

# Sector-Level Impacts



# SECTOR-LEVEL IMPACTS

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This chapter highlights “the big picture” – potential sector wide impacts that Government, civil society and the companies operating in the sector will need to consider and address as part of the multifaceted effort to ensure that O&G operations provide a positive contribution to equitable and sustainable development in Myanmar, including improved protection of human rights.

## A. The Myanmar Energy Context

Myanmar currently suffers from acute “energy poverty”<sup>99</sup> despite proven natural gas reserves of 7.8 trillion cubic feet.<sup>100</sup> 80% of the country's natural gas is exported. Its immediate neighbours, India, China, and Thailand, are all net importers of crude oil and natural gas and have been eager to tap into Myanmar's gas reserves.<sup>101</sup> The geopolitical context of Myanmar's energy sector places the country in a unique position to attract foreign investment into its energy sector while trying to provide for its own energy needs. Yet with only 20% of natural gas feeding domestic demand, there is an insufficient supply to meet local use and only about 26% of the population has access to electricity.<sup>102</sup> The existing power infrastructure can meet only about half of current demand, resulting in frequent blackouts and rationing of electricity supply. Only 13% of the population have access to the national electricity grid, and almost 95% depend on solid fuels such as wood

<sup>99</sup> International Energy Agency, “[Energy poverty](#)”.

<sup>100</sup> BP, “[BP Statistical Review of World Energy](#)” (June 2011).

<sup>101</sup> Energy-hungry China's needs are addressed by the new Shwe Gas pipeline spanning the width of Myanmar, address the country's energy security by bypassing the Strait of Malacca. Thailand is also a net importer of crude oil and gas and Myanmar gas accounts for 30% of Thailand's gas consumption. The pipeline transporting Myanmar's natural gas to Thailand has never been turned off. India's attempts to access to Myanmar's gas have so far failed due to political-economic issues with Bangladesh.

<sup>102</sup> World Economic Forum et al, “[The New Energy Architecture, Myanmar](#)” (June 2013). Asian Development Bank, “[Myanmar Energy Sector Initial Assessment](#)” (Oct 2012).

and rice husks for cooking and heating.<sup>103</sup> The World Bank projected that Myanmar would need \$444 million every year – almost 10 percent of its GDP, the highest of any country in Asia – to achieve universal access to electricity by 2030; to put this number in perspective, the next highest investment requirement, in Timor Leste, would need to invest only 2.7 percent of its GDP.<sup>104</sup>

Energy will be important to Myanmar's further integration into the global economic system: its reserves and strategic location between Asia's two biggest economies already mean it can be an important regional supplier and crossroads. However, the development of the sector will require a transformation of the basic institutions and infrastructure that are needed to drive the country's future economic growth and ensure that O&G and power generation can contribute to poverty alleviation and address the disparity between urban and rural areas. In their proposed framework for Myanmar to build a 'New Energy Architecture',<sup>105</sup> the World Economic Forum and the Asian Development Bank highlight three essential requirements that Myanmar's energy policy must achieve in order to balance a myriad of competing interests: economic growth and development, sustainability, and energy access and security in the country.

However, there are good reasons for Myanmar to diversify away from an over-reliance on the sector. In addition to potential resource curse issues (see [Part 3.B](#) below), as the ADB also notes, Myanmar's current growth pattern, with a major concentration in energy and the extractive industries, is placing huge pressure on its environment and if continued, will certainly be unsustainable.<sup>106</sup> It has also been identified as a country with strong potential to develop renewable energy resources and to be a regional supplier of clean and affordable energy.<sup>107</sup>

### History and Current Context of Myanmar's O&G Sector

Myanmar has a long history of oil production with its first barrel exported in 1853.<sup>108</sup> Following the 1962 coup d'état by General Ne Win, the O&G sector was nationalised and the Ministry of Energy formed the Myanma Oil and Gas Enterprise (MOGE) for exploration and production, the Myanma Petrochemical Enterprise (MPE) for refining and processing, and Myanma Petroleum Products Enterprise (MPPE) for distribution. By the 1980s O&G production had declined due to technical limitations of local companies and restrictions on foreign firms.<sup>109</sup>

When the State Law and Order Restoration Council (SLORC) took power in 1988 one of the first laws promulgated was the Foreign Investment Law of November 1988. This opened the door for international joint venture and production sharing contracts. Shortly afterwards, the SLORC awarded onshore and offshore blocks leading to an influx of international companies including Amoco, Shell, BHP, Total, Idemitsu, and Unocal,

<sup>103</sup> UNDP, "[Accelerating Energy Access for All in Myanmar](#)" (2013), Executive Summary.

<sup>104</sup> UNDP, above, p. 7.

<sup>105</sup> WEF et al, above.

<sup>106</sup> ADB, "[Myanmar in Transition: Opportunities and Growth](#)" (2012), p. 14.

<sup>107</sup> ADB, above, p. 39

<sup>108</sup> WEF et al, above.

<sup>109</sup> A Kolas, "[Burma in the Balance, The Geopolitics of Gas, Strategic Analysis](#)" (Nov 2007).



although most onshore blocks were relinquished within a few years.<sup>110</sup> By 1997 the human rights situation deteriorated further, leading to escalating US economic sanctions. The few US companies already invested in the country, such as Unocal/Chevron, who had a share in Total's block, were 'grandfathered' under the new sanctions regime. EU companies were not legally prevented from investing but, with the exception of Total, generally withdrew or stayed away due to NGO campaigns and reputational risk. The first modern US Alien Tort Claims Act case involved O&G operations in Myanmar during this period, and held that the statute could apply to private actions.<sup>111</sup> As the recent OECD Investment Policy Review noted, history matters, and foreign investment during this time came to be associated by the population with "the full litany of possible ills: land grabbing, population displacement without adequate compensation, forced labour and other abuses of both worker and human rights."<sup>112</sup>

Asian companies acquired a number of offshore blocks in their absence. In 2000, MOGE and South Korea's Daewoo International began exploring the Bay of Bengal discovering a major gas deposit, termed the Shwe Prospect, operated by Daewoo, Korean Gas Corporation, India's ONGC, and GAIL. After intense international lobbying over the Shwe gas find with India, Thailand, and China, all eager for pipelines built to address their energy needs,<sup>113</sup> the Chinese Government signed an agreement with the Myanmar Government in mid-2009 which made China the sole buyer of the Shwe gas reserves.<sup>114</sup> The China National Petroleum Corporation (CNPC) has built parallel O&G pipelines running 2,800 km from Rakhine state to China's Yunnan Province.<sup>115</sup> The gas pipeline is complete and operational as from 2013. The parallel crude oil pipeline will transport African and Middle East crude oil from storage tanks on Madaya Island off Rakhine State across the country to China, bypassing the Straits of Malacca. As of summer 2014 oil had not yet been loaded into the finished tanks at Madaya.

#### Box 11: Artisanal Oil Extraction in Myanmar

Unusually, if not uniquely in the world, Myanmar has a continuous history of artisanal oil extraction, with individuals or small informal enterprises extracting oil with equipment sometimes as simple as a bucket and rope. There is existing artisanal extraction in several oil field areas that provides important primary or secondary livelihoods for communities. The extraction is carried out with little if any health and safety precautions and even fewer measures to protect the environment. The extraction is typically a full time occupation and in many locations has created an 'oil rush' drawing in migrants with associated crime and social impacts. The practice is prohibited by law but carried on in several places in the country where the oil is readily accessible. The original artisanal drillers (*twin-zar-yoe*) were largely blocked from

<sup>110</sup> A Kolas, above.

<sup>111</sup> *Doe I v. Unocal Corp.*, 963 F. Supp. 880. The parties reached an out-of-court settlement in which Unocal agreed to compensate the plaintiffs and provide funds for programmes in Myanmar (the exact terms of the settlement are confidential). This settlement was accepted by the court, and the case was closed on 13 April 2005. For a summary and views from both sides see the [Business & Human Rights Resource Centre](#).

<sup>112</sup> OECD "[Investment Policy Reviews: Myanmar](#)" (Mar 2014), p. 23.

<sup>113</sup> Interview with a senior member of the Myanmar Geosciences Society.

<sup>114</sup> Burmese Environment Working Group, "[Burma's Environment, People, Problems, Policies](#)" (June 2011).

<sup>115</sup> Myanmar Business Network, "[Myanmar-China gas pipeline starts to deliver gas to China](#)" (29 July 2013).

extraction by the Government when oil fields were nationalised in the 1960's and 1970's. This impacted on their primary source of income dating back many generations. There is still a strong desire from many communities to recommence these activities.

Myanmar's Framework for Economic and Social Reform (FESR)<sup>116</sup> commits to increasing the levels of employment in and the profitability of small scale and artisanal mining without eroding the necessary environmental and social standards but makes no similar mention of artisanal oil extraction.<sup>117</sup> Artisanal and small scale mining extraction is an important feature of the informal economy in many countries. There is a growing understanding that simply prohibiting artisanal mining extraction is not always the right approach – it deprives local communities of income and creates tension -- but at the same time small scale extraction often has dangerous implications for health and the environment that must be addressed.<sup>118</sup> Artisanal oil extraction should also be addressed as part of the forthcoming energy policy, starting with a comprehensive options study to understand current activities, livelihood consequences, environmental and social consequences and to set out options for either establishing a safer and more productive approach to artisanal oil extraction (which may be unlikely) or a programme to safely shut down the operations and support communities and small enterprises to move into other, safer livelihood options. While there may be some similarities with artisanal mining in terms of dangerous health and safety and environmental impacts, it is likely to be far more difficult to envisage integration of these artisanal producers into larger scale O&G value chains.

### Current O&G Bidding Rounds

The reformist Government has enhanced transparency somewhat during the most recent onshore and offshore bidding rounds, by publicly advertising tenders in English,<sup>119</sup> but the selection criteria and decision-making remains opaque. Once Myanmar's application to the EITI is accepted, Myanmar's report will have to include information on the process and

<sup>116</sup> [“Framework for Economic and Social Reforms - Policy Priorities for 2012-15 towards the Long-Term Goals of the National Comprehensive Development Plan”](#), (Jan 2013) (Final Draft – Submitted to the First Myanmar Development Cooperation Forum), Overview. The FESR: i) provides a reform bridge linking the ongoing government programs of government to the National Comprehensive Development Plan, a 20-year long-term plan; ii) FESR serves as a required reference for various entities of the government to develop more detailed sectoral and regional plans; iii) it can serve as a guide for building cooperation with development partners and international organisations; and iv) finally, it focuses on potential “quick wins” that the government will consider implementing to bring tangible and sustainable benefits to the population.

<sup>117</sup> [“Framework for Economic and Social Reforms - Policy Priorities for 2012-15 towards the Long-Term Goals of the National Comprehensive Development Plan”](#), (Jan 2013) (Final Draft – Submitted to the First Myanmar Development Cooperation Forum), para 71-74.

<sup>118</sup> See for example: IIED, [“IIED shines a light on small-scale mining”](#) (Mar 2013).

<sup>119</sup> Financial Times, [“Myanmar cleans house – China's worst nightmare?”](#) (15 April 2013). See also a Global Witness report commending the Government for “important early steps towards a transparent oil and gas sector by publishing standard contract terms and names and contact details of bidding companies” but criticising the high levels of corporate secrecy of the companies who have been awarded blocks. Global Witness, [“Real winners of Myanmar's oil and gas blocks remain hidden”](#) (June 2014).

the criteria used to award licenses<sup>120</sup> but there are additional steps beyond these that could be taken to improve transparency. (See the [Annex to the Recommendations](#)).

### *Onshore O&G Bidding Rounds*

Following the November 2010 general elections and the subsequent economic and political reform process, Australia, Canada, the EU and US suspended or removed economic sanctions in 2012<sup>121</sup>, opening the way to new external investment in the sector. There are 101 blocks demarcated for O&G operations in Myanmar, 53 for onshore and 48 for offshore. The Ministry of Energy (MoE) opened new rounds of bidding in 2011 for 19 onshore blocks. The bidding round was less successful than hoped, with seven local companies partnering with foreign companies for only half of the blocks available. In January 2013 there was a new round of bidding for 18 onshore blocks in which 59 bidders were shortlisted.<sup>122</sup> In October 2013, the MoE announced the winners of 16 of the 18 onshore blocks available.<sup>123</sup> PSC negotiations continue and as of the publication of this Report, no PSCs had been reported signed for onshore blocks, although some had received conditional Myanmar Investment Commission (MIC) approval.<sup>124</sup> See [Annex B](#) for further information.

### *Offshore O&G Bidding Rounds*

In April 2013, the much anticipated offshore bidding round was announced for 11 shallow water and 19 deep-water blocks in which 61 international companies were prequalified.<sup>125</sup> While there is limited or no seismic data on these deep-water blocks, the existence of the Shwe, Yadana, Yetagun and Zawtika gas fields has led to hope of new discoveries. The results of the offshore licensing round were announced in March 2014.<sup>126</sup> For onshore and shallow water blocks, foreign bidders had to partner with at least one of the 145 (as of June 2013) Myanmar national owned companies registered at the Energy Planning Department. Bidders for deep offshore blocks need not include a Myanmar partner.<sup>127</sup> The 2013/4 offshore round brought in a number of major and some junior international O&G companies, particularly from North America, Europe, Australia and India. Notably absent were Thai and Chinese companies. Again, as of publication of this Report, no offshore PSCs have been signed. See [Annex B](#) for further information.

<sup>120</sup> EITI, [“The EITI Standard”](#), Section 3.10 Allocation of licenses: “a) Implementing countries are required to disclose information related to the award or transfer of licenses pertaining to the companies covered in the EITI Report, including: a description of the process for transferring or awarding the license; the technical and financial criteria used; information about the recipient(s) of the license that has been transferred or awarded, including consortium members where applicable; and any non-trivial deviations from the applicable legal and regulatory framework governing license transfers and awards. b) Where licenses are awarded through a bidding process during the accounting period covered by the EITI Report, the government is required to disclose the list of applicants and the bid criteria.”

<sup>121</sup> Canada and the US have retained special economic restrictions on key individuals and businesses.

<sup>122</sup> Albert Chandler, [“Myanmar Upstream Oil & Gas Sector”](#) (June 2013).

<sup>123</sup> Two blocks, IOR-3 and PSC M, did not receive any bids. Thirteen of the 16 contracts were production sharing deals, with the remaining 3 as petroleum recovery contracts (for blocks IOR 7, IOR 4 and IOR 6). See the Ministry of Energy [announcement](#).

<sup>124</sup> See <http://dica.x-aas.net/dica/permitted-investment-company>

<sup>125</sup> Myanmar Ministry of Energy, [“Myanmar Offshore Blocks First Bidding Round – 2012”](#) (July 2013).

<sup>126</sup> Myanmar Ministry of Energy, above.

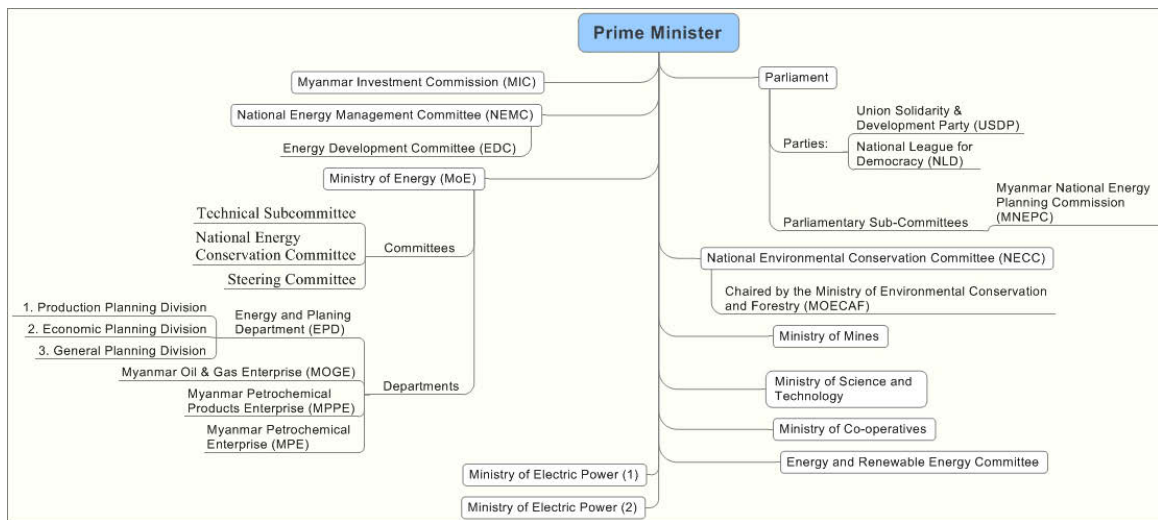
<sup>127</sup> Albert Chandler, above, pg. 4.

### Box 12: Government Institutions Regulating O&G Operations in Myanmar

- The **Ministry of Energy (MoE)** has the main responsibility to carry out exploration and production of crude oil and natural gas, refining, manufacturing of petrochemicals and transportation, and distribution of petroleum products. It is in the process of developing a new Energy Policy. There are no State/Region-level departments of energy.
- The **National Energy Management Committee (NEMC)**, under the MoE, was formed in January 2013 to “formulate National Energy Policy based on energy demand and production and fulfilment of energy requirement on energy matters of the State.” Among the NEMC’s duties is to “explore environmental impact and social impact assessment ahead of the implementation and to release information the people should be informed of.”
- The **Energy Development Committee (EDC)** is tasked with “laying down the energy development policy and plans of the National Energy Management Committee.”
- The **Myanma Oil and Gas Enterprise (MOGE)**, under the MoE, has the exclusive right to carry out all O&G operations with private contractors. As the party entering into PSCs, MOGE holds the contractual rights to receive payment of royalties, bonuses, profits, etc. It has offices at some onshore oil fields. The legal nature, powers and duties of MOGE are unclear from publicly available information. MOGE does not publish regular reports on its performance. It has a role both as a business partner in operations and as a regulator; in many countries this role is split due to potential conflicts of interest. A recent report reviewed some of the challenges MOGE faces and the options for the appropriate model as a national oil company. The Government recently announced plans to make MOGE a state-owned corporation. This will separate its business activities from its role as a regulator of the country’s O&G industry and in doing so, should help it improve its business performance. MOGE has said that it expects the process to be completed by 2015.
- The **National Energy Planning Department (NEPD)** negotiates production sharing contracts (PSCs) with foreign firms.
- The **Ministry of Environmental Conservation and Forestry (MOECF)** is empowered to undertake a range of regulatory activities under the 2012 Environment Conservation Law. It is in the process of establishing a procedure and system for screening, assessing and monitoring environmental and social impacts (ESIA) of business activities.
- The **Myanmar Investment Commission (MIC)** is the main administrative body for the granting of investment permits under the 2012 Foreign Investment Law and 2013 Citizens Investment Law. The MIC approves the terms and conditions of PSCs, but in practice, once MOGE approves the technical specifications of all concessions, MIC would normally also approve the investment.
- The **Directorate of Investment and Company Administration (DICA)** acts a secretariat to the MIC. The incorporation of a foreign Myanmar company and registration of a Myanmar branch of a foreign company is subject to the

procedures and requirements of DICA under the Myanmar Companies Act. A DICA permit is required for all foreign companies, whether a 100% owned, joint-venture or a branch/representative office.

- The **Natural Resources and Environmental Conservation Committee** of the Pyithu Hluttaw oversees legislation related to the development of natural resources and environment conservation activities and also has the power to investigate complaint letters and petition letters regarding natural resources and environment.



### Policy Frameworks for O&G Operations in Myanmar

The policy frameworks for the energy and more particularly the O&G sector provide the signals about where and how far the Government will go in translating broad political commitments into specific incentives and disincentives to drive a responsible, sustainable approach for the sector. They can shape the forthcoming regulatory environment for responsible business in a number of ways, for example by levelling the playing field, requiring all businesses to meet the same “high social and environmental standards” promised in Myanmar’s Framework for Economic and Social Reform<sup>128</sup> (FESR). Alternatively they could make it harder for companies to respect human rights and other responsible business standards by adopting provisions that deny or undermine human rights, or by leaving significant gaps that can be filled by either good or bad practice.

The FESR acknowledges that there are hard choices to be made in balancing the economic, social and environmental issues facing the extractive sector. The FESR specifically recognises that “there will be unavoidable trade-offs” for natural resource and infrastructure projects. It proposes a number of steps as trade-offs: a specific recognition of trade-offs, early consultations with stakeholders to better understand and address those



trade-offs, stricter environmental and social requirements and enhanced transparency.<sup>129</sup> The FESR calls for stricter requirements for environmental and social impact assessments of major projects and programmes that include public participation, with “particular attention” to guidelines concerning resettlement, relocation and compensation. These are important safeguards for policies, administrative processes and projects provided they do not simply promote a broad-brush utilitarian approach that values and balances trade-offs based on the greatest good to the greatest numbers at the macro level. Instead, they should use international standards and good practices to inform processes that lead to appropriate balancing at the meso- and micro-level of projects, with a view to avoiding or preventing harms to the greatest extent possible, and where that is not possible, build in mitigation or compensation steps.

### *Energy Policy Framework*

Myanmar’s energy strategy for the past few decades has consisted largely of exploiting O&G reserves for export, rather than domestic use. It is currently developing a new Energy Policy with support from the ADB. This draws on earlier work from ADB, WEF and Accenture proposing a “New Energy Architecture” for Myanmar based on nine months of multistakeholder consultations.<sup>130</sup> As the ADB project documents note, “Myanmar’s energy sector suffers from a lack of an overall energy planning, policy and strategy. Currently, there is limited and fragmented long-term planning for each energy subsector or planning in the whole energy sector.”<sup>131</sup> The project will have two main activities (i) to prepare the 20-year long-term energy master plan that will include consolidating the existing fragmented medium- and long-term energy plan within the concerned ministries and agencies; and preparing a 20-year long-term energy master plan for each primary energy subsector and the energy sector as a whole;<sup>132</sup> and (ii) to address the institutional arrangements and capacity development within the NEMC, EDC and concerned ministries for sustainable and inclusive development. The revised Energy Policy is due October 2014.<sup>133</sup> The Government is also involved in a number of programmes to develop regional energy cooperation.<sup>134</sup>

The Ministry of Energy (MoE) has set the basis of Myanmar’s energy policy framework— (i) fulfilling domestic energy requirement; (ii) implementing sustainable energy development; (iii) promoting the wider use of new and renewable sources of energy; (iv) promoting energy efficiency and conservation; (v) promoting use of alternative fuels; (vi) implementing effective utilisation of discovered crude oil and natural gas resources in the interest of the entire nation; and (vii) promoting more private participation. The Government has made further political commitments to transparency and good

<sup>129</sup> [“Framework for Economic and Social Reforms - Policy Priorities for 2012-15 towards the Long-Term Goals of the National Comprehensive Development Plan”](#), (Jan 2013) (Final Draft – Submitted to the First Myanmar Development Cooperation Forum), para 91-92.

<sup>130</sup> WEF, ADB, Accenture, [“The New Energy Architecture, Myanmar”](#) (June 2013), pg. 27-29.

<sup>131</sup> ADB, [“Institutional Strengthening of National Energy Management Committee in Energy Policy and Planning”](#) (Mar 2014).

<sup>132</sup> The ADB’s work is in complement to [JICA](#)’s work in preparing the long-term power sector development plan. There is a donor sector working group on electric power that is working on a Power Sector Masterplan, National Electrification Programme and Energy Sector Masterplan.

<sup>133</sup> ADB, above.

<sup>134</sup> Myanmar Ministry of Energy, [“Regional Energy Cooperation”](#) (accessed 15 July 2014).

governance in the sector in its “[Joint Statement on Good Governance and Transparency in the Energy Sector](#)” between Myanmar and the USA and in their subsequent commitment to a [G8 Partnership on Extractives](#).

The ADB has made a clear recommendation that Myanmar’s investment projects “should aim to incorporate measures that protect the environment and people from projects’ potential adverse impacts” and is providing technical assistance to the Government to help develop its own safeguards over a longer time frame.<sup>135</sup> It has highlighted the lack of legal requirements for environmental and social safeguards for energy infrastructure as a deficiency.<sup>136</sup> The Government has signalled in numerous ways that it is beginning to take impacts on the population into account. Myanmar’s cancellation of the Myitsone dam project signaled a significant shift in this direction.

These signals for the new energy policy are positive. The policy should accurately reflect the true economics of O&G production -- taking account of earnings but also of the depletion of stocks, the degradation of the environment and the costs to workers and local communities. As highlighted above, these often externalised costs otherwise end up being borne in most cases by workers, the communities in the area of operations or otherwise by the local or regional governments. The key challenge will be turning these positive commitments and indicated policy directions into concrete policy and where relevant, into the regulatory framework that balances the country’s tremendous short-term need to develop its energy resources and boost its GDP with a longer term commitment to sustainable development and a people centred approach. A key concern is that the pace of policy and regulatory development (which needs time to explore options) is not keeping up with the rapid moves towards finalising arrangements to exploit onshore and offshore resources through the signing of PSCs that will define O&G operations for many years to come (See the [Annex to the Recommendations](#) for suggested recommendations in dealing with this gap).

### *Natural Resource Policy Framework*

There is currently no policy framework, vision or roadmap for the development of the natural resource sector (however narrowly or widely defined) more specifically in Myanmar. UNDP will be working on the development of a national environmental management framework and action plan with the Government through stock-taking of the past and on-going interventions, and identification of the needs in environmental sustainability and mainstreaming environment consideration into development planning. This remains an urgent priority given the country’s reliance on natural resources for their contribution to its development and the need to appropriately safeguard these resources in light of increasing rates of degradation and use. There is also a need to develop them in a way that is inclusive and that considers the options for a more decentralised approach to natural resource management, carefully weighing the costs and benefits in light of

<sup>135</sup> ADB, “[TA 7566-REG: Strengthening and Use of Country Safeguard Systems, MYA: Capacity Building for Implementing Environment and Social Safeguards in Myanmar](#)” (July 2012).

<sup>136</sup> ADB, “[Myanmar: Energy Sector Initial Assessment](#)” (Oct 2012), Summary.

current and potential future capacity at the State / Region level to take a role in managing resources.<sup>137</sup>

Given the pace of investment in the natural resources sector compared to many other sectors, and its overlaps with the agricultural sector which is the lifeblood of the rural economy, there is a need for improved master plans and more detailed land-use planning that envisages and plans for agriculture and extraction co-existence. Throughout the project's lifecycle, there will be relatively few jobs for local community members in the O&G sector, even through the value chain, meaning that many community members in oil field areas will need to continue to rely on agriculture for their livelihoods.

### Laws Regulating O&G Operations in Myanmar

Myanmar needs appropriate levels of private and foreign investment for the development of its energy sector. To attract and manage that investment, there is a need for a clear vision for investment and a transparent legal framework that investors can trust.<sup>138</sup> The Government is responding to competing pressures of revising its legal framework to provide rapid clarity and certainty, with the goal of developing coherent, updated legislation in line with its international commitments and international standards that should ideally be developed allowing time and space for consultation with Myanmar citizens.

Myanmar's Constitution states that "[t]he Union is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union." As noted above, the Constitution contains some guarantees on human rights, but does not grant citizens the right to a clean and healthy environment, nor are there any clauses granting freedom of information, particularly with respect to environmental and social information. That means that stakeholder must look instead to forthcoming policy and laws to incorporate relevant protections.

### O&G Laws

Many of the existing O&G laws (see Box 13 below) are old and outdated and, according to sector analysts, effectively defunct. All indications are that the Government and operators use the signed Production Sharing Contracts (PSC) and the Foreign Investment Law to administer current O&G operations. Unlike in some countries, a PSC does not need approval or ratification of the legislature.

Most of these old laws are not easily available in Burmese or in English translation. The 1918 Petroleum Law is reported to be under review but a revised draft version is not publicly available. As these laws appear to be defunct, they have not been reviewed as part of the SWIA process.

A number of other laws relevant to the O&G sector are undergoing revision, such as the forthcoming EITI Law and the E(S)IA Procedures. There is an opportunity for coordination

<sup>137</sup> Thet Aung Lynn and Mari Oye, "[Natural Resources and Subnational Governments in Myanmar: Key considerations for wealth sharing](#)" (June 2014).

<sup>138</sup> WEF et al, "[The New Energy Architecture, Myanmar](#)" (June 2013).

and cross-referencing among laws to build a more comprehensive approach to O&G operations. It will also be important to ensure there is coordination between any new Petroleum Law and the Environmental Conservation Law (2012) which points to resource-specific legislation as the place to develop more specific environmental controls for the sector.

### Box 13: Principal Existing O&G Laws in Myanmar

- The Oilfields Act (1918) supplemented by numerous laws and regulations, including:
- The Oilfield Rules (1936)
- The Petroleum Act (1934)
- The Petroleum Rules (1937)
- The Essential Supplies and Services Act (Law No. 13/2012)
- The Water Power Act (1927)
- The Oilfields (Labour and Welfare) Act (1951)
- The Petroleum Resources (Development Regulation) Act (1957)
- The Law Amending the Petroleum Resources (Development Regulation) Act (1969)
- Oilfield (Workers and Welfare) Act (1951)
- The Myanmar Petroleum Concession Rules (1962)
- Occasional Notifications from the Ministry of Energy are also relevant

#### **In addition: State Owned Economic Enterprise (SOEE) Law**

The 1989 SOEE Law and MIC Notification No. 1 of 2013 prescribe a list of types of business activities that the Government has the exclusive right to carry out (unless the Government otherwise provides special permission), which includes public services such as banking and insurance, the generation of electricity, as well as activities involving timber, metals, forestry and **oil and gas**.<sup>139</sup> Investments in the exploration of commercial scale production of oil and natural gas therefore require the approval of the Union Government, and adherence to the Ministry of Energy's terms and conditions.<sup>140</sup>

The 1989 SOEE Law does not impose any obligations on businesses that are permitted to carry out these SOEE business activities. Instead, obligations on such businesses relating to the conduct of their activities may be imposed by other applicable laws (e.g. the 2012 Foreign Investment Law, the 2013 Citizens Investment Law, the 2012 Environmental Conservation Law, etc.) as well as under any contracts with the Government (such as a PSC in the O&G sector).

#### *An Extractives Industries Transparency Initiative (EITI) Law*

A law would help legally entrench the EITI institutions and reporting framework in the country as there may be certain actors, foreign and national, who will try to subvert the process. As the World Bank's study on EITI implementation notes: "[t]hose countries that have invested time in providing a regulatory or legislative basis and/or requisite waivers for EITI have often been able to implement the standard more rapidly because regulations

<sup>139</sup> Chapter II, Article 1, 1989 State-owned Economic Enterprises Law

<sup>140</sup> Myanmar Investment Commission, "[Notification No. 1 of 2013: 3.1 List of economic activities which are allowed with the relevant ministry's recommendations](#)" point 9.



or legislation clarify the roles of all parties involved in the process...”<sup>141</sup> Adopting these into an EITI law would set Myanmar on a seemingly irreversible path that could challenge and eventually replace the former (and to some extent on-going) practices in the sector where secrecy and corruption were often the accepted approach to business in the sector.

### *Environmental and Social Impact Assessment Procedure for O&G Operations*

For many years there was no regulatory framework for conducting Environmental Impact Assessments (EIA) in Myanmar, although some of the international O&G companies in Myanmar routinely carried out their own ESIA prior to significant activity, using third party providers. Other projects conducted ESIA on a case-by-case base, using a mixture of international and Myanmar third parties, or internal experts. The quality of these ESIA has been mixed, and few were ever made public. ESIA have now risen up the agenda, following the Presidential decision to suspend the Myitsone dam project and the protests at Letpadaung mine. The Letpadaung mine has subsequently been required to conduct an ESIA which is publicly available as a November 2013 draft.<sup>142</sup>

Properly conducted ESIA that result in detailed environmental and social management plans (ESMP) that are developed through consultation, publicly available and can be monitored and used to hold companies accountable for their impacts, can provide a solid basis for more responsible investment in the sector. An ESIA is a natural “anchor” for broadening the ESIA process to include a full range of human rights<sup>143</sup>, thereby contributing to a more systematic assessment and management of these issues in Myanmar. The recently adopted EIA Regulations and the associated forthcoming Procedures<sup>144</sup> should help to put in place a solid regulatory framework. The Annex to the Procedures will define which types and sizes of project require an EIA or Initial Environmental Examination (IEE).

However, there is a risk of pinning too many hopes on ESIA and neglecting other dimensions of an appropriate environmental and social regulatory framework. MOECF has been growing quickly but still has a limited number of staff working on ESIA, testifying to departmental overstretch in putting the process into practice. The Environment Conservation Department of MOECF is creating sub-national offices, at the regional level, with further offices planned at the district and township levels from 2016 onwards.<sup>145</sup> This will provide an important opportunity to address what is currently missing: monitoring the implementation of environmental laws, including the implementation of E(S)MPs at the more local level, closer to operations. But there remains the core challenge of building new staff expertise and capacity to take meaningful action. In parallel, there is a need to build civil society capacity to be able to understand and credibly participate in E(S)IA consultations and E(S)MP monitoring.

<sup>142</sup> See: <http://www.myanmarangtse.com.mm/images/pdfs/ESIA OF LETPADAUNG PROJECT ON NOV 21ST BY KNIGHT PIESOLD 2883 PAGES.pdf>

<sup>143</sup> DIHR and IPIECA, “[Integrating Human Rights Into Environmental, Social and Health Impact Assessments](#)” (Dec 2013).

<sup>144</sup> Draft procedures refer to an EIA rather than an ESIA so this refers to an EIA Procedure.

<sup>145</sup> Thet Aung Lynn and Mari Oye, “[Natural Resources and Subnational Governments in Myanmar: Key considerations for wealth sharing](#)” (June 2014), pg. 22.

The importance of further developing the suite of environmental laws and regulations, including on environmental liability, for the O&G sector as well as all other heavy footprint sectors cannot be overstated. The same is true for social issues, including those highlighted in the FESR (resettlement, relocation and compensation). There is a need for long term donor support to the country in developing and enforcing the type of regulatory system that matches the Government's vision of responsible, sustainable development.

#### Box 14: The Draft Environmental Impact Assessment Procedure

The 2012 Environment Conservation Law included for the first time a specific requirement for the new Ministry of Environment, Conservation and Forestry (MOECF) to establish a system for Environmental Impact Assessment.<sup>146</sup> MOECF (with support provided by the ADB) has designed a multi-step process that follows standard EIA practice.

The recent Environmental Conservation Rules<sup>147</sup> include some basic provisions on EIAs that are then supplemented by far more detailed provisions on EIA under the draft EIA Procedures. These include many features that will help support a more robust EIA approach in Myanmar. However, the current latest English version of the draft EIA Procedure (dated 24 December 2013) is quite weak on social issues and not surprisingly includes no reference to human rights issues. The Recommendations in [Part 7](#) make suggestions for improvements.

There are several **provisions** in the draft EIA Procedure that can be built on to integrate relevant potential human rights impacts into the final version:

- **Includes some references to social issues:** refers to social and socio-economic impacts at various points.
- **Refers to specific human rights issues but without labeling them as human rights** including indigenous peoples and involuntary resettlement (noting that they will be covered by other ministry processes and are not covered by the EIA Procedure). However in the absence of such national procedures, it requires adherence to international best practice on Involuntary Resettlement and Indigenous People, setting an important precedent of referring to international standards.
- **Disclosure and Transparency:** requires that MOECF organises disclosure of the draft IEE or EIA reports, invites public comment and arranges public consultation at the local level; public disclosure of MOECF decisions.
- **Public consultation:** requires the project proponent to disclose information to and

<sup>146</sup> Environmental Conservation Law (2012), Article 7. In addition, for foreign investments in the O&G sector, see DICA, "[MIC Notification 1/2013](#)" (Jan 2013), which lists 'economic activities which are allowed in accordance with certain separately stipulated conditions. A list of "Activities requiring Environmental Impact Assessments" refers to a requirement for an "initial study and assessment on environmental and social impacts". Sectors which are subject to this requirement include minerals and oil and gas exploration and production, dams, large scale agribusiness, chemicals manufacturing etc. MOECF is identified as lead Ministry in determining this whether this requirement has been satisfied, which suggests that the draft EIA Procedure being developed by MOECF will govern the review of O&G E(S)IA.

<sup>147</sup> These Rules were released at the end of June 2014 in Burmese. No English language translation is currently publicly available.

consult with local communities, project affected peoples, civil society and local government through all phases of the process of preparing an EIA Report and take their views into account and report publicly on the consultation.

- **Robust EIA reports:** requires a wide range of information to be included in the EIA report, including consideration of alternatives and cumulative impacts.
- **Conditions attached to an Environmental Conservation Certificate:** requires an Environmental Management Plan (EMP) and the possibility to specify a wide range of conditions that can be attached to the final certificate for approval.
- **Monitoring:** requirements for monitoring or inspection by the ministry or consultants acting on its behalf and required notification to the ministry of a breach; monitoring reports are to be made public.
- **Appeal:** appeal by the project proponent is allowed in certain circumstances but it is unclear from the draft (or translation) whether project affected people can appeal a decision.
- **Accountability:** clear provisions assigning responsibility to the project proponent for all adverse impacts, including by its contractors and sub-contractors and penalties for non-compliance.
- **Inclusive:** the EIA Review Board will comprise technical experts from relevant government departments, government organisations, technical organisations as well as civil society.

## B. Potential O&G Sector Impacts

This part of the chapter looks at potential positive and negative “sector-wide impacts”. It looks at how the O&G sector can be a potential driver or contributor to either positive or negative impacts in three areas: economic, governance and environmental and social.

As used in this SWIA Report, these sector-wide impacts can result from government action – policies, laws, actions by its institutions – that require or at least support responsible business approaches or that actively undermine or even prohibit them. They can also result from company action, including where companies act together. Many impacts result from a combination of Government action or policy (or lack thereof) and company actions.

### Economic Impacts

Myanmar currently has one of the lowest levels of tax revenue collection, and natural resource revenues are an important source of income.<sup>148</sup> Only 1 per cent of the FDI coming into Myanmar from FY2010–11 was outside the extractive sectors,<sup>149</sup> although the more recent pattern of inward investment is changing. Gas revenues are the largest source of foreign income for the Government of Myanmar, with a peak of 6.5% of GDP

<sup>148</sup> OECD, “[OECD Investment Policy Reviews: Myanmar 2014](#)” (2014), p. 159.

<sup>149</sup> Jared Bissinger, “[Foreign Investment in Myanmar, A Resource Boom or a Development Bust? Contemporary Southeast Asia](#)”, Vol 34, No. 1 (2012), pp. 23-52.

projected in 2014/15.<sup>150</sup> As such, the O&G sector will remain a major contributor to the Myanmar economy through significant revenue transfers for a long time to come.

Historically, Myanmar's economy has been operated to benefit political elites, rather than the population. Under the military regime, there was very limited transparency around O&G operations and revenues. Even in a recent report reviewing the Government budget, UNICEF was not able to find the 2012-2013 figures for contributions of the energy sector to the consolidated national budget.<sup>151</sup>

The Framework for Economic and Social Reforms (FESR) specifically recognises the potential for the country to be cursed rather than blessed by its abundant resources. It indicates plans to reform the management of natural resources to contribute to a sustainable basis for the country's growth: "macro-economic policies to manage the impact of increased demand for Myanmar's exports on the exchange rate and inflation rate and facilitate public expenditure smoothing."<sup>152</sup> As a recent report notes, there is a "quadruple challenge here: (i) slowing down the rate of extraction to a sustainable pace; (ii) avoiding pressure on the exchange rate that makes non-resource exports uncompetitive; (iii) obtaining full value—for the country as a whole—of the resources being extracted, which will require renegotiating pre-2011 contracts; and (iv) investing the value in ways that will benefit future generations, such as a sovereign wealth fund."<sup>153</sup> The FESR also signals a purposeful diversification of economic sectors, focusing in particular on labour-intensive sectors – agriculture, infrastructure, light manufacturing and tourism.

#### Box 15: Escaping the Resource Curse

The "resource curse" refers to the paradox that many countries with plentiful natural resources, such as O&G, tend to perform worse in terms of governance and economic development than countries with fewer natural resources. Global examples of the resource curse are well-documented. Initiatives such as the Norwegian Oil for Development Programme<sup>154</sup> and the Natural Resource Governance Institute (formerly the [Natural Resource Charter](#)) seek to help governments and their societies "effectively harness the opportunities created by natural resources ... to provide a pathway out of poverty."

However, if managed well, as another recent UNICEF report identifies, extractive sector rents can contribute to human development if reinvested wisely. This could include direct support to economic, social and cultural rights: for example, less than nine days of natural gas revenues would be needed to ensure one teacher per each primary school grade and

<sup>150</sup> IMF, "[Myanmar: 2013 Article IV Consultation and First Review Under the Staff-Monitored Program](#)" (Aug. 2013).

<sup>151</sup> UNICEF, "[Snapshots of Social Sector Spending Allocations and Spending in Myanmar](#)" (2013), Annex 2. There is a blank instead of reported revenues from the energy sector.

<sup>152</sup> "[Framework for Economic and Social Reforms - Policy Priorities for 2012-15 towards the Long-Term Goals of the National Comprehensive Development Plan](#)", (14 January 2013) (Final Draft – Submitted to the First Myanmar Development Cooperation Forum), Section 5.3.

<sup>153</sup> Lex Rieffel and James W. Fox, "[Too Much, Too Soon? The Dilemma of Foreign Aid to Myanmar/Burma](#)" (March 2013), p. 8.

<sup>154</sup> See the Norwegian Government's [Oil for Development Programme](#).



0.87% of revenues from new natural gas projects would provide for the purchase of all the vaccines needed annually in Myanmar.<sup>155</sup> The “translation” of gas revenues to teachers or vaccines highlights the magnitude of the funding gaps, but does not count the costs of the underlying educational and health systems that need to be in place to support those services. The report nonetheless provides an ambitious but human-centred vision for use of Myanmar’s abundant O&G resources.

The sector will require the development of a small, but highly skilled workforce that will require companies providing training and education for employees, workers and contractors.<sup>156</sup> However, O&G is not labour intensive, meaning investment does not translate into large-scale job creation<sup>157</sup> that can bring immediate and visible benefits to a population hungry for change. Sector-wide training programmes that extend beyond the needs of the enterprise, as has been done in other countries<sup>158</sup> would provide a way of developing a more sustainable set of skills and expertise in the country.

Nor does the sector create many deep linkages to the rest of the economy. However if companies approach such linkages strategically, they can develop local supply chains that both bring indirect economic opportunities, while also lowering company costs in the long term. If developed appropriately “corporate social responsibility programmes” as referred to in the PSC, can provide much needed infrastructure, services or income generation opportunities for excluded groups.

Foreign investors in the sector can bring much-needed innovation and expertise as well as access to additional funding for highly capital-intensive projects that had formerly been inaccessible to the Government or national companies.

## Governance Impacts

This section examines the O&G sector’s contribution to improved or diminished governance in Myanmar through its connection with **conflict**, **militarisation**, pressures for **revenue sharing**, and **corruption**; and considers the involvement of the military in business, and the impact of Myanmar’s candidacy for EITI on governance of the sector.

### Conflict and Revenue-Sharing

Many of Myanmar’s natural resources are in the ethnic minority states with long running conflicts. They have been a flashpoint for grievances by ethnic minority groups. There are

<sup>155</sup> UNICEF, “[From Natural Resources to Human Capital: Practical, feasible, immediate resourcing solutions for Myanmar’s children](#)” (2013), p. 2.

<sup>156</sup> [TOTAL notes](#) that it has spent \$11 million on training (presumably since 1992 when the Yadana project started but this is not specified).

<sup>157</sup> [TOTAL notes](#) that while the Yadana pipeline created 2,500 people jobs during the construction phase, for the long-term operating phase, the number of employed is 800. 95% of the company’s workforce is Myanmar nationals.

<sup>158</sup> See for example, the [Petroleum Institute of Thailand](#), a neutral, independent, non-profit organisation established to foster better understanding of the petroleum, petrochemical, and related industries in Thailand with emphasis on human resources development, information services, technical services, public policy and regulatory support, to ensure sustainable development and competitiveness of the industry and the country.

some onshore blocks in current or post-conflict areas<sup>159</sup>. Major O&G pipelines pass through areas with a history of conflict or inter-communal violence, characterised by large numbers of *tatmadaw* troops, militias,<sup>160</sup> and armed ethnic minority-based opposition groups, leading to high levels of militarisation.

Over recent years, the Myanmar army has been accused of widespread human rights violations, including forced labour, against civilians in the vicinity of gas pipelines, leading to a clear association by locals and more widely between O&G operations and human rights violations. The fact that O&G projects bring with them increased presence of state security prompts concerns of human rights abuses from the local population, and it also prompts fears from armed groups of greater militarisation and therefore a potential shift in the military balance of power in conflict or ceasefire areas. Natural resource revenues have also financed continuing conflict (in the case of O&G, mostly on the government side). The ceasefires have also opened up new areas for business, mostly mining, which are associated with negative impacts on local populations.

The 2008 Constitution allocates all natural resources to the Union Government. Natural resource revenue also flows to the Union Government, and the Constitution currently does not contain any obligation for the revenue from natural resources to be subject to equitable sharing among the citizens. The desire of ethnic minority groups for more control over and benefit from natural resources in their areas is one of the key drivers of their demands for constitutional change. Gas revenues are a part of this debate, which remains unresolved in the current round of peace talks, and which the Government wants left to the subsequent political dialogue.

The FESR highlights as a “quick win” an action point for the Government to “develop the necessary measures to enhance equitable sharing of resources among various states and regions as well as other local governments.”<sup>161</sup> But as noted in the recent paper from the Myanmar Development Resource Institute (MDRI) “[a]ny discussion of wealth sharing in Myanmar bears on three key, on-going processes: proposed Constitutional reform, peace negotiations between the central Government and non-state armed groups, and expansion of investment in the extractive industries accompanied by a push for transparency of revenue flows.”<sup>162</sup>

A Constitutional amendment process is currently underway in Parliament. However it is uncertain if any reforms will in fact be enacted before the 2015 general elections,<sup>163</sup> given the military’s veto powers over constitutional change, the complex and contentious nature

<sup>159</sup> Onshore blocks A, B1/B2, J, R, S, T, U and V are all in areas which have been or currently are affected by armed conflict.

<sup>160</sup> Transnational Institute/Burma Centrum Netherlands, “[Developing Disparity: Regional Investment in Burma’s Borderlands](#)” (Feb 2013).

<sup>161</sup> “[Framework for Economic and Social Reforms - Policy Priorities for 2012-15 towards the Long-Term Goals of the National Comprehensive Development Plan](#)”, (14 January 2013) (Final Draft – Submitted to the First Myanmar Development Cooperation Forum), para 103.

<sup>162</sup> Thet Aung Lynn and Mari Oye, “[Natural Resources and Subnational Governments in Myanmar: Key considerations for wealth sharing](#)” (June 2014), pg. 2.

<sup>163</sup> The Irrawaddy, “[USDP Leader Urges Committee to Review Key Constitutional Changes](#)” (18 February 2014). Thura Shwe Mann, the Speaker of the Union Parliament urged the parliamentary constitutional amendment committee to complete work six months before the 2015 elections.

of the debate, the limited time remaining (particularly since a national referendum is also required), and the Government's expressed fears that the constitutional reform process could create "instability".<sup>164</sup>

Implementation of EITI will make the scale of revenues going to the Government more transparent, which could intensify demands for revenue sharing. There are increasingly open calls by some States for a more equitable sharing of revenue. Rakhine political and community leaders have called for a 50-50 split of revenue with the Union Government.<sup>165</sup> The November 2013 Chin National Conference called for 'equitable sharing between the Union and State government of the revenues obtained from the natural resources,' for 'state government to play a more important role in the management of the natural resources in the state,' and for strengthened environmental policies and transparency."<sup>166</sup> These on-going debates, particularly in areas of latent conflict, are likely to significantly colour the population's view of the sector in these regions. Localised measures through social investment programmes are unlikely to satisfy these broader demands.

The Government has expressed interest in models of revenue distribution from other countries. An allocated distribution of benefits to compensate producing regions and communities for the social and environmental costs of production and allow for more equal living standards across regions could help balance out those trade-offs for natural resource development highlighted in the FESR.<sup>167</sup> In a country where disparities and inequities are evident and bound to grow, a system to redistribute revenue will help promote the social cohesion required for economic growth. But this must also be balanced against the capacities of regional and local governments to manage funds, the potential of adding another layer(s) of corruption and rent-seeking to revenue flows and entrenching local elites, the potential volatility for state budgets as natural resource commodity prices fluctuate and the counterbalancing measures for accountability that can realistically be set in place.

Once revenue is distributed, the policy choices the government makes -- at the central, region/state and local levels -- will also play a vital role in turning O&G revenues into sustainable, equitable growth. Sound economic policies and sustained growth alone are insufficient for social development. The Government must make important choices about investing in comprehensive, inclusive and rights-based social policies and building strong democratic institutions for accountability.<sup>168</sup>

<sup>164</sup> See for example, The ConstituionNet, "[Amending the Constitution will 'hurt' the people', says Myanmar's President](#)" (18 May 2014).

<sup>165</sup> Mizzima, "[Arakan National Conference calls for Rakhine to get 50% of oil and gas revenues](#)" (April 2014).

<sup>166</sup> Cited in Thet Aung Lynn and Mari Oye, "[Natural Resources and Subnational Governments in Myanmar: Key considerations for wealth sharing](#)" (June 2014), pg. 38.

<sup>167</sup> The FESR specifically recognises that "there will be unavoidable trade-offs" for natural resource and infrastructure projects and proposes a number of steps as trade-offs: a specific recognition of trade-offs, early consultations with stakeholders to better understand and address those trade-offs, stricter environmental and social requirements and enhanced transparency. "[Framework for Economic and Social Reforms - Policy Priorities for 2012-15 towards the Long-Term Goals of the National Comprehensive Development Plan](#)", (14 January 2013) (Final Draft – Submitted to the First Myanmar Development Cooperation Forum), para 91-92.

<sup>168</sup> UNRISD, "[Mineral Rents and the Financing of Social Policy: Options and Constraints](#)", Research and Policy Brief 16 (Dec 2012).

### *Business Links with the Military*

The military is deeply involved in the Myanmar economy through its two holding companies, Union of Myanmar Economic Holdings Limited (UMEHL) and Myanmar Economic Corporation (MEC), both of which remain on the US sanctions list. Although both have mining interests, they have not been involved in O&G.

Any business activity involving the military and UMEHL/MEC is accompanied by exposure to being directly linked to human rights abuses. In particular, heightened caution is required when doing business in Myanmar's conflict-affected areas, including areas in an official state of emergency. Despite the suspension/lifting of investment and trade sanctions against Myanmar by the US, EU and other governments<sup>169</sup>, companies committed to responsible business conduct will want to avoid dealings with the military and their companies. This issue is relatively straightforward for companies incorporated in the United States, which are prohibited by U.S. law from making investments in Myanmar with the military and any entities in which the military owns a stake of 50% or more.<sup>170</sup> The EU does not impose such restrictions on its companies, save in respect of arms and equipment that can be used for internal repression.<sup>171</sup>

However connections with the military may not be immediately apparent. Enhanced due diligence will be required to ensure there is no direct linkage through the acquisition or use of land that may have been confiscated or unlawfully expropriated by military linked businesses, or indeed by the military itself.

### *Improving Extractives Transparency*

In a report compiled in 2012, the Resource Governance Index, which measures the quality of governance in the oil, gas and mining sector, gave Myanmar the worst score out of all countries surveyed for failing "to disclose any meaningful information about the extractive sector and lacking basic governance standards."<sup>172</sup> While revenue from gas exports over the past five years helped boost international reserves to \$9.9 billion, little showed up in Government accounts, according to the IMF.<sup>173</sup>

<sup>169</sup> The EU had previously imposed bans on trade and investment in the sectors of logging, timber processing and mining of precious metals and precious stones (Council Decision 2010/232/CFSP of 26 April 2010 renewing restrictive measures against Burma/Myanmar, 05/22). In May 2012, the EU suspended its trade and investment bans, except for its embargo on arms and equipment that can be used for internal repression: Official Journal of the EU (Council Decision 2012/225/CFSP of 26 April 2012 amending Decision 2010/232/CFSP renewing restrictive measures against Burma/Myanmar, L115/25). In April 2013, the EU suspended bans were permanently lifted. See: Council of the EU, "[Council Conclusions on Myanmar/Burma, 3236th Foreign Affairs Council meeting](#)", Luxembourg (22 April 2013). In 2012, the United States partially suspended its trade and investment sanctions against Myanmar. See also, U.S. Department of Treasury, "[An Overview of the Burmese Sanctions Regulations Title 31 Part 537 of the U.S. Code of Federal Regulations](#)".

<sup>170</sup> United States Department of the Treasury, General License No. 17, read with the United States Burmese Sanctions Regulations 31 C.F.R. Part 537. These laws prohibit investments by United States persons with the Burmese Ministry of Defense, including its Office of Procurement, any state or non-state armed group, or any entity in which any of the foregoing own a 50% or greater interest.

<sup>171</sup> In May 2012, the European Union suspended its trade and investment bans, except for its embargo on arms and equipment that can be used for internal repression: Official Journal of the European Union, "[Council Decision 2012/225/CFSP of 26 April 2012 amending Decision 2010/232/CFSP renewing restrictive measures against Burma/Myanmar L115/25](#)" (27 April 2012).

<sup>172</sup> Revenue Watch, "[Myanmar](#)" (accessed 11 July 2014).

<sup>173</sup> IMF, "[Myanmar 2011 Article IV Consultation](#)" (May 2012).



Corruption and lack of transparency are long-entrenched problems in both the Government, including the judiciary, and in business, which is widely acknowledged by domestic civil society, the international community, and the Government itself. Myanmar ranks 157th out of 177th on Transparency International's Corruption Perception Index.<sup>174</sup>

In December 2012 the President announced that the Government would tackle pervasive corruption in its ranks, acknowledging problems of weak governance,<sup>175</sup> and ratified the UN Convention against Corruption (UNCAC).<sup>176</sup> An Anti-Corruption Law was enacted on 7 August 2013 by the legislature although the President's Office submitted comments highlighting weaknesses and inconsistencies with UNCAC.<sup>177</sup> An Anti-Corruption Commission was appointed in February 2014. The Commission involves 15 members, five of who are appointed by the President, with another five each appointed by the speakers of both houses. While it is encouraging that the Union Government has acknowledged the problem and begun to take steps to address corruption, it remains a major risk for companies investing in Myanmar, as it will take some time for corruption to be significantly reduced in all levels of Government. Given the home state anti-corruption laws that apply to many of the larger international O&G operators and the significant fines that can accompany violations, these businesses could also be a strong voice for tackling the problem.

The President signalled an intention to apply for the Extractives Industry Transparency Initiative (EITI) membership early in his term in 2012, and donor governments have supported this. In August 2013 a Deputy Minister was quoted as saying "If we become an EITI member, corruption in resource based industries will be wiped out automatically. The other benefit we will get from it is more foreign investment."<sup>178</sup> In reality, eliminating corruption in the sector will take far more than this, but EITI implementation will be an important step towards revenue transparency.<sup>179</sup>

The Government formally applied for EITI membership in May 2014<sup>180</sup> and was accepted as a candidate in July 2014.<sup>181</sup> The Myanmar EITI (MEITI) Multi-Stakeholder Group has developed a work plan that sets out the objectives for EITI implementation and is aligned with the reporting and validation deadlines established by the EITI.<sup>182</sup> The first report is likely to be in 2016. The MEITI Workplan indicates that the Multistakeholder Group is working on a draft law that will set out the changes necessary to implement EITI.

<sup>174</sup> Transparency International, "[Myanmar](#)" (accessed 11 July 2014).

<sup>175</sup> The Irrawaddy, "[Third phase of reform tackles govt corruption, President says](#)" (26 December 2012).

<sup>176</sup> See: United Nations Office on Drugs and Crime "[United Nations Convention against Corruption Signature and Ratification Status as of 2 April 2014](#)" (accessed 15 July 2014).

<sup>177</sup> The Republic of the Union of Myanmar President's Office, "[Press Release on the Promulgation of Anti-Corruption Law](#)" (8 August 2013).

<sup>178</sup> Myanmar Times, "[Myanmar EITI application on track](#)" (11 August 2013).

<sup>179</sup> The EITI has two core components around transparency and accountability: oil, gas and mining companies disclose their payments to the government, and the government discloses its receipts. The figures are reconciled and published in annual EITI Reports alongside contextual information about the extractive sector. A multi-stakeholder group with representatives from government, companies and civil society is established to oversee the process and communicate the findings of the EITI Report.

<sup>180</sup> Myanmar EITI, "[MEITI-MSG submitted its candidature application on 7 May, 2014](#)" (May 2014).

<sup>181</sup> Myanmar EITI, "[Myanmar accepted as EITI Candidate country](#)" (July 2014).

<sup>182</sup> Myanmar EITI, "[MEITI-MSG Approved Work Plan](#)" (May 2014).

US and EU companies have home country laws requiring reporting on extractive revenue payments to governments. The advantage of EITI is that it applies to companies regardless of nationality, levelling the playing field among competitors and allowing local stakeholders to obtain a more complete picture of extractives revenues.

For companies, EITI candidacy signals the Government's intent to improve governance. Once MEITI reporting is in place, companies will be able to point to a transparent process that documents the financial benefits for the country, and can underpin government accountability for appropriate stewardship of those funds. Greater transparency can also insulate regional governments (and companies) against assumptions among populations in producing regions that revenues are greater than they really are. This may be particularly important in the early days of the new rounds of exploration when there is limited to no revenue flowing back to the Government and few local jobs or other tangible benefits.

In addition to stimulating governance reform through enhanced public financial management and contributing to anti-corruption efforts, MEITI could contribute to the improvement of human rights protection. EITI requires an inclusive approach to stakeholder engagement, starting with the Multi-Stakeholders Group, but also through MEITI's planned outreach to citizens and affected communities. The Myanmar Alliance for Transparency and Accountability (MATA) serves as an umbrella organisation for a number of CSO groups and ensures regular and wider liaison with wider CSO constituencies around the country. Moreover an 'Oil and Gas Group' of 18 companies has met twice since January 2014 and is expected to continue to meet on a regular basis.<sup>183</sup> Multi-stakeholder structures and networks are therefore being put in place which can be built on to address the wider range of issues for the sector that are beyond EITI's mandate.

When reviewing Myanmar's application, the EITI Board assessed the ability for civil society to engage in the EITI. It typically looks at the following types of issues: impediments to the free selection of civil society representation; an enabling framework for CSO activities, not only in theory but also in practice; whether civil society representatives are distinct from members of parliament from the ruling party or other political parties aligned with the Government and from the private sector; whether there are any restrictions to access to external funding and training; and patterns of harassment and intimidation of civil society representatives working on governance, transparency and anti-corruption issues.

The changes the Government put in place to respond to these issues has the possibility of collateral positive impacts for all civil society<sup>184</sup>. However arrests of people for their peaceful activities is continuing, with dozens of political prisoners still behind bars and others on trial. Many of them have been arrested under the Peaceful Assembly and Processions Law. Moreover, journalists have also been arrested under other repressive laws (see [Part 4.1](#) on Stakeholder Engagement). MATA warned EITI's International Board

<sup>183</sup> MEITI, "[MEITI Candidacy Application Form](#)" (May 2014), p. 11.

<sup>184</sup> The Form addresses a number of changes made in laws and the release of political prisoners linked to CSO requests as part of the MEITI process. MEITI Candidacy Application Form, above, pg. 11-12.

on the eve of their deliberations on Myanmar's membership that EITI conditions regarding civil society freedoms are not being met but stopped short of asking for a delay of the country's consideration.<sup>185</sup>

If the MEITI opts for disclosures of contracts,<sup>186</sup> social expenditures and beneficial ownership<sup>187</sup> (optional under the 2013 EITI Standard),<sup>188</sup> this, combined with greater transparency around environmental and social impacts expected to be required under the forthcoming EIA Procedure has the potential to dramatically open up the sector to public scrutiny from the first step of concluding contracts. Together with the EITI requirement for transparency around revenue paid by O&G companies, and its reconciliation with payments the Government acknowledges, would allow Myanmar stakeholders and others to better understand the true costs and benefits of the sector.

### Environmental & Social Impacts

Most of the environmental and social impacts, including human rights impacts of O&G operations happen at the project-level (see [Part 4](#)) or cumulative-level (see [Part 5](#)). This section considers key factors relating to **sector** level impacts and how they can be addressed.

#### *Lack of Environmental & Social Regulation*

The most pressing issue for the sector is the current lack of national environmental, social and human rights standards to regulate the environmental, social and human rights impacts of O&G operations, both onshore and offshore. Under the FESR the Government has committed "that future concession agreements meet high social and environmental standards as well as delivering a transparent and equitable sharing of financial benefits. In this regard the legal and fiscal frameworks under which these agreements are made will need to be revised and modernised. It will also be important that the respective regulatory agencies have clearly defined authority, institutional capacity and resources for monitoring regulatory compliance" (emphasis added).<sup>189</sup> Despite the recognition at the highest levels that the legal frameworks need to be revised and modernised, there is little indication that MOGE's model PSC which was reportedly developed in the early 1990's based on model PSCs used in Malaysia, Indonesia, Thailand, and Singapore, has been updated to address these issues. This model PSC is the basis for the on-going rounds of offshore and onshore contracting.

<sup>185</sup> The Irrawaddy, "[Burma Accepted for EITI Scheme, But NGOs Remain Concerned](#)" (3 July 2014).

<sup>186</sup> Note that if the IFC finances any extractive projects in Myanmar, it will require that any contracts are disclosed to the public: IFC, "[Policy on Environmental and Social Sustainability](#)" (2012), para. 49-52.

<sup>187</sup> See a recent report on information requested and gathered from the 47 winners of the 2013 and 2014 oil and gas blocks on details of their beneficial owners, Global Witness, "[Who is buying up Myanmar's Oil & Gas?](#)" (June 2014). See also: Global Witness, "[Beneficial Ownership and the Extractive Industries Transparency Initiative](#)" (date unknown).

<sup>188</sup> See the EITI Standard, Section 3.12b - which requires the Government to disclose its policy on contract and license transparency, and encourages disclosure of the contracts and agreements (Section 3.12a). These topics are in the MEITI Workplan.

<sup>189</sup> "[Framework for Economic and Social Reforms - Policy Priorities for 2012-15 towards the Long-Term Goals of the National Comprehensive Development Plan](#)", (Jan 2013) (Final Draft – Submitted to the First Myanmar Development Cooperation Forum), Section 5.3.

Given the importance of the PSC to regulating O&G companies in Myanmar, there is a window of opportunity in the current round of PSCs to build in requirements to apply international standards on responsible business conduct, and specifically include a requirement to meet IFC Performance Standards and World Bank Group (WBG) Environmental, Health and Safety Guidelines in the PSC. The current model PSC includes only a requirement on the operator to ‘be responsible to conduct Petroleum Operation in accordance with the good international petroleum industry practices’ and with national law. While “good international petroleum industry practices” is often seen in PSCs and particularly older models, it does not provide the clarity or specificity necessary to hold companies accountable for their environmental, social and human rights performance.<sup>190</sup> Unless there is a legal requirement to meet more specific standards, some (but not all) companies may operate to whatever minimal Myanmar standards are applicable.

Myanmar currently has a weak framework for protection of the environment and society. The 2012 Environmental Conservation Law is only a framework law, and must be complemented by more detailed laws and regulations. While the law provides for general environmental protection obligations, it does not stipulate whether and how infringements of the law are punishable. It is unclear if it provides for claims for compensation for damages only from the government and not individuals harmed by environmental pollution,<sup>191</sup> although claims for damages from local communities are making their way to court.<sup>192</sup> The law also leaves the management of natural resources to more resource-specific legislation, yet it is unclear if these issues will be picked up in the revised Petroleum Law reported to be under development.

The labour law framework is most developed but is undergoing extensive overhaul. There are significant gaps in laws covering many of the non-labour social issues that are relevant to O&G operations, such as land acquisition and resettlement procedures, community health, safety and security, as well as other emerging issues such as indigenous peoples’ rights. Given the absence of laws or vague or outdated provisions, it will be very difficult for the Government to hold companies accountable to operating to the “high social and environmental standards” as promised in the FESR. Furthermore, the Government’s administrative capacity to implement new Myanmar policies and laws consistently and effectively in areas where there will be O&G operations will take time.

The O&G sector is highly regulated in some parts of the world given its high risk profile (though even in developed countries, accidents happen where there is insufficient attention to risk)<sup>193</sup>. It has been active in developing its own technical standards and guidance to address the wide ranging hazards and risks inherent in such operations.<sup>194</sup> In addition, some companies commit to applying their company standards globally which is

<sup>190</sup> Which precise standard applies in the context becomes a matter of discussion between the government and the operator or litigation – neither of which are helpful approaches to holding companies accountable to consistent, robust, internationally agreed standards.

<sup>191</sup> Environmental Conservation Law (2012), Article 33.

<sup>192</sup> See Business and Human Rights Resource Centre, “[Case profile: Myanmar Pongpipat lawsuit \(re environmental & health impact of Heinda tin mine\)](#)” (accessed 15 July 2014).

<sup>193</sup> For example, TIME, “[100 Days of the BP Spill: A Timeline](#)” (2010).

<sup>194</sup> For example, [IPIECA](#), [International Association of Oil & Gas Producers](#), [Society of Petroleum Engineers](#).

to be welcomed. This presents an opportunity for improvements in the sector through peer-to-peer learning and via the business relationships O&G companies will create. It also provides the opportunity to model good corporate behaviour that not only builds wealth and creates jobs, but acts as a steward for protecting the surrounding environment, society and workers. But in the absence of an enforceable legal requirement by the host government, if a company fails to meet its commitment, there are no enforceable accountability mechanisms. A lack of standards allows companies to externalise most of their environmental, social and human rights costs onto Myanmar society. Such externalised costs include for example, unremediated environmental contamination, ecosystem services that are used but not paid for, failure to compensate workers for work completed or injury, displacing farmers without compensation etc. These costs will for the most part be localised around O&G operations and fall on workers and communities. At the same time, the absence of arrangements for equitable revenue sharing (see above), means a disparity in local costs and benefits that can fuel a rise in tensions around O&G operations.

For these reasons, it is important that the Government incorporate specific international standards in the PSC's currently awaiting agreement, and subsequently take steps to update older contracts to bring them in line on this issue. Suggested changes to the PSC are set out in the [Annex to the Recommendations](#).

### *Climate Change*

Myanmar is a country that is vulnerable to climate change given its long coastline and extensive delta, its heavy reliance on agriculture, much of which is in an area already referred to as the “dry zone”, and its reliance on natural resources.<sup>195</sup> The O&G sector's longer term, aggregate impact includes its contribution to climate change, which this SWIA Report will not expand on, not least as Myanmar's contribution to global climate change is currently minimal.

However it is worth noting the related aggregate environmental and health impacts from gas flaring which is not prohibited in Myanmar and specifically permitted under the PSC, as well as its longer-term contribution to climate change.<sup>196</sup> Many other countries have moved to limit or prohibit gas flaring.<sup>197</sup>

### *Land Footprint*

Significant land impacts are generally felt at the project level. The aggregate national land footprint of the sector is not large compared to some e.g. agriculture, particularly as much new development will be offshore. However, the national land use policy that is currently under discussion needs to incorporate the O&G sector into coordinated land use planning.

<sup>195</sup> “[Myanmar's National Adaptation Programme of Action \(NAPA\) to Climate Change](#)” (2012).

<sup>196</sup> See the [Global Gas Flaring Reduction Partnership](#) (accessed 15 July 2014).