, the Ministry, with encouragement from its technical advisers, sought initial public input, and received submissions inter alia from MCRB.¹¹⁸ However, no text of the draft Rules was subsequently released for consultation, and the 100-page Rules were adopted in February 2018.

The following is an overview of the 2015 amended Myanmar Mines Law, and 2018 Mines Rules. (Details of provisions for subsistence mining are in Chapter 2).

Commodity Scope

- The 2015 amended Mines Law separates the legislation on gemstones from other minerals and makes reference to the 2016 Gemstone Law. The scope of the 2016 Gemstone Law (currently under further revision) covers jadeite as well as rubies, sapphires, diamonds and other coloured gems present in Myanmar. The Myanmar Gemstone Law is also complemented by a distinct set of regulations for the gemstone sector, the Gems Rules (in July 2016 still in draft form and under Parliamentary review). These are institutionally managed separately by the State-owned Myanmar Gems Enterprise (MGE). In other jurisdiction, gems are rarely regulated entirely separately from other types of minerals and the rationale for keeping them separate has been questioned in view of governance problems in the sector.¹¹⁹
- The 2015 amended Mines Law sets the legal framework for all other minerals, including precious and heavy metals as well as industrial minerals.
- Pearls, though not considered a mineral, are also within the scope of MoNREC regulatory oversight. Like gemstones they are regulated separately by the 2014 amended Myanmar Pearl Law.¹²⁰

Licensing and Ownership

The 2015 amended Myanmar Mines Law maintains the restrictions on foreign investment, which is only permitted in large-scale mining of minerals. This is also reflected in the 2016 Investment Law in which small- and medium-scale mining are 'restricted activities' open only to Myanmar companies, not foreign investors (see below) and only with Ministry permission. The 2015 Law also:

- Introduced amendments to permitting types and procedures.
- Introduces a 'Medium-scale' Mineral Production Permit.
- Does not include sizes for the different types of large, medium, small-scale and subsistence mine in the Law; this is left for the Rules. The 2018 Mines Rules retain the

¹¹⁶ [Myanmar Mines Law, 1994](#)

¹¹⁷ MCRB interviews, 2016

¹¹⁸ MCRB, [Submission on the drafting of Rules implementing the Myanmar Mines Law](#), 7 March 2016

¹¹⁹ Paul Shortell, [Does Myanmar need a gemstones law?](#) NRGI in Myanmar Times, 25 January 2017; NRGI, [Governing the Gemstones Sector: Lessons from Global Experience](#), May 2017; NRGI, [Governing the Gemstones Sector: Considerations for Myanmar](#), May 2017

¹²⁰ [The Law Amending the Myanmar Pearl Law](#), 2014

complicated arrangements for different types of licence in the 1996 Rules. Types of permit – large-, medium-, small-scale or subsistence – are defined by a combination of permit length, size, commodity and type of ownership (foreign or Myanmar). Compared to the 1996 Rules, some sizes of permits have been reduced and lengths of permits have been changed.

- Distinguishes between foreign and citizen (Myanmar) investment for the purposes of licensing and royalty payments, providing greater flexibility for local investors than foreign investor with regard to royalty payment arrangements (Chapter III). (According to MCRB field research in 2016, the PSC terms for domestic investors allowed them to meet their production sharing requirements by submitting mineral of a lower purity grade than that required of foreign investors).
- Introduces the possibility for Myanmar citizen investment under medium or small-scale permits to be converted into large-scale extraction involving foreign investment, subject to geographical and surveying reports and the quality and volume of the mineral deposit in question (Chapter III, Art7c). Transfer of a mineral licence is subject to review and approval of MoNREC.
- Updates the definition of Large-scale Mineral Production Permits.
- Extends the maximum validity of the large-scale licence, from 25 to 50 years. This was an issue which both Myanmar and prospective foreign investors advocated for.¹²¹ They argued that increased security of tenure could attract increased foreign investment. Furthermore, longer timeframes for operation will encourage more sustainable mining practices as operators will not rush to extract as much mineral as possible before their production permits expire.
- Increased penalties for violations such as informal mining.

Table 2 seeks to provide an overview of the different types of minerals licences believed to exist following the adoption of the 2015 Law and outlined in the 2018 Rules, other than gemstones licences which are not covered by this SWIA and subsistence mining (covered separately).

Permits are all issued by ‘the Ministry’ i.e. MoNREC, after the approval of the Ministry’s Administrative Committee, with the exception of small-scale production permits. According to Rule 87(a), these can be issued by a State/Region Plot Scrutiny and Issuing team, after submitting a report and obtaining the opinion of the Ministry (which may be a mechanism to avoid overlapping tenure).

Table 2: Types of Mineral Exploration and Production Permits

¹²¹ MCRB interview, 2016

Permit type	Maximum Size (Rule 12)	Licence Length (years including max extensions)
Large-Scale	1 to 2100 km ²	Prospecting (Rule 10 + 17b) 1+1 Exploration (Rule 26 + 32b) 3+1+1 Feasibility (Rule 38 + 44 a,b) 1+1+1 Production (Rule 52 + 58) 15 to 50, + 5
Medium-Scale	Up to 1 km ²	Prospecting (Rule 10 + 17b) 1 +1 Exploration (Rule 26a,b + 32) 3+1+1 Feasibility (Rules 38, 44 a,b) 1+1+1 Production (Rule 68 + 74) 10 to 15, + 2
Small-Scale		
Industrial raw mineral or stone	< 0.08 km ² (20 acres)	Prospecting (Rule 11 + 17c) 1+1 Exploration (Rule 27 + 32c) 1+1+1 Production (Rule 86 + 92) 5 to 10, + 2
Metals other than gold and other precious metals	< 0.04 km ² (10 acres)	
Gold	< 0.016 km ² (4 acres)	

Permitted activities for different stages are not included in the February 2018 Mines Rules (an earlier draft contained a list of permitted Exploration activities) although aerial survey under prospecting is permitted.

In all cases, and regardless of the stage of the mine lifecycle and type of licence (i.e. prospecting, exploration, feasibility or production), the maximum size of the area allowed is set out in Rule 12 by commodity and permit type (Large, Medium or Small). This approach of maintaining potentially the same tenement area throughout the project cycle needs to be reviewed, as it could result in a Production Permit being issued for a maximum area of 2,100 km², which is larger than the island of Mauritius.

The steps of the licensing process itself, including the basis on which licence applications are evaluated by MoNREC, are not clear from either the Law or Rules (see Chapter 4). MoNREC makes some forms available online that give some insight into the type of information that applicants are required to provide as part of applying for a mineral licence.¹²² Apart from this, there is no information publicly available that clearly explains the process that MoNREC applies for receiving and evaluating licence applications.

MCRB research indicated that in practice, mineral licences are reviewed and approved by a committee from MoNREC, with input from the DGSME and ECD, as well as the relevant SOE. However, the respective roles of these different stakeholders in decision-making is not elaborated in the Law, Rules, or other publicly available documentation. As outlined above, pursuant to the 2015 amended Mines Law, the permit application process for subsistence and small-scale permits has – at least in theory – been devolved to the region/state-level.

Myanmar's first EITI report indicates a number of factors that are taken into account by MoNREC in the evaluation of licence applications. However, how these different factors are weighed is unclear. This leads to a high level of discretion on the part of the Government, as well as uncertainties for investors. The complexities and complications of the current licensing regime and its interaction with other laws such as the Investment Law and EIA process are discussed further in Part 4.

Integrated Prospecting, Exploration and Feasibility Permit

One problem with the 2015 amended Mines Law (and 2018 Rules) is that, like the 1994 Mines Law, it does not provide mining companies with reassurance on the question of 'conjunctive tenure'. This is the legal guarantee that the resource which a company identifies through investment in prospecting and exploration will not be taken away from them prior to production and handed to another company. Without this guarantee, few major companies will take the risk of market entry.

To address this uncertainty, potential investors in large-scale mines have, at prospecting stage, sought 'integrated' mining permits for 'at least three stages' of the mining project cycle, typically prospecting, exploration and feasibility. These are valid for a period of five years, extendable up to nine. Some integrated permits have been issued in 2016 and 2017 under section 9(d) of the 2015 amended Mines Law. However, such 'integrated permits' are confusing for stakeholders. They also must not override the need to assess and permit companies at each stage-gate or the project cycle, in particular concerning management of environmental and social impacts.

Mineral Processing Permit and Trading Permit

A new type of Permit for Mineral Processing was introduced as Article 10 of the 2015 amended Mines Law, which permits, according to Chapter 10 of the Rules, large-scale processing permits for 15-50 years with a five year extension, medium-scale permits for 10-15 years with a two year extension, and small-scale for 5-10 years with a two year

¹²² NRGI, [Mineral and Gemstone Licensing in Myanmar](#), April 2016, p. 8

extension. What constitutes large-, medium- and small-scale is unclear. Chapter 11 of the Rules sets out Rules for a Mineral Trading Permit.

Artisanal/subsistence miners

Subsistence mining is addressed in the 2018 Mines Rules, with plot size defined under Rule 97 as < 1 acre for gold and other valuable metals (and for gold plots, only 1 plot may be granted per household); < 3 acres for other metals; and < 5 acres for industrial raw minerals or stones. Various requirements concerning operations and closure are defined in other parts of the Rules (See also Part 2). However, the inclusion of subsistence mining in the 100+ pages Mines Rules is not a user-friendly way to regulate subsistence miners. Moving the provisions into a separate set of Rules would be more practical and allow for the flexibility needed to address its specific nature.

Fiscal regime: production sharing terms, taxes and royalties

The 1994 Mines Law required foreign investors to operate in a joint venture with a Myanmar company and the relevant mining SOE, either on a production sharing basis or profit sharing basis. Production Sharing Contracts (PSCs) are the most common royalty arrangement in Myanmar but globally, they are rarely used in the mining industry. There are a number of reasons why investment agreements or pure licensing regimes are preferable to PSCs in the mining sector (see Part 4: Sector-Level Impacts). Their continued use in Myanmar has been a further factor discouraging foreign investment.

According to the 2015 amended Mines Law, the holder of a permit for mineral production must pay a royalty on the value of the sale of minerals. According to the 1994 Myanmar Mines Law, this rate was determined by the former MoM (now MoNREC). This arrangement was reflected in the terms of the handful of PSCs obtained by MCRB as part of the SWIA research. However, the 2015 amended Mines Law sets fixed royalties for specific mineral groups (see Box 6).

This specifies that the mineral tax is to be calculated based on the percentage of pure metallic mineral which the traded commodity contains, and the prevailing international price of the mineral(s) in question at the time of the sale (Chapter 19). The 'prevailing international price' appears to be determined in a fairly inconsistent manner, with limited detail provided in the Law or PSCs reviewed by MCRB as to how this figure is determined. Where the actual sales price of a mineral is less than the 'international price' set, the royalty rate paid by a company risks being higher than what is indicated by the Law.

The 2015 amendments introduce the opportunity for Myanmar companies to pay royalties in minerals. Previously, royalties were legally required to be paid in cash. Companies operating in joint ventures with foreign investors may, however, only pay royalties in cash and only in Myanmar kyat, at the exchange rate set by the Central Bank of Myanmar. Field data collected by MCRB has indicated that some joint ventures including foreign investors and ME-2 pay the production share portion in kind, despite the requirement to pay in cash (i.e. they pay the production share for a gold contract in gold, rather than in monetary currency). For tin and tungsten producers, foreign joint venture operators are expected to contribute mineral concentrate at a higher level of purity than their Myanmar counterparts,

72% and 65% purity respectively, according to MCRB field data. It should be noted that all of these discriminatory provisions could risk challenge under Myanmar's Investment Protection Agreements, particularly if they are changed in future to make them even less favourable to foreign investors.

Box 6: Royalty Rates for Minerals (Section 18, 2015 Amended Myanmar Mines Law)

Minerals	Royalty rate on sales price
Gold, platinum, uranium. May include other precious metallic minerals subject to Ministerial decision and Union Government approval. Such additions will be announced by ministerial notification.	5%
Silver, copper, lead, tungsten, nickel, heavy sands and others. May include other precious metallic minerals subject to Ministerial decision and Union Government approval. Such additions will be announced by ministerial notification.	4%
Iron, zinc, lead, tin, tungsten, aluminium, arsenic, manganese, cobalt and others. May include other metallic minerals subject to Ministerial decision and Union Government approval. Such additions will be announced by ministerial notification.	3%
Raw industrial minerals or stones	2%

As part of the SWIA research, MCRB reviewed several PSCs, which were shared confidentially by companies. A typical selection of the terms contained in one of these agreements with ME-2 is provided in Box 7. However, the terms in each PSC are negotiable and can therefore be assumed to vary.

Social and environmental provisions in the Mines Law and Rules

Several subsections were added by the 2015 amendments to the Mines Law which are intended to increase the scope of environmental and social responsibility of the mine operator.

- An addition to Section 13e (1) requiring mines to minimise environmental damage and negative impacts on local communities, and to make an annual contribution to a fund for environmental conservation.
- An additional requirement (Section 13e (2) to contribute to a Mine Closure Fund for environmental rehabilitation and reforestation.

The Mines Rules contain (identical) requirements in Rule 51c (large-scale), 67c (medium-scale) and 85c (small-scale) for the company to submit at the time of its application for a Production Permit the evidence that it has undertaken negotiations with local communities about local social responsibility, and obtained their agreement.

Box 7: Overview of Terms Contained in a sample Production Sharing Contract

- PSC entered into by ME-2 Managing Director, who represents Ministry, and head of the private company.
- Specifies in MMK the minimum investment to be made and that this amount must be invested solely by the private partner in the joint venture.
- Profit sharing: an initial minerals tax is required whereby 50% of the production is taxed at 4% during the first 12 months of production.
- After this initial period, the production is split between the two JV partners at 30% to the SOE and 70% to the mine operator.
- In allocating fiscal value to the JV's monthly mineral production, PSC sets out a process whereby price is calculated on the basis of the average price 'on the global market value' of the mineral in question, as available online.
- Mining SOE may choose to receive its share of production as mineral or cash, as determined by the market price set by the above procedure. It is not clear from the PSCs reviewed whether this choice may be made on a monthly or yearly basis, or at another interval. Flexibility to choose mineral or cash allows mining SOE to stockpile while mineral prices are low and receive cash when prices are higher.
- After the deduction of mineral tax, the 'remaining minerals' are shared by the mining SOE and private company according to the formula: Production in metric tons \times 100% = ME-2 (30%) \times metric tons \times operator (70%) \times metric tons.
- Project-related costs such as transportation and production are to be assumed by the private partner.
- Operations must proceed in accordance with plan approved by SOE.
- Operator must compile a monthly report on production, storage and sales according to a mutually agreed-upon format. Copy must be submitted to SOE partner on a monthly basis.
- SOE partner agrees to provide support to the private partner with mineral exports, if needed, as well as support the operator in setting up a foreign currency bank account to allow the company to save export revenue.
- SOE partner assumes responsibility for preventing other parties from entering the concession area by cooperating with regional authorities.
- Operator must take out insurance as stipulated in 1993 Myanmar Insurance Law.
- Sets out terms for dispute arbitration between the company and mining SOE, stating that dispute resolution steps must meet the standards set out in the 1944 Myanmar Arbitration Act. Arbitration must take place in Nay Pyi Taw.
- States that if minerals are found within the permit area other than that or those for which the operator holds a permit, this must be reported to the mining SOE. One PSC reviewed (wherein ME-2 is the public JV partner) notes that if diamonds or coloured gems are found, these will be owned by ME-2, not the Gems Enterprise.
- Indicates that prior permission must be obtained from the Ministry of Forestry if any trees are to be felled, including within the concession area.
- Land on the mined concession must be reforested by the private partner after mine operations end, or the private partner must pay compensation.
- Where homes, farms or land have been damaged by operations the private partner must pay compensation to affected parties.

The Mines Rules also cross-reference in multiple places the need to abide by the Environmental Conservation Law, Rules and EIA Procedure (see Table 3). However, they also appear to be pre-determining the type of process (EMP, IEE, EIA etc.) to apply, even though this is not consistent with sizes and thresholds in the EIA Procedure Annex 1 (see extract in Table 4) which sets out which mining projects require an IEE or EIA, although an EIA requirement can also be applied to a smaller project by virtue of it being e.g. located in an environmentally sensitive area (Art 25). The size thresholds for mining were hotly debated in 2015 between the two then Ministries. Requirements in the 2018 Mines Rules are therefore inconsistent with the EIA Procedure which will lead to legal uncertainty.

The Law states that where an EIA is required, costs are to be shared with the JV partners (Section 35a) (see Environmental Impact Assessment (EIA) Procedure below).

Table 3: Requirements for EIA, IEE or EMP in the Mines Rules

Stage	Rule	Apparent EMP/IEE/EIA requirement according to 2018 Mines Rules
Prospecting	8 e	Screening ('shall submit a project proposal')
Exploration	24 f	Environmental Management Plan (EMP)
Feasibility	37 e	Environmental Management Plan (EMP)
Large-scale Production	48 f	Environmental Impact Assessment (EIA)
Medium-scale Production	64 g	IEE or EIA
Small-Scale Production	82 f	Initial Environmental Examination (IEE)
Subsistence	97 c	Initial Environmental Examination (IEE)

Feasibility Study

The 2015 amended Mines Law introduced the concept of Feasibility Study defined in amended Section 2(i) (a) as “the examination of a mineral deposit following Exploration to ensure whether it can be mined commercially or not. This includes consideration of mining, processing and marketing, as well as analysis of the environment and social impacts.” Establishing the requirement for a Feasibility Study has the potential to enable the Myanmar Government and its agencies to better and more holistically review and compare the projected fiscal benefits of a proposed project relative to its negative impacts. However, it is unclear that MoNREC DoM will have the capacity to accurately assess Feasibility Studies, including reviewing the accuracy of projection models, plans and budgets submitted by the

company or their representatives. Industry sources told MCRB that the government mineral sampling lab lags far behind international industry standards. Technical studies based on specialist sampling methods may therefore be inaccessible to the officials reviewing a company feasibility study in Myanmar. This may place DoM in the position of having to trust company-generated geological data and financial projections, which may affect the outcome of company-Government mine negotiations.

Cost and revenue estimates at the feasibility stage are key to deciding on revenue splits and tax breaks. The feasibility stage is also when the need for community investment and infrastructure development is determined. Expert input to government at this stage would therefore be beneficial. For this reason, in some jurisdictions, feasibility studies have to be either performed or approved by independent experts external to the company, typically mining engineers and economists specialised in financial modelling. While project-level EIAs have to be undertaken by qualified third parties registered with ECD, there is currently no such stipulation for feasibility study experts in the 2015 amended Myanmar Mines Law, and the Rules do not provide clarity.

Occupational Safety and Health

MCRB field research identified safety and health to be a major issue in both the formal and informal parts of the mining sector (see Part 4: Sector-level impacts and Part 5.4: Labour). There is a pressing need for regulatory oversight and enforcement. In particular, it is important that safety and health requirements in different laws and regulations are aligned, accountabilities are clear, and resources are committed to enforcement.

Currently Myanmar lacks a complete legal framework for occupational safety and health (OSH). OSH is partially covered by sectoral laws including the Factories Act, and the 1996 Mines Rules contain some provisions on safety and health (see Part 5.4: Labour). A draft Mines Safety Law was elaborated by the former Mines Ministry and submitted to the previous Parliament. It covered OSH in the mining industry and some environmental impacts. It is unclear whether its provisions are now incorporated in Chapters 28 and 29 the 2018 Mines Rules.¹²³

The question of accountability for OSH in the mining sector is also further complicated by the introduction of the EIA process, which is overseen by the Environmental Conservation Department (ECD), MoNREC. The overlapping and unclear responsibilities for OSH and its implications for decentralisation and federalism are further explored in NRGI's report.¹²⁴

Draft Occupational Safety and Health (OSH) Law

A draft Occupational Safety and Health Law which was prepared for several years within the Ministry of Labour, Immigration and Population (MoLIP) was sent to Parliament in 2017.¹²⁵ The timetable for its passage is uncertain. The scope of the Bill (Article 4) covers all sectors, public and private, including 'mining and gems exploration and any modification process related to them'. It also reflects a change of approach advocating a bipartite system

¹²³ MCRB interviews, 2016; MCRB has seen a partial early draft.

¹²⁴ NRGI, [Natural Resource Federalism: Considerations for Myanmar](#), January 2018

¹²⁵ [Occupational Safety and Health Bill](#) as presented to Parliament, 2017 (Burmese)

where both employers and employees take ownership of occupational safety and health systems, while the Government oversees the implementation of this process.

The Bill contains three key provisions:

- Creation of a national OSH Council to facilitate tripartite discussions, after which decisions can be adopted at a national level.
- Formation of workplace safety and health committees with equal numbers of employer and employee representatives. Such committees will be directly responsible for the implementation of national OSH policies at the workplace.
- Appointment of a qualified workplace safety and health officer to provide technical support to employer and employee representatives.

However, the Bill could be improved. In particular:

- The proposed requirement for approvals from the Director-General prior to establishing a business or undertaking various steps such as constructing a new building or installing a machine, creates additional administrative burden and may duplicate other approval processes such as EIA.
- There is an ambiguous reporting relationship between Health and Safety Officers and the Ministry which appears to undermine the need to reinforce that the highest levels of company management must be directly responsible for establishing a safety culture and must be held accountable for it.
- The Draft OSH Law could adopt more of a risk-based approach, in which organisations, relevant authorities and workers identify, assess and understand occupational safety and health risks which they are exposed to, take mitigation measures in accordance with the level of risk and are held accountable for the outcome.¹²⁶

The OSH Law provides for the option of introducing sector-specific OSH Rules. To ensure consistency between the Mines Law and Rules safety provisions, it could be advisable to extract the OSH provisions from the 2018 Mines Rules, and adopt them as sector-specific Rules which could also be brought in line with the cross-sectoral OSH Law, once adopted. The guidelines produced by BGR (see Part 4: Sector-Level Impacts) could also be incorporated into a separate set of Mining OSH Rules, or detailed Notifications.

Protection of the Rights of National Races (2015)

Article 5 of the 2015 Law Protecting the Rights of National Races is relevant to the mining sector. It states that “*hta-nay tain-yin-tha* [the usual phrase for Indigenous Peoples] should receive complete and precise information about extractive industry projects and other business activities in their areas before project implementation so that negotiations between the groups and the Government/companies can take place.”¹²⁷ However, a definition for ‘*hta-nay tain-yin-tha*’ was not included in the Law, and this and other issues need to be addressed in bye-laws which, as of February 2018, were still being prepared.

¹²⁶ MCRB and Australian Chamber submit comments on new OSH Law, 3 November 2017

¹²⁷ MCRB, [Indigenous Peoples' Rights and Business in Myanmar](#), Briefing Paper, February 2016

Environmental Conservation Law and Rules and Environmental Impact Assessment (EIA) Procedure

Environmental protection in Myanmar's mining sector is regulated by a combination of regulations under the Mines Law, a number of cross-sectoral laws on issues like water, land, forestry and hazardous substances, and the 2012 Environmental Conservation Law (ECL).¹²⁸ The ECL established a requirement for EIA (referring to it as 'EIA and SIA'). The supplementary 2014 Environmental Conservation Rules¹²⁹ re-iterated a requirement for 'ESIA' (sic), elaborated in the 2015 EIA Procedure¹³⁰ where it is referred to as 'EIA'.¹³¹

Article 2(g) of the EIA Procedure clarifies that 'environmental impact' includes social impacts. These in turn include Involuntary Resettlement and those relating to Indigenous Peoples. Article 2(h) defines 'Adverse Impact' as "any adverse environmental, social, socio-economic, health, cultural, occupational safety or health, and community health and safety effect suffered or borne by any entity, natural person, ecosystem, or natural resource, including, but not limited to, the environment, flora and fauna, where such effect is attributable in any degree or extent to, or arises in any manner from, any action or omission on the part of the Project Proponent, or from the design, development, construction, implementation, maintenance, operation, or decommissioning of the Project or any activities related thereto". The Procedure also requires cumulative impacts to be addressed.

Where a Project requires it, one of two types of assessment should be done: either a full EIA using a qualified consultant registered with ECD; or, in the case of a lower impact activity, an Initial Environmental Examination (IEE). An IEE lacks the initial Scoping Phase of the EIA but is otherwise similar. In either case, an Environmental Management Plan (EMP) should be established to mitigate impacts. This should be approved by MoNREC to become a contractual commitment by the Project Proponent (company). This leads to the issuance of an Environmental Compliance Certificate (ECC) by ECD, which then monitors the Project for compliance (see Part 5.7: Environment and Ecosystem Services).

¹²⁸ [2012 Environmental Conservation Law](#)

¹²⁹ [2014 Environmental Conservation Rules](#)

¹³⁰ [2015 Environmental Impact Assessment Procedure](#)

¹³¹ Myanmar legislation uses a variety of terms e.g. EIA EIA/SIA, or ESIA. However the MONREC has clarified to MCRB that they prefer to use the term 'EIA' and to stress the scoped defined in the EIA procedure i.e. that this also includes social and health impacts. This SWIA therefore uses the term 'EIA' unless there is a particular reason not to.

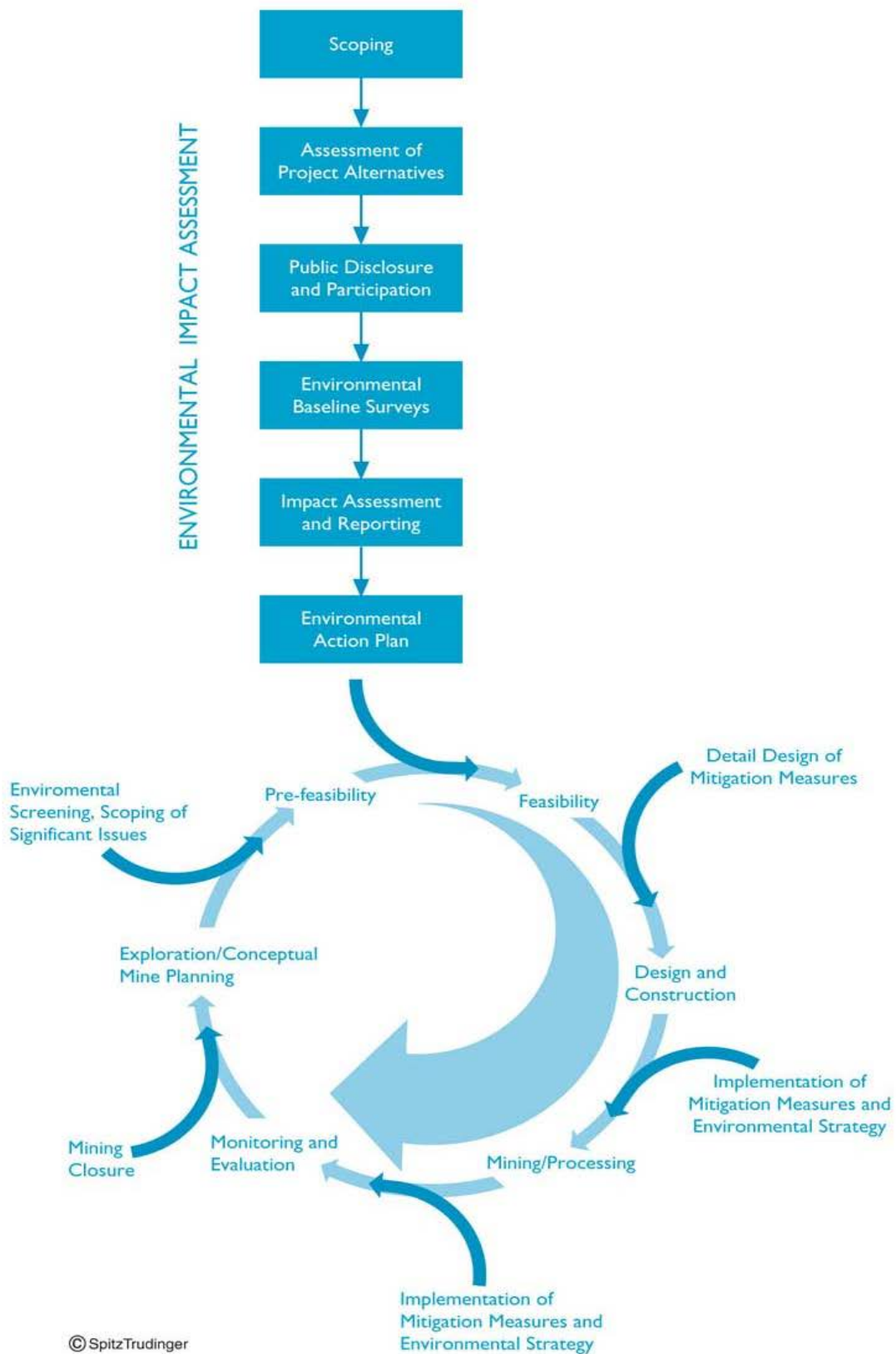


Figure 2: Environmental and Social Impact Assessment in the Mine Lifecycle¹³²

¹³² Adapted from Mining and the Environment ed. Spitz and Trudinger (2009)

Table 4: Annex 1 of EIA Procedure (extract): Categorisation of Mining Activities

	Type of Economic Activity	Criteria for IEE Type Economic Activities	Criteria for EIA Type Economic Activities
132	Extraction of Rock, Gravel or Sand from a River or Marine Waters	≥ 1,000 m ³ /a but < 50,000 m ³ /a	≥ 50,000 m ³ /a
133	Construction, Building and Ceramic Minerals Extraction (aggregates, limestone, slates, clay, gypsum, feldspar, silica sands, granite, kaolin, bentonite, marble, and quartzite)	< 200 acre and < 100,000 t/a	≥ 200 acre or ≥ 100,000 t/a
134	Extraction and Refining of Industrial Minerals (barite, fluorite, phosphate, potash, salt, soda ash, asbestos)	< 200 acre and < 100,000 t/a ore	≥ 200 acre or ≥ 100,000 t/a ore
135	Extraction of Ferrous, Non-Ferrous Metal and Precious Metal Ore Except Gold (iron, manganese, silver, copper, tin, antimony, lead, nickel, zinc, chromium, bauxite), and Precious Stone	< 50 acre and < 50,000 t/a	≥ 200 acre or ≥ 50,000 t/a
136	Refining of Metal Mineral Ore (without using hazardous chemicals)	< 50,000 t/a	≥ 50,000 t/a
137	Refining of Metal Mineral Ore (using hazardous chemicals)	< 25,000 t/a	≥ 25,000 t/a
138	Extraction and Refining of Gold Ore (without using hazardous chemicals)	< 20 acre	≥ 20 acre
139	Extraction and Refining of Gold Ore (using hazardous chemicals)	< 20 acre and < 25,000 t/a	≥ 20 acre or ≥ 25,000 t/a
140	Coal Mining (underground and surface)	< 100,000 t/a coal	≥ 100,000 t/a coal
141	Mining, including Dredging of Heavy Mineral Sands (tungsten, ilmenite, rutile, zircon, titanium, monazite)	≥ 1,000 m ³ /a but < 50,000 m ³ /a	≥ 50,000 m ³ /a

Annex 1 of the EIA Procedure needs revision to:

- Distinguish between phases in the mine lifecycle (as is done for oil and gas), as different phases of the cycle have different impacts, and do not all require a full EIA which is generally only undertaken at pre-feasibility/feasibility stage (Figure 2);
- Address illogical requirements such as the need for all gold mines of < 20 acres to conduct an IEE as this creates an IEE requirement for even subsistence miners; and
- Correct errors relating to project sizes.

Furthermore, greater consistency between tenement sizes in EIA Annex 1 and the Mines Rules would be useful.

Existing Mining Projects

The 2015 EIA Procedure also applies to existing projects. It requires them to undertake environmental compliance audits, including on-site assessments, to identify concerns related to the project's impacts and to determine whether a retroactive IEE or EIA are necessary (Article 8). Table 1 shows that around 1450 mining operations are currently licenced by MoNREC. As of 31 May 2017, ECD had received 39 EIA, 316 IEE and 1693 EMP (total 2048 documents) relating to the mining sector.¹³³ Most of these were commissioned by DoM using its own template for EMPs which is not consistent with that in the EIA Procedure. The MoNREC Minister who has responsibility for both mining and environment is understood to have issued a requirement for mines of > 50 acres to first undertake an environmental audit, in accordance with Article 8 of the Procedure.¹³⁴

Public Participation and Disclosure

The 2015 EIA Procedure (Article 38 for IEE, Article 65 for EIA) requires project proponents, whether companies or public agencies, to publish the EIA report no later than 15 days after its submission to ECD; ensuring that it is available to civil society, project-affected people, local communities and other concerned stakeholders by: (i) posting the EIA on the project or project proponent's website(s); (ii) communicating by means of local media (i.e. newspapers); (iii) at public meeting places (e.g. libraries, community halls); and (iv) at the offices of the project proponent. The EIA Procedure also requires ECD to make the report publicly available upon receipt.

The issuing of the EIA Procedure has been an important step towards improving the environmental and social accountability of businesses in Myanmar. However, a number of obstacles to the successful implementation and enforcement of the EIA Procedure in Myanmar's mining sector remain (see Part 4: Sector-Level Impacts and Part 5.7: Environment and Ecosystem Services). It is intended that the EIA Procedure will also be complemented by a set of sector-specific Mining EIA Guidelines to assist project proponents and their consultants.

The Procedure was issued at the same time as a first set of National Environmental Quality Guidelines, focused on emissions.¹³⁵ The Guidelines are based on the IFC Environmental Health and Safety Guidelines and contain mining sector specific guidance on allowable emissions. The Guidelines prescribe specific principles to control noise and vibration, air emissions and effluent discharges at reasonable costs to the operator and with existing technology.¹³⁶ Further details on environmental regulation are given in Part 5.7.

Myanmar Investment Law

In October 2016, the Government passed a new Myanmar Investment Law,¹³⁷ which supersedes the previous 2012 Foreign Investment Law¹³⁸ and the 2013 Myanmar Citizens

¹³³ Presentation by ECD to the Environmental Working Group 12 June 2017, held on file with MCRB

¹³⁴ Communication with ECD, March 2017

¹³⁵ [2016 National Environmental Quality Guidelines](#)

¹³⁶ VDB, [Client Alert – Emission Guidelines Issued](#)

¹³⁷ VDB, [Client Briefing Note: What Changes in Practice under the New Investment Law?](#), 8 October 2016

¹³⁸ [2012 Foreign Investment Law](#).

Investment Law¹³⁹ to create a single law for both foreign and domestic/citizen investors. In March 2017, the Myanmar Investment Rules (MIR) were adopted.¹⁴⁰ The new Law and Rules introduce a number of changes to the previous 2012 Foreign Investment Law, including:

- **The introduction of an ‘endorsement’ process, instead of a full MIC Permit:** There are now types of permit possible, one being a ‘full’ MIC Permit, and the other an approval or ‘Endorsement’ for permission to use land; the second process supposedly being a faster process. Full MIC Permits will be necessary for strategic, large or environmentally or socially impactful projects (Section 36 MIL, defined further in Article 3-11 of the MIR).
- **The Law applies to all investors:** The previous 2012 Foreign Investment Law applied only to those foreign investors holding an MIC permit. Under the new Law, everyone who invests in Myanmar is an investor subject to the 2016 Investment Law, irrespective of whether they hold an MIC permit or not.
- **Tax incentives have changed:** The 5-year tax holiday which was previously automatically granted to foreign investors receiving an MIC permit has been removed. The granting of tax holidays is now at the discretion of MIC. A number of other tax incentives have also changed.
- **Myanmar law has been brought in sync with international investment laws:** The new law includes common international standards of protection for investors found in many bilateral investment treaties, including national treatment, most favoured nation, and fair and equitable treatment. This is in line with Myanmar’s obligations in some of its existing bilateral investment treaties.
- **New protections for workers:** The law includes a new set of employer obligations regarding workers: investors can only cease or close their business after compensating workers; workers need to be paid during a temporary closure; and investors must pay compensation for workplace injury, sickness, death or loss of limbs.
- **New transparency provisions:** Including a requirement (Rule 45) for MIC to publish the Proposal Summary within 10 days of receiving the Proposal and before it is considered by MIC and a requirement (Rules 196/199) for holders of an MIC Permit to publish an annual report including details of how it has invested responsibly and sustainably.

How these new provisions will play out in practice remains to be seen and there are a number of aspects that warrant further clarification/elaboration in subsequent regulation or notifications to the Law, including:

- Defining what types of project will fall under Article 36, i.e. be classified as types of projects that will require a full MIC Permit because they inter alia have a large potential impact on the environment and the local community.
- Defining how the provisions and definitions of the new Law relate to connected legal requirements; for example, how community consultation and consent provisions pursuant to Article 5 of the 2015 Law on Protection of the Rights of Ethnic Nationalities and EIA requirements outlined in the 2012 Environmental Conservation Law and 2015 EIA Procedure are reflected in MIC decision-making processes regarding the granting of permits and approvals.

¹³⁹ [2013 Myanmar Citizens Investment Law](#)

¹⁴⁰ [Myanmar Investment Rules](#), MIC Notification 35/2017, 31 March 2017

- Clarifying what types of projects will trigger the Article 46 requirement for national parliamentary approval for projects.
- Elaborating the role of state/region governments in permitting decision-making, including provisions for consultation with the local communities who are potentially impacted by a project early in the permitting decision-making, e.g. through a requirement that MIC must seek comments from regional/state governments who in turn are obliged to consult with the relevant local communities.

In April 2017, MIC issued an updated list of Restricted Investment Activities¹⁴¹ under Chapter 10, which restated the previous approach and that in the 2015 amended Mines Law. Only the Union Government may undertake “Feasibility study and production of radioactive metals such as uranium and thorium”. Foreign Investors are not allowed to do prospecting, exploration, feasibility study and small- and medium-scale mineral production or refining, or prospecting, exploration and production of jade/gem stones. MoNREC approval is needed for foreign investment in large-scale mineral production and small, medium and large-scale production using citizen (i.e. Myanmar) investment. Under the 2017 Myanmar Companies Act, ‘Myanmar companies’ can have up to a 35% equity share from foreign investors.

C. International Frameworks

In addition to the national laws and regulations outlined above, a number of international frameworks that address the human rights impacts of mining activities are relevant in the Myanmar context. Some apply to foreign mining investors operating or looking to operate in Myanmar. In other cases the Myanmar Government and other in-country stakeholders are taking part in the initiative.

Extractive Industries Transparency Initiative (EITI)

EITI is a global initiative to promote the open and accountable management of natural resources.¹⁴² The EITI seeks to address governance of the oil, gas and mining sectors, in particular transparency surrounding how a country’s natural resources are governed. This includes looking at how extraction rights are issued, how the resources are monetised, and how they benefit the people and the economy.

The 2016 EITI Standard¹⁴³ has two parts. Part 1 deals with the implementation of the Standard, and Part 2 with the governance and management of the international EITI. The Standard is overseen by a multi-stakeholder board, including representatives from governments, extractive industries companies, CSOs, institutional investors and international organisations. Having submitted their progress reports and annual reports on revenue paid by companies and received by government, countries are validated against the Standard and rated as having made Satisfactory Progress, Meaningful Progress, Inadequate Progress, or No Progress.

¹⁴¹ MIC Notification 15/2017, [List of Restricted Investment Activities](#), 10 April 2017

¹⁴² [Extractive Industries Transparency Initiative](#)

¹⁴³ The [2016 EITI Standard](#)

Myanmar's current status in EITI is that it is 'Yet to be Assessed' under the 2016 standard. It issued its first EITI report on 2013/2014 financial year data in December 2015.¹⁴⁴ Its second report was delayed, following the change of government. It is now committed to submitting reports for two financial years in March 2018. These will be assessed against the 2016 Standard after July 2018. MEITI has also released its Beneficial Ownership Roadmap to compliance by 2020.¹⁴⁵ Under EITI, technical assistance is being provided on establishing a cadaster system, as well as to develop a pilot for disclosing beneficial ownership.

International Council on Minerals and Metals (ICMM) Sustainable Development Framework

The ICMM is an industry organisation dedicated to improving the social and environmental performance of the mining and metals industry while contributing to sustainable development. The ICMM brings together 23 mining and metals companies as well as 34 national and regional mining associations and global commodity associations to maximise the contribution of mining, minerals and metals to sustainable development. The values that guide the work of the ICMM include care, respect, integrity, accountability, and collaboration.¹⁴⁶ The ICMM has created different standards and frameworks to guide companies in improving their performance standards. The [Water Stewardship Framework](#), for example, outlines a common industry approach based on finding solutions that work for business and water users. The ICMM's [Sustainable Development Framework](#) comprises 10 mandatory principles that serve as a best practice framework on sustainable development for the mining and metals industry and against which ICMM members have to report. ICMM members Freeport and MMG (as PanAust) have early stage prospecting/exploration interest in Myanmar.

Voluntary Principles on Security and Human Rights (VPSHR)

The [Voluntary Principles on Security and Human Rights](#) (VPSHR) is a multi-stakeholder effort by governments, businesses and civil society that seeks to minimise and address the risk of human rights abuses in communities adjacent to extraction sites that are associated with public and private security provision. The VPSHR is designed specifically for extractive industries. The Principles are endorsed by the ICMM, the International Committee of the Red Cross, IFC, and IPIECA (the global oil and gas industry association for environmental and social issues). The VPSHR is based on the recognition that communities residing near extractive industries operations may be at risk of human rights violations. It is designed to help extractive industries companies maintain the safety and security of their operations within an operating framework that ensures respect for human rights, fundamental freedoms, and international humanitarian law. The VPSHR includes Implementation Guidance Tools that are aimed at assisting companies, their employees, and contractors to apply the Principles.¹⁴⁷ In 2016, Myanmar was identified by the VPSHR as one of three countries for the establishment of an 'In-country Implementation Pilot Group', and there have been some initial meetings and a scoping study to define an agenda.

¹⁴⁴ MEITI, [Myanmar First EITI Report](#), December 2015

¹⁴⁵ [Myanmar Beneficial Ownership Roadmap](#), March 2017

¹⁴⁶ ICMM, [Vision and Values](#)

¹⁴⁷ ICMM, ICRC, IFC and IPIECA, [Voluntary Principles on Security and Human Rights Implementation Guidance Tools](#), 2012

China Chamber of Commerce of Metals, Minerals & Chemicals Importers and Exporters (CCCMC) Guidelines

The CCMC Guidelines for Social Responsibility in Outbound Mining Investments were launched in 2014 by the CCCMC, a department under China's Chamber of Commerce which includes more than 6,000 company members. They call for Chinese companies investing overseas in the minerals and metals sectors to adhere to the UNGPs and to conduct risk-based supply chain due diligence.¹⁴⁸ The Guidelines provide guidance for mining companies on how to establish social responsibility management systems and disclose social responsibility information.¹⁴⁹

Companies looking to implement the Guidelines can also refer to the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains to operationalise the due diligence recommendations. These have been developed to be consistent with the OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and so simultaneously ensure compliance with OECD member-state requirements for minerals supply chain due diligence. In addition to supply chain checks, the Guidelines also call on implementing companies to disclose payments made to governments in compliance with the EITI Standard and relevant stock exchange listing rules.¹⁵⁰ With support of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and Emerging Market Multinationals Network (EMM), CCCMC developed a three-year Sustainable Mining Action Plan for 2016-2018 to globally establish the guidelines and to achieve a maximum impact in the mining sector, by ensuring a structured and coordinated implementation.¹⁵¹ An exploratory visit to Myanmar by GIZ took place in February 2018.

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

This [OECD Due Diligence Guidance](#) is a government-backed multi-stakeholder initiative on responsible supply chain management of minerals from conflict-affected areas. The Guidance is applicable to all minerals and global in scope; however, it has supplements focused in particular on tin, tantalum, tungsten, and gold. Its objective is to help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices. Since its adoption in May 2011 the Guidance has become a leading industry standard; it is now referenced and used in binding regulations in the US and serves as the basis for the EU Regulation (below). The London Metal Exchange is also reported to be working on Principles for Responsible Sourcing, including child labour and conflict minerals.¹⁵² Human Rights Watch has used the Guidance as part of an assessment of how 13 leading jewellery and watch companies undertake human rights due diligence in their gold and diamond supply chains.¹⁵³

¹⁴⁸ CCCMC, [Guidelines for Social Responsibility in Outbound Mining Investments](#), 2014

¹⁴⁹ EMM Network, [CCCMC: Developing Guidelines for Social Responsibility in Mining Investment](#)

¹⁵⁰ Global Witness, [New Chinese Guidelines Offer Mineral Companies Chance to Reduce Conflict, Corruption Risks and Show Value to Host Communities](#), 23 October 2014

¹⁵¹ https://www.emm-network.org/case_study/sustainable-mining-in-china/

¹⁵² Reuters, [London Metal Exchange aims to ban metals sourced with child labour](#), 13 February 2018

¹⁵³ Human Rights Watch, [The Hidden Cost of Jewellery](#), 8 February 2018

The OECD Guidance also served as an important base for the development of the [Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains](#), developed by China's Chamber of Commerce in collaboration with the OECD. The Guidance is comprised of a 5-step framework: establishing strong company management systems; identifying and assessing risk in the supply chain; designing and implementing a strategy to respond to identified risks; carrying out independent third-party audits of supply chain due diligence; and reporting annually on supply chain due diligence. Conflict-affected and high-risk areas are identified in the Guidance as including armed conflict and violence of an international or non-international character, but also includes areas "of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence." As such, the Guidance is highly relevant for companies operating in Myanmar, in particular conflict-affected regions, and for those sourcing the 3Ts and gold from these regions. The OECD has also signed a Memorandum of Understanding with CCCMC to co-operate on the development of Chinese industry guidelines for responsible mineral supply chains.

European Union Regulation on Conflict Minerals

On 3 April 2017, the Council of the EU adopted a [Regulation](#) aimed at stopping the financing of armed groups through trade in conflict minerals.¹⁵⁴ This obliges EU companies to source their imports of tin, tantalum, tungsten (3Ts) and gold responsibly and to ensure that their supply chains do not contribute to funding armed conflict. These 'due diligence' rules will become binding from 1 January 2021, though importers are encouraged to apply them as soon as possible. The Regulation carries obligations to source responsibly for the 'upstream' part of the production process, which involves the extraction and refining of these minerals. At least 95% of all EU imports of those metals and minerals will be covered, while small volume importers will be exempt. The competent authorities in EU member states will carry out checks to ensure that EU importers of minerals and metals comply with their due diligence obligations. In addition, the Commission will carry out a number of other measures to further boost due diligence by both large and small EU 'downstream' companies, which are those that use these minerals as components to produce goods. The Commission will also draft a handbook including non-binding guidelines to help companies, and especially SMEs, with an indicative list of conflict-affected and high-risk areas.

The Regulation builds upon the 2011 OECD guidelines (above) which set the international benchmark for supply chain due diligence.¹⁵⁵ The text adopted by the Council results from an agreement reached with the European Parliament in November 2016, subsequently approved by the Parliament in a plenary vote on 16 March 2017 following several years of debate and public consultation. Unlike the Dodd Frank Act Section 1502 provisions in the US (currently under threat of repeal from the Trump Administration),¹⁵⁶ the EU rules will apply to all conflict-affected and high-risk areas in the world without geographical limitations, thereby encompassing Myanmar's states and regions still engaged in ethnic armed conflict.¹⁵⁷ As it currently stands it is expected to include most gold, tin and tungsten

¹⁵⁴ [Conflict Minerals: Council adopts new rules to reduce financing of armed groups](#), Council of the European Union, Press release 181/17, 3 April 2017

¹⁵⁵ European Parliament press release, [Conflict minerals: MEPs secure mandatory due diligence for importers](#), 16 June 2016

¹⁵⁶ US Government, [Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203](#), especially Section 1502. See also [Global Witness briefing](#) of November 2017

¹⁵⁷ See [Conflict Minerals Regulation explained](#), European Commission

exported from Myanmar, including tin and tungsten producing areas such as the Wa region, Kayah State, and Tanintharyi Region.