



MYANMAR

by:

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BASELINE REPORT: Myanmar (Burma)

SNAPSHOT BOX

Number of Multinational Business Enterprises operating in the country	529 Permitted enterprises as of 31/12/2012. ¹
Number of Micro, Small and Medium Business Enterprises operating in the country	Small and medium business enterprises in Myanmar in 2008 is 40194 in total ²
Number of State-owned Enterprises and the industries in which they operate	<p>About 33 State Economic Enterprises under the government ministries.³</p> <p>652 industry enterprises owned by government agencies in 2010, operating in food and beverages, clothing, construction materials, personal goods, household goods, printing and publishing, industrial raw materials, mineral and petroleum products, agricultural equipment, machinery and equipment, transport vehicles, workshops and dockyards, etc.⁴</p> <p>More than 90 state-owned businesses were privatized in 2008, more than 300 in 2009, more than 100 in 2010, and 76 privatized in 2011.⁵ One state owned oil refinery to be privatized this year.⁶</p>

1 Foreign enterprises permitted to invest in Myanmar as of 31/12/2012 by sector: 5 in Power, 113 in Oil and Gas, 67 in Mining, 216 in Manufacturing, 46 in Hotel and Tourism, 19 in Real Estate, 26 in Livestock and Fishers, 16 in Transport and Communication, 3 in Industrial Estate, 9 in Agriculture, 2 in Construction and 7 in Other Services.

Foreign enterprises permitted to invest in Myanmar as of 31/07/2012 by country are 34 from China, 61 from Thailand, 40 from Hong Kong, 52 from Republic of Korea, 54 from U.K, 76 from Singapore, 43 from Malaysia, 2 from France, 15 from U.S.A, 12 from Indonesia, 5 from the Netherlands, 25 from Japan, 8 from India, 2 from Philippine, 2 from Russia Federation, 14 from Australia, 2 from Austria, 2 from Panama, 4 from Viet Nam, 1 from United Arab Emirates, 15 from Canada, 2 from Mauritius, 2 from Germany, 2 from Republic of Liberia, 1 from Denmark, 1 from Cyprus, 2 from Macau, 1 from Switzerland, 2 from Bangladesh, 1 from Israel, 1 from Brunei Darussalam, 1 from Sri Lanka.

“Data on Foreign Investment, Local Investment and Company Registration,” Directorate of Investment and Company Administration, and Ministry of National Planning and Economic Development, accessed Sep 20, 2012, <http://www.dica.gov.mm/dicagraph.htm>.

2 Dr.Pussadee Polsaram, and Ms Thaw Dar Htwe, “Small & Medium Enterprises Development Policies in Myanmar,” p. 3, accessed July 10, 2012, <http://www.aseansec.org/documents/SME%20Development%20Policies%20in%204%20ASEAN%20Countries%20-%20Myanmar.pdf>

3 State Economic Enterprises: Agricultural Enterprises, Myanmar Timber Enterprises, Myanmar Fisheries Enterprise, Livestock, Foodstuff and Milk Products Enterprise, Industry 1 and 2, Myanmar Oil and Gas Enterprise, Myanmar Petrochemical Enterprise, Myanmar Petroleum Products Enterprise, Myanmar Electric Power Enterprise, Off-Shore Project, Public Works, Myanmar Five Star Line, Inland Water Transport, Myanmar Port Authority, Myanmar Shipyards, Myanmar Airways, Myanmar Railways, Road Transport, Myanmar Post and Telecommunications, Central Bank of Myanmar, Myanmar Economic Bank, Myanmar Foreign Trade Bank, Myanmar Agricultural and Rural Development Bank, Myanmar Investment and Commercial Bank, Myanmar Insurance, Security and Printing Works, Myanmar Small Loan, Trade Enterprises, Information, Social Security Board. Central Statistical Organization, *Ministry of National Planning and Economic Development, The Government of the Republic of the Union of Myanmar: Statistical Year Book 2010* (Nay Pyi Taw, 2012), pages. 365-366.

4 Central Statistical Organization, *Ministry of National Planning and Economic Development, The Government of the Republic of the Union of Myanmar: Statistical Year Book 2010* (Nay Pyi Taw, 2012), page 163

5 “Privatisation Schemes Fuelling Inflation and Mistrust, Business People Say,” *Eleven Myanmar*, January 16, 2013, accessed January 31, 2013, <http://elevenmyanmar.com/business/2144-privatisation-schemes-fuelling-inflation-and-mistrust-business-people-say>; “Myanmar to Privatize 76 more State-owned Enterprises,” accessed July 20, 2012, <http://www.asean-cn.org/Item/1809.aspx>.

6 “Myanmar to Privatize Oil Refineries,” *Eleven Myanmar*, July 25, 2012, accessed July 30, 2012, <http://elevenmyanmar.com/business/380-myanmar-to-privatize-oil-refineries>.

	<p>SOEs will be sold off within 10 years and within 5 years, there will be fewer SOEs.⁷</p> <p>Out of 33 State Economic Enterprises, under the Ministry of Transport, 4 enterprises including Inland Water Transport, Myanmar Port Authority, Shipyards, and Airways are to be privatized within (2012-13) fiscal year(April-March).⁸ Myanmar Posts and Telecommunications (MPT), one of State Economic Enterprises will be turned into an independent corporation this year.⁹</p>
<p>Flow of Foreign Direct Investment from 2008 to 2012 (or other recent 3 to 5 year range)</p>	<p>US \$ 714.9 Million (2007-08)</p> <p>US \$ 975.6 Million (2008-09)</p> <p>US \$ 963.3 Million (2009-2010)</p> <p>While FDI inflow is stated at US \$ 20 billion for the fiscal year 2010-11 by UNESCAP, referring to the Ministry of Commerce of Myanmar,¹⁰ the actual FDI flow was \$756 million for 2011 according to UNCTAD.¹¹</p> <p>According to the Myanmar Investment Commission, Myanmar received US\$794 from April 1 to December 31 2011.¹²</p>
<p>Main industries in the country</p>	<p>Agricultural and related manufacturing firms in Food and Beverages¹³; oil and gas, mineral and petroleum products, Clothing and wearing apparel, wood and wood products, Construction materials, Pharmaceutical, Personal and Household Goods, Industrial raw materials; Livestock and Fisheries; Hotel and Tourism</p>

7 Win Ko Ko Latt, "State-owned Firms to be Sold Off Within 10 years: Government," *Myanmar Times*, September 5-11,2011, accessed July 10, 2012, <http://www.mmmtimes.com/2011/business/591/biz59106.html>.

8 "Myanmar to Privatize 4 State Enterprises," *Xinhua*, February 6, 2012, accessed July 10, 2012, <http://www.asean-cn.org/Item/4507.aspx>.

9 "Telecom Agency Set To Become Independent Corporation," *Eleven Myanmar*, January 31, accessed February 1, 2013, www.elevenmyanmar.com/business/2301-telecom-agency-set-to-become-independent-corporation.

10 UNESCAP, "Myanmar: Opening Up To Its Trade And Foreign Direct Investment Potential," (Trade and Investment Division, Staff Working Paper 01/12, September 20, 2012, revised December 31, 2012), p. 5.

11 UNCTAD, "World Investment Report 2012: Towards A New Generation of Investment Policies," 2012, pg.204. See also Jared Bissinger, "Behind Burma's Rising FDI," *The Diplomat*, August 31, 2011, accessed October 30, 2012, <http://thediplomat.com/asean-beat/2011/08/31/behind-burmas-rising-fdi/>

12 Kyin Myo Thwe, "Myanmar Foreign Investment almost \$800m in 9 months," *Mizzima*, February 11, 2012, accessed February 12, 2012, www.mizzima.com/business/8887-myanmar-foreign-investment-almost-800m-in-9-months.htm.

13 Food and Beverages amount 65.36% of SMEs in 2008, clothing and wearing apparel, 4.49% (See Dr. Pussadee Polsaram, and Ms Thaw Dar Htwe, "Small & Medium Enterprises Development Policies in Myanmar).

<p>Number of cases involving business-related human rights violations reported to (i) NHRIs, (ii) other national human rights bodies (e.g. ombudsmen) , and/or (iii) international human rights bodies</p>	<p>According to the ALRC citing a local news, the majority of over 1700 complaints received by the Myanmar National Human Rights Commission (MNHRC) in the first six months of its operations concerned land grabbing cases reportedly committed by army-owned companies, joint ventures and other economically and politically powerful operations with connections to the military.¹⁴ As of September 2012, according to U Win Mra, Chairman of MNHRC, ‘around 30 complaint letters come daily to Myanmar National Human Rights Commission and most are related to farmland problems.’¹⁵</p>
<p>Have the Framework and/or the Guiding Principles been translated into the country’s languages and published in the country?</p>	<p>A local NGO called Spectrum operating in Myanmar is translating the Guiding principles, overall framework, implementation guidelines, and principles of responsible contracting. They are also drafting summary guides on the UN framework appropriate for short guidance notes and for broad scale distribution.¹⁶</p>

14 The Asian Legal Resource Center (ALRC), “Myanmar at Risk of Land-Grabbing Epidemic,” June 6, 2012, accessed July 20, 2012, <http://www.alrc.net/doc/mainfile.php/hrc20/717/>.

15 “Human Rights Commission Receives Lots of Complaints Daily,” *Weekly Eleven*, September 14, 2012, accessed Oct 30, 2012, <http://elevenmyanmar.com/politics/692-human-rights-commission-receives-lots-of-complaints-daily>

16 Data from Email Communication with David Allen, Director of the Spectrum

17 The 1988 Foreign Investment Law was replaced by The Foreign Investment Law, The Pyidaungsu Hluttaw Law No.21/2012, The 3rd Waning of Thadingyut, 1374 M.E. 2nd November, 2012. See more detail for the procedural regulation for establishing a business presence for foreign investors in Chapter 3 of the FDI regulations, the Republic of the Union of Myanmar, Ministry of National Planning and Economic Development, Notification No. 11/2013, The 5th Waning day of PyarTho 1374, M.E.(31st January, 2013). The main framework of the procedures is the same with the 1988 FDI Law such as obtaining a permit issued by the Myanmar Investment Commission (MIC) and a permit for registering the company by the Directorate of the Investment and Company Administration (DICA) (See also UNESCAP, “Myanmar: Opening Up To Its Trade And Foreign Direct Investment Potential.”)

Types of Business Enterprises in the Country

<p>Name of the Type of Business Enterprise</p> <p><i>E.g. company, partnership, business trust etc.</i></p>	<p>Description of the Legal structure of the Type of Business Enterprise</p>	<p>Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?</p>	<p>Any legislation specifically applicable to the Type of Business Enterprise</p> <p>(E.g. Corporations Law)</p>
<p>Sole Proprietorship</p>	<p><i>A sole proprietorship is a business owned by an individual which usually operates under the name of the owner. Establishment and operation is simple. It is not required to register. Capital formation and withdrawal can be performed at one's will. However, the proprietor's liability is unlimited.</i></p>		
<p>Partnerships</p>	<p><i>A group of individuals may enter into partnerships in order to carry on a business. The partnership's rights and obligation are based on the agreements between the partners and the Partnership Act of 1932. In accordance with the Act, the number of partnerships is limited to twenty. A partnership firm may be registered, but registration is not compulsory. All partnerships formed in Myanmar are of unlimited type as the Partnership Act does not permit a limited partnership. When no provision is made for the period of time, the partnership will be dissolved when all partners are willing to do so.</i></p>		<p><i>The Partnership Act(1932)</i></p>

<p>Companies Limited by shares</p>	<p><i>In a Private Limited Liability Company, the transfer of shares is restricted, the public cannot be called upon to subscribe for shares, and the number of members is limited to fifty.</i></p> <p><i>In a Public Limited Liability Company, the number of shareholders must be at least seven. The company, after registration, must apply for a Certificate of Commencement of Business to enable to start the business operation.</i></p> <p><i>Joint Venture Company Limited formed under the foreign investment law 2012¹⁷ (Joint Venture between the foreigner and local investors registered under the Myanmar Company Act 1914; between Foreign Company and State Owned Economic Enterprises and registered under the Special Company Act 1950.</i></p> <p><i>Joint Venture Company Limited: Joint Venture between State Owned Economic Enterprises and Private Entrepreneurs registered under the Special Company Act 1950</i></p>	<p><i>Although Company law 1914 has no provision requiring the business enterprise to recognize a duty to society, the new Foreign Investment Law 2012 and its regulations have some provisions on social impact assessment (SIA) and environmental impact assessment (EIA) requirements to apply for investment permit from the Myanmar Investment Commission (MIC) specifically for big projects with large amount of investment and projects required to do EIA and SIA according to the rules of the Ministry of Environmental Conservation and Forestry (article 33 of FDI regulations)</i></p>	<p><i>The Myanmar Companies Act 1914 for the limited companies, Myanmar Companies Rules 1940, Myanmar Companies Regulations 1957</i></p> <p><i>The Special Company Act 1950 for a company with share contribution of the State</i></p>
<p>Associations not for Profit</p>			

Sources: Central Statistical Organization, Statistical YearBook 2010¹⁸.

¹⁸ National Planning and Economic Development, "Business Organization," accessed August 10, 2012, <http://www.dica.gov.mm/Citizen%27s.htm>.

OVERVIEW OF MYANMAR'S BUSINESS AND HUMAN RIGHTS LANDSCAPE

The business and human rights landscape of Myanmar becomes visible in the forms of labour protests, demanding justice for victims of land confiscation and concern for environmental damage directly linked with business operations especially in extractive industries. Until recently when the quasi-civilian government has started to take substantial steps that led to some political and economic reform measures, Myanmar has been criticized and sanctioned for its human rights records for decades.¹⁹ Critics have noted that political instability, economic mismanagement of the former regime and the resulting poverty serve as main driving forces behind the nexus of business activities and human rights violations such as forced migration, exploitation and trafficking.²⁰

¹⁹ See more reports on the concluding observations of the CRC and CEDAW committees for more human rights concern and also reports of human rights organizations such as Human Rights Watch (HRW) and the Earth Rights International (ERI). Some references: Convention on the Rights of the Child (CRC), "Consideration of the reports submitted by States Parties under 44 of the Convention: Third and Fourth Periodic Reports of States Parties due in 2008: Myanmar," CRC/C/MMR/3-4, 17 May, 2011. Committee on the Rights of the Child (CRC), "Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Union of Myanmar," CRC/C/MMR/CO/3-4, 3 February, 2012. Committee on the Elimination of Discrimination against Women (CEDAW), "Concluding Observations of the Committee on the Elimination of Discrimination against Women: Myanmar," CEDAW/C/MMR/CO/3. 7 November, 2008; Human Rights Watch (HRW), "The Recruitment and Use of Child Soldiers in Burma," 2007, accessed December 30, 2011. <http://www.hrw.org/en/reports/2007/10/30/sold-be-soldiers>; Earth Rights International (ERI), "The Burma-China Pipelines: Human Rights Violations, Applicable Law, and Revenue Secrecy." 2011, ccessed January 10, 2012. <http://www.earthrights.org/sites/default/files/documents/the-burma-china-pipelines.pdf>.

²⁰ CRFB, "CRC Shadow Report Burma."; Elaine. Pearson et.al., "The Mekong Challenge: Underpaid, Overworked and Overlooked: The Realities of Young Migrant Workers in Thailand," ILO, 2006, accessed December 30, 2011, www.ilo.org/public/english/region/.../underpaid-eng-volume1.pdf; U.S. Department of State, "Trafficking in Persons Report 2011: Burma."; International Council on Social Welfare (ICSW), "Trafficking and Related Labour Exploitation in the ASEAN region," November 2007; CRFB, "CRC Shadow Report Burma."; PWO, "Stolen Lives."; KWAT, "Eastward Bound."

The former military regime has moved away from a socialist system to a so called market oriented system since 1990s. Until recently the economic system of the country informally operated under the control of the ruling military elites and their allies, with a set of "rules of the game" favouring rather narrow interests.²¹ Until 2010, according to the assessment of Sean Turnell, an economist with a special focus on Myanmar, Myanmar's economy was unbalanced and volatile without the institutions and qualities required for sustainable economic growth and development in addition to rampant corruption.²² In fact, the economy had been sluggish over the past decades, a situation which according to the ADB was attributable to factors such as 'low investment, limited integration with global markets, dominance of state-owned enterprises in key productive sectors of the economy, and frequent episodes of macroeconomic instability'.²³

In addition to the poor economic situation, the low public investment in health, education and social services has led to very low human development since 1980. According to the UNDP, Human Development Index (HDI) of Myanmar was very low at 0.3 and even though it has slightly increased since 2000, it is still below the average of the East Asia and the Pacific.²⁴ In 2011, Myanmar's HDI was 0.483 at a rank of 149 out of 187 countries.²⁵ As of 2010, around 25% of the population was living below the national poverty line that was MMK 376'151 (Around US \$ 437 at an exchange rate of US

²¹ Sean. Turnell, "Burma's Economy 2010: A Fresh Look at Some Elemental Issues," September, 2010.

²² Ibid.

²³ ADB, "Myanmar in Transition," 3-4.

²⁴ Human Development Index (HDI) was introduced "as an alternative to conventional measures of national development, such as level of income and the rate of economic growth. The HDI represents a push for a broader definition of well-being and provides a composite measure of three basic dimensions of human development: health, education and income." "Human Development Index (HDI)," UNDP, accessed Sep 20, 2012, www.hdr.undp.org/en/statistics/hdi.

²⁵ UNDP, "Human Development Report 2011: Sustainability and Equity: A Better Future for All," 2011.

\$ 1= MMK 860) per adult per year.²⁶ While poverty serves as the root cause for human rights violations such as various forms of labour exploitation, the lack of adequate laws, policies and protection mechanisms exacerbated the situation.

Labour issues have been one of the main human rights concerns directly related to business practices apart from land confiscation and environmental damages as highlighted in the following section. While reform-friendly governmental personnel and members of parliament are trying to respond to these issues by drafting and enacting new laws and regulations, obstacles and challenges still lie ahead. At the same time, it is the most crucial time for the country to tackle these challenges and prevent business related human rights abuses.

Issues of business related human rights concerns

1) Labour Rights

Labour Exploitation

Between 1 May to 30 June 2012, workers staged strikes against extremely low salaries at 90 factories including garment, purified water, foot wear, plastic, laces, chemical fertilizer, furniture, electrical apparatus, wig, liquor, snacks, construction and petroleum products in the industrial zones in Yangon.²⁷ For instance, workers from Crown Steel factory, a Chinese-owned steel factory in Hmawbi in Yangon Region, went on hunger strike to get 40,000 kyat (\$48) per month as their basic salary. Their basic earning was 160 kyat (less than US \$0.20) a day and ranging from 4,500 to 10,000 kyat (\$5.35 to \$12) a month including overtime pay and various

allowances.²⁸ In other words, their income was far below the national poverty line of 376151 kyats per adult per year or 1000 kyat per day in 2010.²⁹

Similarly, at the Hi Mo High Art Wig factory, workers went on strike for the second time in late May following the company owners' refusal to pay the wage increases which had been agreed after the protests in early May.³⁰ After the strikes, the minimum salary for workers in industrial zones was temporarily set at 56,770 kyats (around US\$66)³¹ including overtime payment, as suggested by the Union Chamber of Commerce.³² The current state of the law on the minimum wage in Myanmar is the Minimum Wages Act of 1949 that is outdated and not in accordance with the changing economic reality of the country. Recently the new minimum wage law has been drafted by the Ministry of Labour, Employment and Social Security. It has yet to be discussed at the Parliament.

In spite of the temporary agreement of the minimum salary, the breach of the agreement by some employers at some factories has led to workers' protests over low salaries again at some factories later in 2012. Other reasons for protests include poor working conditions and the fact that many employers disapprove the formation of labour unions and as a consequence dismissed employees

26 IHLCA Project Technical Unit, "Integrated Household Living Conditions Survey in Myanmar (2009-2010): Poverty Profile," UNDP Myanmar, June, 2011, accessed http://www.mm.undp.org/ihlca/01_Poverty_Profile/index.html. (Around US \$ 437 at an exchange rate of US \$ 1= MMK 860)

27 More detail in "Labour Dispute Settlement," Ministry of Labour, Employment and Social Welfare, accessed Sep 29, 2012, www.mol.gov.mm/mm/departments/departments-of-labour/dol-regional-and-coordination-division/all-list/.

28 "Myanmar Steel Workers Go Hunger Strike," 25 May 2012, accessed August 3, <http://www.thaivisa.com/forum/topic/557906-myanmar-steel-workers-go-on-hunger-strike/>

29 IHLCA Project Technical Unit, "Integrated Household Living Conditions Survey in Myanmar."

30 Nyein Nyein, "Factory Workers End Strike." *The Irrawaddy*, June 6, 2012, accessed August 3, 2012, <http://www.irrawaddy.org/archives/5996>.

31 Exchange rate 1 US\$ = MMK 860

32 Ma Moe Wai, labour activist told that workers' minimum salary is around MMK 30,000 excluding overtime payment during an informal talk with Ma Moe Wai, Labour Activist on 23, Sep, 2012. Current earning of most of the workers in industrial zones at around 30,000 kyats (around US \$ 34) per month is the lowest salary in ASEAN region. "Local Business Owners will Find Difficulty to Find Workers if Minimum Wage Cannot Be Defined Before AFTA," *The Yangon Times*, Vol 8, No.28, Aug 1, 2012.(Burmese)

who took the lead in such organisations.³³ With the enactment of the labour organization law, the formation of labour unions is now legally permitted.³⁴

Child Labour

A recent study conducted by the UNDP and the government found that child labour participation rate (aged 10-14) among the poor is 18%³⁵ and school enrolment rate for those poor working children is very low at 11.6%.³⁶ Child labour can be seen in various sectors, such as food-processing, street-vending, refuse collection, light-manufacturing industries, restaurants, teashops, family agricultural activities, and large-scale development projects in the extractive and energy industries.³⁷ Children in vulnerable situations such as homeless children, street children, children affected by armed conflicts or disasters have a high risk of being exploited. They are reportedly subjected to dangerous and hazardous working conditions with low wages and working the same hours as adults, with the absence of systematic labour inspections.³⁸ For instance, according to the Human Rights Foundation of Monland, child labour abuse cases were found near Thai-invested Dawei economic zone in 2011.³⁹ There were cases of children reportedly working on

road building projects as wage earners.⁴⁰

Forced Labour Issues

Following progress in the attempt of the new government in eliminating forced labour including signing a Memorandum of Understanding with the ILO and developing a joint strategy to eliminate forced labour by 2015, the ILO has lifted some of the “restrictions” it had imposed on Myanmar in 1999 and 2000.⁴¹ Forced labour is prohibited under the law amending the 2012 Ward and Village Administration Act.⁴²

Although the ILO still received 158 forced labour complaints between June 1 and October 11, 2012 compared with 148 in the same period in 2011. According to the ILO the actual incidence of the use of forced labour is declining with an increasing awareness of communities to lodge complaints with the ILO.⁴³ During 2011, alleged records of forced labour relating to business activities included forced farming with local authorities threatening workers with fines, loss of farm land and imprisonment. Force labour benefitted mostly the military, defence-owned commercial interests, and large private corporations.⁴⁴

33 “More Protests Against Low Salaries, Unfair Dismissal,” *Eleven Myanmar*, November 2, 2012, accessed Dec 30, 2012, <http://elevenmyanmar.com/national/1149-more-protests-against-low-salaries-unfair-dismissal>.

34 The Labour Organization Law, The Pyidaungsu Hluttaw Law No.7/2011, The 14th Waxing day of Thadinkyut 1373, M.E. (11th October, 2011).

35 IHLCA Project Technical Unit, “Integrated Household Living Conditions Survey in Myanmar, p. 51.

36 Ibid.

37 “2012 Concluding Observations of the CRC Committee,” at para.69; WCRP cited in CRFB, “CRC Shadow Report Burma,” p. 3; U.S Department of State, “Trafficking in Persons Report 2011: Burma.”

38 CRFB, “CRC Shadow Report Burma,” p. 23-24. “2012 Concluding Observations of the CRC Committee,” para. 69.

39 Kyaw Kha, “Report Documents Child Abuse Cases Near Dawei Economic Zone,” *Mizzima*, January 17, 2012, accessed July 10, 2012, www.mizzima.com/news/inside-burma/6428-report-documents-child-abuse-case-near-dawei-economic-zone.html.

40 Ibid.

41 ILO, “Resolution concerning the measures on the Subject of Myanmar Adopted under Article 33 of the ILO Constitution,” 101st session, Geneva, May-June 2012.

42 Punishment is not more than one year imprisonment or not more than MMK 100,000 or both. See Law amending Ward or Village Administration Act, The Pyidaungsu Hluttaw Law No.7/2012, The 6th Waxing day of Tagu 1373, M.E. (8th March, 2012).

43 “Myanmar Acting to Cut Forced Labour: ILO,” *AFP*, November 12, 2012. <http://www.google.com/hostednews/afp/article/AleqM5iCyVyNYRoNc7Z1Lx65ZFiYQNGi2g?docId=CNG.5091d95ca15cd3fd981dde37c5a8a02d.1b1>.

44 UN General Assembly, “Report of the Special Rapporteur on the Situation of Human Rights in Myanmar,” A/66/365. 16 September 2011, paras. 64-66, 68-69; Human Rights Council, “Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana*,” A/HRC/19/67. 7 March 2012, paras.53-56; U.S Department of States, “Trafficking in Persons Report 2011: Burma.” ; U.S Department of States, “Trafficking in Persons Report 2012: Burma.”

Table 1: Major Laws Relating to Labour Rights Issues

Issue	Recently enacted laws	Laws under review or drafting ⁴⁵	Law Repealed	Existing Laws
Labour Rights in general	<p>The Labour Organization Law, The Pyidaungsu Hluttaw Law No.7/2011, The 14th Waxing day of Thadinkyut 1373, M.E. (11th October, 2011)</p> <p>The Settlement of Labour Dispute Law, The Pyidaungsu Hluttaw Law No. 5/2012, The 6th Waxing day of Tagu 1373, M.E. (28th March, 2012)</p> <p>The Social Security Law, The Pyidaungsu Hluttaw Law No.15/2012, The 14th Waxing day of Wargaung 1373, M.E. (31st August 2012)</p>	<p>Minimum Wage Act (Draft Issued)</p> <p>Employment and Skill Development Act(Draft Issued)</p> <p>Leave and Holidays Act, 1951</p> <p>Wokmen's Compensation Act (1923)</p> <p>Disability Employment Act of 1958</p> <p>The Occupational and Skill Development Draft Law</p>	<p>The Trade Unions Act, 1926</p> <p>The Trade Disputes Act, 1929</p> <p>The Social Security Act, 1954</p>	<p>Constitution 2008²</p> <p>Factories Act, 1951</p> <p>Shops and Establishments Act (1951)</p> <p>Leave and Holidays Act 1951</p> <p>Payment of Wages Act 1936.</p> <p>Employment and Training Act, 1950</p> <p>Employment Statistics Act, 1948</p> <p>Oil fields Labour and Welfare Act, 1951</p> <p>The Rangoon Foreshore Labour Employment Control Order, 1958</p> <p>The Regulation Protecting the Inland Freight Handlers, 1970</p> <p>Instruction of the Central Inland Freight Handling Committee Office, 2005</p>
Forced Labour related laws including migration	<p>Ward or Village Tract Administration Act, The Pyidaungsu Hluttaw Law, No. 1/2012, The 3th Waxing day of Tapaung 1373, M.E. (24th February, 2012) & its Amendment on 28th March, 2012)</p>		<p>Ward or Village Tract Administration Act, 1907</p>	<p>The Anti Trafficking in Persons Law, The State Peace and Development Council Law No. 5/ 2005, The Waxing Day of Tawthalin, 1367, M.E., September, 2005</p> <p>Law Relating to Overseas employment, The State Peace and Development Council Law No 3/99, The 12th Waning Day of First Waso, 1363 M.E. (9th July, 1999)</p>

45 Article 24 of the 2008 Constitution stated “The Union shall enact necessary laws to protect the rights of workers.”

Numerous reports of the ILO and Earth Rights International (ERI) have also documented forced labour cases in the oil and gas sector.⁴⁶ In 1996, villagers who had been subjected to relocation, forced labour, torture, murder and rape on the Yadana pipeline project filed a lawsuit under the Alien Tort Claims Act against Unocal, an American Oil Company for its complicity in those human rights abuses committed by the military.⁴⁷ In 2005, Unocal agreed to compensate the plaintiffs before it came to trial at the Superior Court of California and the case was withdrawn.⁴⁸ Until recently, forced labour has still been a human rights concern associated with oil and gas industries in addition to other issues such as land confiscation with lack of adequate compensation and negative environmental impacts.⁴⁹

2) Land Confiscation and forced displacement

Trend in Land Confiscation

Land confiscation, forced displacement and forced resettlement without informed consent or adequate compensation have been a major business related human rights issue. The main actors have been local private companies linked with the military, multinational companies in joint ventures with State owned enterprises or local businesses.⁵⁰ Over the past decades, the practices of land confiscation have been widespread across the country for various purposes including infrastructure projects such as railways, roads and airports, expansion of urban areas, establishment of industrial zones, building army battalions, construction of state owned factories, and leasing the land to private companies for agriculture and livestock business projects, resource extraction projects such as oil and gas, mining and hydropower projects.⁵¹

For instance, ERI has documented a letter dated March 16, 2010, sent by the MOGE to local villagers in Arakan State in the area of the “Burma-China pipelines” under construction. The letter gives notice to villagers to vacate their land within five days in accordance with a contract between villagers and Daewoo International for the Shwe gas pipeline. But the letter does not mention any information on the terms and conditions of the contract and what compensation villagers will receive.⁵² According to interviews conducted by ERI with affected villagers on Maday Island in Arakan State, some of the villagers were still waiting to receive compensation

46 ILO, Report of the Commission of Inquiry established to examine the complaint concerning the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), made by delegates to the 83rd Session (1996) of the Conference under article 26 of the Constitution of the ILO, GB/273/5; Earth Rights International (ERI), “Energy Insecurity: How Total, Chevron, and PTTEP Contribute to Human Rights Violations, Financial Secrecy, and Nuclear Proliferation in Burma (Myanmar),” 2010; Earth Rights International (ERI), “The Human Cost of Energy: Chevron’s Continuing Role in Financing Oppression and Profiting from Human Rights Abuses in Military-Ruled Burma (Myanmar),” 2008; ERI, “The Burma-China Pipelines: Human Rights Violations, Applicable Law, and Revenue Secrecy,” 2011, accessed January 10, 2012, <http://www.earthrights.org/sites/default/files/documents/the-burma-china-pipelines.pdf>.

47 “Burmese Win Appeal in U.S Alien Tort Case Against Unocal,” Human Constitutional Rights, accessed Sep 24, 2012, <http://www.hrcr.or/hottopics/burmese.html>.

48 “Doe v. Unocal Case History,” Earth Rights International (ERI), accessed www.earthrights.org/legal/doe-v-unocal-case-history.

49 ERI, “Energy Insecurity,” p. 11; ERI, “Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron’s Yadana Gas Project in Military-Ruled Burma (Myanmar),” 2009; Earth Rights International (ERI), “Energy Insecurity.”; ERI, “Total Impact.”; ERI, “The Burma-China Pipelines: Human Rights Abuses, Applicable Law, and Revenue Secrecy,” Situation Briefer No.1, March 2011; Shwe Gas Movement, “Corridor of Power: China’s Trans-Burma Oil and Gas Pipelines,” September 2009.

50 The Asian Legal Resource Center (ALRC), “Myanmar at Risk of Land-Grabbing Epidemic,” June 6, 2012, accessed July 20, 2012, <http://www.alrc.net/doc/mainfile.php/hrc20/717/>; See also Ta’ang Students and Youth Organization, “Grabbing Land: Destructive Development in Ta’ang Region,” November 2011; Lahu Women Organization, “Grab For White Gold: Platinum Mining In Eastern Shan State,” 2011.

51 The Burma Environmental Working Group (BEWG), “Burma’s Environment.”; Lawi Weng, “MPs Form Committee to Probe Land Grabs,” *The Irrawaddy*, July 25, 2012, accessed August 3, 2012, <http://www.irrawaddy.org/archives/10028>; Man Thu Shein, “Famous Companies Involved in Land Confiscation Cases,” *Weeklyeleven*, No.43, vol.7, August 1, 2012. (Burmese)

52 ERI, “The Burma China Pipelines,” p. 8 and 9.

for their land seized by the government to make way for the natural gas storage facility. Some received no compensation for their paddy fields which were flooded during the construction work and left permanently unsuitable for farming.⁵³ In the case of Latpadaung Copper mine project⁵⁴, over 7,800 acres (3,250 hectares) of farmland in Salingyi Township, Sagaing Division, has been confiscated for the project jointly operated by an economically and politically powerful joint venture of the Union of Myanmar Economic Holding Ltd. (UMEHL)⁵⁵ and China's Wan Bao mining company. The project reportedly began in late 2011 and landowners were forced to leave the area in early 2012 without an adequate compensation.⁵⁶

In some cases of land confiscation in the Yangon Region, companies privately owned by some members of parliament from the ruling Union Solidarity and Development Party (USDP) and some Union Ministers, former military officials

and serving administrative officials were involved.⁵⁷ These companies are not state-owned, but they are businesses privately owned by some people in power. Some rich businessmen entered the 2010 election as representatives of the ruling USDP party and became MPs. For instance, about 1000 acres of farm land from Mingaladon Township in the Yangon Region were leased to Zay Kabar Company which is owned by a businessman who became USDP member of Parliament after the 2010 election. The seizure took place in 2010 and farmers were forced to accept a compensation below the market price.⁵⁸ In 2011, Zay Kabar Company started to develop industrial zone although the land concession had been issued for agricultural purposes. Since it is not legal to use agricultural land for other purposes without issuing "La Na,"⁵⁹ the administrative office of the Yangon Region's Mingaladon Township issued a stop order.⁶⁰ Regardless of this order, according to the news, the Company reportedly continued to

53 Ibid.

54 Currently the project and the incident of violent crackdown on protestors against the project in November, 2012 are under investigation by an investigation body led by Aung San Suu Kyi.

55 The Union of Myanmar Economic Holding Ltd. (UMEHL) is one of the economic entities owned by the military. Another one is the Myanmar Economic Corporation (MEC). "UMEHL shareholding is restricted to only the military, active and retired, and their family members."; See more at Sikder Haseeb Khan and Pervaz Shams, "Banker, Trader, Soldier, Spy," *Forum*, Volume 3, Issue 3, March 2008, accessed July 10, 2012, www.thedailystar.net/forum/2008/march/banker.htm; According to Source Watch and Institute for Defence Studies and Analyses, MEC is an agency of Myanmar's Ministry of Defence. MEC and UMEHL have reportedly taken the dominant position in a wide range of economic activities.

56 Khin Oo Thar, "Massive Land Confiscation for Copper Mine," *The Irrawaddy*, May 4, 2012, accessed August 20, 2012, www.irrawaddy.org/archives/3655; For another example of the land seizure among others involved by the UEMH, see also Network of Safeguarding Farmers' Rights, "Land Confiscation and pieces of success story," 2011 (In Burmese). It is about a joint venture project of the UEMH with a Chinese Company and a local private company, Htoo Trading in Magwe Region.

57 For instance, companies involved in land grabbing reportedly include those owned by Union Minister of Agricultural and Irrigation Ministry and Union Minister of Economics and Trading Ministry, Chairman of Union of Myanmar Federation of Chamber and Commerce Industry (UMFCCI), Chairman of Myanmar Rice Trading Association, Three MPs from the ruling USDP party; See more at Man Thu Shein, "Famous Companies Involved in Land Confiscation Cases" (in Burmese); The Asian Legal Resource Center (ALRC), "Myanmar at Risk of Land-Grabbing Epidemic."

58 While the market price is around 2,000,000 MMK per acre, farmers were paid only 300,000MMK per acre. See Man Thu Shein, "Famous Companies Involved in Land Confiscation Cases."

59 Under Article 39 of the 1953 Land Nationalization Act, agricultural land can be used for other purposes such as for building houses or building fish ponds or industrial zones with the approval of the Ministry of Agriculture and Irrigation. However, final decision to give this grant was made by the former regime, the State/Division Peace and Development Council. The official document for this permission is called 'La Na 39'; See UNHCR, and UNHABITAT, "Guidance Note on Land Issues, Myanmar." Note: 1953 Land Nationalization Act was abolished with enactment of Farmland Law, The Pyidaungsu Hluttaw Law No.11/2012, The 8th Waxing day of Tagu 1373, M.E. (30th March, 2012). However, for land cases that dated prior to the enactment of this Farmland Law, 'La Na 39' can be regarded as still applicable as advised by famous activist lawyer Phoe Phyu.

60 William Boot, "Land Grabs Intensify as Burma 'Reform' Races Ahead of Law," *The Irrawaddy*, May 15, 2012, accessed July 15, 2012, <http://www.irrawaddy.org/archives/4239>.

bulldoze snatched land without complying with the order of the township authorities.⁶¹

In some cases, companies with an agricultural concession reportedly adopt the model of contract farming especially if their profit is comparably low because they lack governmental support or they are located on marginal lands. In such cases, companies grant loans to farmers for fertilizers, pesticides and seeds while farmers provide the land and labour. Then Businesses can export the agricultural produce purchased from farmers since they obtained agricultural commodity export quotas along with their concessions. Although this model seems better for farmers than obtaining little compensation and losing their livelihoods, it represents a shift in the country's agricultural sector that pushes farmers from working their land towards being wage labourers for large and powerful companies.⁶² However, according to some activists and lawyers working on land issues, the number of farmers who could work on contract farming is relatively small compared with the number of farmers who lost their livelihoods due to loss of their farmlands to large scale land concessions or other purposes as seen in the cases mentioned above.⁶³ Such a case is what happened in Hugawng Valley in Kachin State.⁶⁴

Yuzana Company, owned by U Htay Myint, a businessman and currently a member of Parliament for the USDP Party, was granted a 200,000 acre agricultural concession in Hugawng Valley bordering and within the Hugawng Valley Tiger Reserve in western Kachin State in 2006. Yuzana made an agreement with the then Northern Regional Commander Maj. Gen. Ohn Myint on the concession area, and then the township SLRD⁶⁵

was brought into the negotiations. The Forest Department was excluded. The land that the SLRD demarcated to Yuzana included both villagers' customary farming and village land (even though some of the land was registered and marked on SLRD maps) as well as the Hugawng Valley Tiger Reserve. The concession land comprises forest, wetland, and flooded land, as well as villager's paddy farms. The Forest Department made Yuzana keep a 10 km forested corridor for tigers to potentially pass through the valley from one mountain to the next. Reportedly nearly 14 villages are included within the concession area, with an estimated 5,000 villagers alone in just one part of Yuzana's concession.

The Hugawng Valley Development and Agricultural Planning Committee (HVDAPC), composed of 19 representatives from five different villages and over 800 farmers, sent a petition letter in 2007 to Senior General Than Shwe about the impact of the Yuzana concession on their lives and livelihoods and their lack of adequate compensation. Despite these grassroot movement efforts, by February 2010 over 150 households out of about 1,000 in a total of 6 villages (Warazup, Nansai, Bankawk, La Ja Pa, Awnggra and Jahtuzup) were forced off their lands and relocated to a Yuzana 'model village' with poor farming land and without fishing grounds. One NGO has so far documented 3,600 acres of land confiscated in 11 villages. Many of the villagers were forced to accept financial compensation, although some resisted as they found it inadequate. The situation escalated when in July 2010 a group of the affected farmers filed a lawsuit on behalf of all the farmers whose land was taken against Yuzana. Farmers rejected Yuzana's offer of payments of 80,000 Kyat (\$80) per acre (300,000 Kyat per acre is claimed to be a more accurate value).⁶⁶

In spite of the effort of the farmers, Kachin State court ordered Yuzana to pay the same low amount

61 Ibid.

62 The Burma Environmental Working Group (BEWG), "Burma's Environment."

63 Phoe Phyu, a well-known activist and lawyer gave this comment based on his own experience. An informal talk with Phoe Phyu on 23, Sep, 2012.

64 The Burma Environmental Working Group (BEWG), "Burma's Environment."; See also The Kachin Development Networking Group (KDNG), "Tyrants, Tycoons and Tigers: Yuzana Company Ravages Burma's Hugawng Valley," 2010.

65 The Settlement and Land Record Department (SLRD).

66 The Burma Environmental Working Group (BEWG), "Burma's Environment."

that the company was supposed to pay in 2011.⁶⁷ In late August 2012, the farmers went on strike in front of Yuzana company in Yangon and the news reported that UHtay Myint agreed to return a thousand acres of farmland after negotiations with the farmers' representatives. According to the same news source, in another case, more than fourty thousand acres of confiscated land were returned to the government to give it back to farmers.⁶⁸ Except that, until the end of this year, most of farmlands were not returned to the farmers.⁶⁹

Legal Framework

Under a set of rules, "Procedures Conferring the Right to Cultivate Land/ Right to Utilize Land for Agriculture, Livestock Poultry Farming, and Aquaculture Purposes," adopted by the former regime in 1991, the government leased the cultivable land, fallow land and waste land to state-owned economic organizations, joint-ventures including foreign investment, other organizations and private individuals on a commercial basis such as for agriculture, livestock poultry farming and aquaculture purposes.⁷⁰ Most villagers could not prove ownership of their land, because they did not have a formal land registration title.

According to Win Myo Thu, managing director of ECoDev, a local NGO, one third of rural farmers are landless and only 15% of farmers who own land have land use certificates.⁷¹ In many cases, customary land use of farmers was ignored and agribusinesses were awarded such "vacant' land

67 Khin Hnin Htet, "Court' cheats' Yuzana Land Grab Victims," *DVB*, 11 January 2011, accessed July 15, 2012, <http://www.dvb.no/news/court-%E2%80%98cheats%E2%80%99-yuzana-land-grab-victims/13662>.

68 Ibid.

69 Tun Tun Win, "Land Grabbing Cases of Military and Private Companies," *Eleven*, 08 January 2013, accessed January 30, 2013, <http://elevenmyanmar.com/component/article/53-top-events-2012/business/2039-land-grabbing-cases-of-military-and-private-companies>.

70 The Burma Environmental Working Group (BEWG), "Burma's Environment"; See also UNHCR, and UNHABITAT, "Guidance Note on Land Issues, Myanmar."

71 Conversation with Win Myo Thu on 14 Sep, 2012 on problems of new Farmland Laws.

given it was not registered with the SLRD. Even if farmers registered their land with the SLRD and had the land use certificate, land confiscation was still possible.⁷² For instance, in Phyarpone Township in Ayeyarwaddy Region, in a farmer's narration, his farmlands were confiscated as a punishment for his failure to sell a compulsory quota of the produce to the state in 1996.⁷³ Similarly, village and township authorities reportedly confiscated land for a variety of reasons and then resold it to their friends or relatives. In Phyarpone Township, about 3000 Acres were confiscated in 1996 for leasing the land to a Singaporean company⁷⁴. Farmers were not given any compensation.

The new laws related to land use, "Farmland Law' and "Vacant, Fallow and Virgin Lands Management Law (VFV Law)"⁷⁵ enacted by the new government and passed by the Parliament in March also do not seem to adequately address the problem of land grabbing.⁷⁶ According to article 37(a) of the 2008 Constitution, the State still owns all land and resources. Although farmers can get their land use

72 The Burma Environmental Working Group (BEWG), "Burma's Environment."

73 Since 1964 under the Revolutionary Council (RC) regime, farmers were required to sell a compulsory quota of the produce to the state at low prices. The system was continued by the socialist government and the State Law and Order Restoration Council (SLORC), which later changed its name to the State Peace and Development Council (SPDC) until 2002; Tin Soe, "Myanmar in Economic Transition: Constraints and Related Issues Affecting the Agriculture Sector," *Asian Journal of Agriculture and Development* 1, 2 (n.d.): p. 58-68.

74 According to farmers, later they were informed of a joint project between Yuzana Company and the Ministry of Agriculture and Irrigation on those farmlands in 1998. But until now, only one third of the land was utilized and the rest was wasted and abandoned; See "Land confiscated and abandoned," *The Yangon Times*, Vol.8, No.33, Aug.30, Sep 5, 2012. (Burmese).

75 The Vacant, Fallow and Virgin Lands Management Law, The Pyidaungsu Hluttaw Law No. 10/2012, The 8th Waxing day of Tagu 1373, M.E. (30th March, 2012); Farmland Law, The Pyidaungsu Hluttaw Law No.11/2012, The 8th Waxing day of Tagu 1373, M.E. (30th March, 2012).

76 The Asian Legal Resource Center (ALRC), "Myanmar at Risk of Land-Grabbing Epidemic." Thomas Kean, "More Warnings Over Land Bills: Experts Say Two Pieces of Draft Legislation Have 'Major Gaps' that could be Exploited for Land Grabs," *MyanmarTimes*, Vol 31, No. 615, February 20-26, 2012. <http://www.mmmtimes.com/2012/news/615/news61510.html>

certificates (LUC)⁷⁷ under the 2012 Farmland Law including the right to sell, the right to exchange, the right to access credit, the right to inherit, and the right to lease⁷⁸, shifting cultivators in upland areas of the country are excluded from such provisions⁷⁹. Shifting cultivators cannot apply for land use certificates under the rule that requires farmers not to leave the land without sound reasons. These shifting cultivations can be regarded as ‘vacant and fallow land’ and therefore be subject to land concessions to businesses. 42% of farmers live in upland areas and their livelihood is agriculture. Less than 10% of them have land use certificates.⁸⁰

The 2012 Farmland Law also restricts freedom of farmers to choose crop. If land is registered as paddy land, they cannot grow other crops and if they want to do so, they have to apply to the government.⁸¹ According to Win Myo Thu, it hampers the practice of integrated farming and the rights of farmers to adapt their crop choice from time to time to land fertility and to the market situation. If farmers fail to comply with the rule for growing other crops, their LUC can be revoked.⁸²

77 Articles 4 to 8, Chapter II of the 2012 Farmland Law contain provisions on granting land use titles. Land use certificates can be issued by township Farmland Administrative Body (FAB). First applications on land use titles have to be submitted to township SLRD offices through township FAB. Township SLRD need to make investigation of land use applications and report to the township FAB. Finally the approval to issue land use certificates will be decided by the district FMB. Upon this approval made by the district FAB, farmers need to give registration fee to the township SLRD and after that, the township FMB will issue the certificate accordingly.

78 Article 9, Chapter III, the 2012 Farmland Law.

79 The FAO defines shifting cultivation as “a system in which relatively short periods of continuing cultivation are followed by relatively long periods of fallow”. 1982, FAO/University of Ibadan Workshop on Shifting Cultivation and Extension, <http://www.fao.org/docrep/r1340e/r1340e04.htm>.

80 Meeting with Win Myo Thu, Managing Director of Eco Dev and a local expert in land and environmental issues and doing research on these areas.

81 Article 12(8), Chapter IV, The 2012 Farmland Law.

82 The LUC will also be revoked if farmers fail to inform the Farmland Administrative Body (FAB) of reasons for land remaining fallow or not to build structures without permission

Provisions in the Farmland Law on compensation for land being seized for development projects of the government are not sufficient.⁸³ In addition, the law does not require the ‘free, informed and prior consent’ of affected farmers. According to Win Myo Thu, the lack of a clear definition of what is meant by “the state” and “projects for its benefits,” can jeopardize the effective application of the protection which the law wants to provide.⁸⁴

In addition, Farmland Administrative Bodies (FAB) are vested with the power to oversee land dispute cases and the decision power at various administrative levels such as the ward and village tract level, the township level, the district level and regional or state level.⁸⁵ The Central level FAB is chaired by the Minister and Deputy Minister of the Ministry of Agriculture and Irrigation (MOAI) and the Director General of the SLRD department is the secretary and heads of relevant government departments are members. The central body will have to establish respective FABs at various administrative levels.

The fact that decisions of the FAB may not be appealed to a court of law, denies the rights of farmers’ access to an independent judicial system.⁸⁶ And it renders the mechanism unconstitutional due to lack of separation of powers between the legislative, executive and judicial branches of the government as espoused in the current Constitution. Given the history of the former Land Committees which rarely recognized the interests and rights of smallholder farmers, it is essential to improve existing dispute resolution mechanisms in order to strengthen tenure security for these.⁸⁷

83 Article 26 and 27, Chapter IX, The 2012 Farmland Law, deal with remedy and compensation.

84 Meeting with Win Myo Thu on 14 Sep, 2012.

85 Articles 22-25, Chapter 8, the 2012 Farmland Law.

86 Articles 11 and 19, Constitution 208 the right of citizens to access to an independent judiciary

87 See also Food Security Working Group’s Land Core Group, “Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law: Improving the Legal and Policy Frameworks Relating to Land Management in Myanmar,” November 2012.

The VFV law is identical to the 1991 Prescribing Duties and Rights of the Central Committee for the Management of Cultivable Land, Fallow Land and Waste Land with regard to allowing the lease of VFV land to citizens, private sector investors, government entities and NGOs for agricultural developments, mining and other purposes allowed by law. However, article 25 of the new VFV Land law does recognize the usage of VFV land by farmers without formal recognition by the government and grants protection of their interests.⁸⁸ The law in conjunction with the Farm Land Law allows the existing use of VFV land by farmers to be formally recognized by the government and to be reclassified as farmland and hence apply for land use certificates.⁸⁹

In contrast to the 1991 VFV rules, the 2012 VFV law and its bylaw do consider some protection mechanisms for farmers. However, they still need to be enhanced to effectively allow equitable resolution of land conflicts between smallholder farmers, the State, the private sector and investors by establishing an independent dispute resolution procedure and adjudication mechanisms. According to the 2012 VFV law and its bylaw, the Central Committee for the Management of Vacant, Fallow and Virgin Lands (CCVFV) has the overall management responsibilities regarding VFV lands including dispute resolution in coordination with other government departments and agencies.

CCVFV is a national, multi-ministerial committee formed at the President's discretion who may appoint the Minister of MOAI as Chairperson; the Director General of the SLRD as the Secretary and individuals from various government organs, or other suitable persons of his choosing, as members of the CCVFV.⁹⁰ One of the functions of CCVFV

is to fix the rate of security fees to be deposited for the use of VFV land, to intervene when acquired VFV land is not being developed within the allotted time frame and to eventually revoke the lease accordingly.⁹¹ If the law is implemented effectively, it might be able to prevent land speculation and facilitate the returning of undeveloped land to farmers.

Article 12 of the VFV Law permits the lease of VFV land to foreign investors or organizations consisting of foreign investors for businesses that citizens are not capable of undertaking.⁹² On the one hand, there are no adequate mechanisms to protect the rights and interests of small holding farmers against land confiscation and forced relocation in the VFV law. On the other, land confiscation and forced relocation is prohibited under Article 126 of the new Foreign Investment Rules by not permitting the lease of land for the investment purpose if there is objection from affected communities.⁹³ The provision also requires the consent from communities and permission from the relevant government departments in giving compensations at market value. Besides, investors need to ensure relocation and resettlement of local people and provide jobs to them in their investment projects. Article 35 of the 2012 Foreign Investment Law allows foreign investments in joint venture with local businesses to utilize land for agriculture and livestock rearing. According to Article 31 and 32 of the 2012 FIL Law, land lease periods to foreign investors from the government or from authorized private owners are up to 50 years, depending on the type and size of the investment. Leases can be extended twice for another ten years.

88 Article 25, Chapter 2012 VFV Law.

89 Article 10 (4), Chapter 4 of the VFV law allows rural farmers families to apply for the use of a maximum area of 50 acres of VFB to be developed and managed. And it is in conjunction with Article 8, Chapter 2, Article 34 of Chapter 11 of the Farmland law where VFB land can be reclassified as Farmland and the land use certificate can be applied.

90 Article 3, Chapter II, the 2012 VFV Law.

91 Article 36, Chapter 4, the VFV by law and article 22, Chapter 7, the 2012 VFV Law.

92 Article 12, Chapter 4, the 2012 VFV Law

93 Article 126, Chapter 15, Foreign Investment Rules.

Table 2: Major laws in relation to land rights issues

Issue	Recently Enacted Laws	Laws under Review	Laws Repealed	Existing Laws
Laws related to Land rights issues	<p>The Vacant, Fallow and Virgin Lands Management Law, The Pyidaungsu Hluttaw Law No. 10/2012, The 8th Waxing day of Tagu 1373, M.E. (30th March, 2012).</p> <p>Farmland Law, The Pyidaungsu Hluttaw Law No.11/2012, The 8th Waxing day of Tagu 1373, M.E. (30th March, 2012).</p> <p>The Foreign Direct Investment Law, 2012, The Pyidaungsu Hluttaw Law No.21/2012), The 3rd Waning of Thadingyut, 1347 M.E. (2nd November, 2012)</p> <p>The FDI regulations, the Republic of the Union of Myanmar, Ministry of National Planning and Economic Development, Notification No. 11/2013, The 5th Waning day of PyarTho 1374, M.E.(31st January, 2013).</p>	<p>The Vacant, Fallow and Virgin Lands Management Law, The Pyidaungsu Hluttaw Law No. 10/2012, The 8th Waxing day of Tagu 1373, M.E. (30th March, 2012).</p> <p>Farmland Law, The Pyidaungsu Hluttaw Law No.11/2012, The 8th Waxing day of Tagu 1373, M.E. (30th March, 2012).</p> <p>Forest Law (1992)</p>	<p>The Law Safeguarding Peasants Rights, 1963</p> <p>The Land Nationalization Act, 1953</p> <p>The Tenancies Law, 1963</p> <p>Foreign Investment Law, 1988</p>	<p>Constitution 2008</p> <p>Protection of Wildlife and Conservation of Natural Areas Law(1994)⁹⁴</p> <p>Duties and Rights of the Central Committee for the Management of Culturable Land, Fallow Land and Waste Land (1991)⁹⁵</p> <p>Land Acquisition Act 1894</p>

3) Environmental and Social Impact

Over the last decades, extractive industries such as logging, mining and oil and gas extraction have negatively affected the rights to food security, to livelihood and the right of indigenous people to live their own cultural practices people. In addition deforestation, , soil erosion, landslides, river siltation, damaging topsoil fertility by chemicals, and pollution had negative impacts on the right to

94 “The Law provides a mechanism for compensating individuals or businesses who have existing rights to the land under relevant acquisition laws” (Article 8), and the Director General of the Forest Department can “make provisions for reasonable rights and privileges in respect of the affected rights of the people in the region” where the natural area is established (Article 11); See also Food Security Working Group’s Land Core Group, “Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law.

95 It is not clear if these rules have been formally repealed.

health.⁹⁶

Logging

In Myanmar logging is mainly responsible for deforestation. Several logging projects along the Thai-Myanmar Border and the China Border in northern Myanmar during the 1990s and 2000s contributed to deforestation in Myanmar. Myanmar has been regarded as having one of the highest deforestation rates in the world with an

96 See also at The Burma Environmental Working Group (BEWG), “Burma’s Environment: People, Problems, Policies,” 2011; Kachin Development Networking Group (KDNG), “Valley of Darkness: Gold Mining and Militarization in Burma’s Hugawng Valley,” 2007; Ye Yint Aung, “Please Rain, Rain Come” *Weekyeleven*, No.42, vol.7, July 25, 2012 (In Burmese); Earth Rights International (ERI), “Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron’s Yadana Gas Project in Military-Ruled Burma (Myanmar),” 2009.

estimated 800,000 to 1 million hectares a year.⁹⁷ Logging concessions for valuable woods such as teak, ironwood and rosewood were given to local, Chinese and Thai business people with good connections to the government or to insurgent groups which concluded ceasefire agreements with the government since the mid 1990s.⁹⁸ Although logging might have somewhat decreased over the past years, until recently, timber export has still been a major source of income for the military regime⁹⁹ and the ethnic armed groups in ceasefire agreements according to a 2009 report of Global Witness.¹⁰⁰ A warning issued by the Union Minister of Environmental Conservation and the Minister of Forestry that punitive action will be taken against illegal timber trading indicates that it still an issue today.¹⁰¹

Mining

Since 1988 when the economy was opened to foreign investments, the Ministry of Mines has reportedly given hundreds of mining concessions for the rich mineral resources of Myanmar to local and foreign investors mostly from China.¹⁰² For instance, gold mining sites in Hugawng Valley in Kachin State along Chindwin River had increased from 14 in 1994 to 31 in 2006 and the number of machine or hydraulic mining and pit mines had reached about 100 by 2006. Moreover, this particular example of gold mines in Hugawng Valley indicates how large-

scale mechanized industry has higher negative impact on environment and the local people.¹⁰³

Another example are the copper mine projects known as the Sabetaung and Kyisintaung mine projects (S&K mines) and the Letpadaungtaung project in Monywa township in Sagaing Region. The Sabetaung mine project operated by Myanmar's state-owned Mining Enterprise No.1 and RTB-Bor Copper Institute of Yugoslavia, reportedly operated from 1983 until the mid-1990s. Chemical run off from the mine had destroyed farmlands and polluted underground clean water with the result that the locals' livelihood, food security, health and access to clean water was severely jeopardized.¹⁰⁴ Full scale commercial operations at the S&K mine began in 1998 with the involvement of Ivanhoe company and due to high level of acid released from the mine, farmlands in this area have been destroyed to an extent that trees cannot grow there anymore.¹⁰⁵ In addition, local people reportedly developed skin diseases and severe breathing and eye problems.¹⁰⁶ Nevertheless, the Letpadaungtaung mine project became operational in 2011. It is run by UMEHL and China's Wan Bao mining company and local villagers are currently demanding to stop the project. In addition to inadequate compensation for their loss of farmland and livelihood, there is a high concern about the destruction of the cultural heritage important not only for the region but also for the country.¹⁰⁷

97 Martin Smith cited in BEWG, "Burma's Environment"; See also Global Witness, "A Choice for China: Ending the Destruction of Burma's Northern Frontier Forests," London, 2009; Global Witness, "A Disharmonious Trade: China and the Continued Destruction of Burma's Northern Frontier Forests," London, 2009.

98 Global Witness, "A Disharmonious Trade," 2009, p.69-84.

99 Revenue from logging on average amounts to USD 200 million a year. Martin Smith cited in BEWG, "Burma's Environment."

100 Global Witness, "A Disharmonious Trade."

101 "Union Minister Said Illegal Timber Trading Will Be Punished," *Yangon Times*, August 9-15, 2012 (in Burmese).

102 The Burma Environmental Working Group (BEWG), "Burma's Environment: People, Problems, Policies," 2011; Kachin Development Networking Group (KDNG), "Valley of Darkness: Gold Mining and Militarization in Burma's Hugawng Valley," 2007.

103 KDNG, "Valley of Darkness."

104 Testimonies of a local farmer and former project manager at S&K project at a ceremony calling for stopping Letpadaungtaung Mine Project organized by 88 students on 30, Sep. 2012.

105 Ibid.

106 Ibid.; See also findings from Australian scholars at Thomas Maung Shwe, "Ivanhoe Mines Receives \$ 103 million from Monywa Mine Sale," *Mizzima*, August 5, 2011, accessed September 20, 2012, <http://www.mizzima.com/business/5729-ivanhoe-mine-sale.html>.

107 The Venerable Ledi Sayadaw U Nānadhaja (1846-1923) stayed in Ledi village near the town of Monywa. He is regarded as the most outstanding Sayadaw of the age. Many of his work on Buddhism are still available both in Burmese and English as well. Due to mine operations, memorial places related to the Sayadaw has been damaged.

Oil and Gas

Myanmar is rich in oil and gas. As of January 2011, proven crude oil reserves of Myanmar stood at 50 million barrels which is rank 79 worldwide.¹⁰⁸ Proven gas reserves stood at 283.2 billion cubic meters which is rank 40 as of January 2011.¹⁰⁹ Richness of oil and gas reserves in Myanmar has attracted foreign investments since the former regime intensified the opening of the sector in 2004. As of August 2012, altogether 20 foreign companies were engaged in 10 onshore and 27 offshore blocks.¹¹⁰

The first foreign investment projects were Yadana and Yetagun gas projects undertaken by French, American, Thai, Malaysian, and Japanese oil companies in partnership with the Myanmar Oil and Gas Enterprise (MOGE), the State Owned Enterprise in the 1990s. Natural gas is being exported from Yadana and Yetagun projects and it is expected that the export from other large projects, the Zawtika and Shwe Gas projects which are under construction, will begin in 2013.¹¹¹ The Zawtika project is a joint venture between the MOGE and the state owned PTTEP Oil Company of Thailand.¹¹²

The Shwe Gas projects are led by Chinese, South Korean, and Indian multinational companies in partnership with the MOGE, local companies and the state security forces. The projects are also known as the “Burma-China pipelines,”¹¹³ consisting of the

Shwe Natural Gas Project and the Burma-China oil transport project. Two massive pipelines will transport gas from Myanmar and oil from the Middle East and Africa across Myanmar to China.

According to Arakan Oil Watch, mining operations for the construction of the deep sea port on Madaya Island where China’s crude oil tankers will dock on their way to China from the Middle East and Africa, killed hundreds of fish and destroyed important fishing grounds where local people have been fishing for centuries.¹¹⁴ In addition, there are other social problems as well. Roads have been damaged by the project construction in Kyaukphyu Township and the locals in Arakan State have not seen a new public jetty for them yet since the existing public jetty is now being used solely for the ships for the project.¹¹⁵

Environmental and Social Impact Assessment (ESIA assessment)

ESIA Legal Framework

Article 45 of the 2008 Constitution stated “The Union shall protect and conserve natural environment.” Article 390 also includes a provision on environmental conservation. The legal mechanism for ESIA is now put in place with the 2012 Environmental Conservation Act.¹¹⁶ Article 7 (13) of Chapter 4 mentions the need for SIA and EIA for any project operated by the government or organizations or individuals. Article 14 is related with waste disposal in accordance with environmental standards and Article 19 is related to maintenance of cultural heritage. For violations of bylaws, regulations and directives issued under this law, punishment is not more than one year or fine or both under Article 32.¹¹⁷ And critics indicate

114 Arakan Oil Watch cited in BEWG, “Burma’s Environment.”

115 Juliet Shwe Gaung, “Concern Remain over Shwe Gas Benefits,” *The Myanmar Times*, August 2012.

116 Environmental Conservation Act, Pyidaungsu Hluttaw Law No. 9/2012, The 8th Waxing day of Tagu 1373, M.E. (30th March, 2012).

117 Article 7 (13), Chapter IV. Article 14, 19 and 32 of the 2012 Environmental Conservation Act.

108 “The World Factbook: Myanmar,” Central Intelligence Agency,” accessed September 23, 2012, <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html>.

109 Ibid.

110 “20 Foreign Companies engage in 37 onshore and offshore oil and gas blocks,” *Weekly Eleven*, No.44, Vol.7, August 8, 2012 (In Burmese).

111 Nyein Chan Win, “Myanmar Estimates US \$ 800m from Gas Revenue,” *Weekly Eleven*, accessed July 30, 2012, http://eversion.news-eleven.com/index.php?option=com_content&view=article&id=977:myanmar-estimates-us-800m-from-gas-revenue-&catid=43:bi-weekly-eleven-news&Itemid=110.

112 “Zawtika Gas Project Opens Temporary Base Camp,” *Mizzima*, February 1, 2011, accessed July 30, 2012, <http://democracyforburma.wordpress.com/2011/02/01/zawtika-gas-project-opens-temporary-base-camp/>.

113 Earth Rights International (ERI), “The Burma-China Pipelines: Human Rights Abuses, Applicable Law, and Revenue Secrecy,” March 2011.

weak enforcement penalties.¹¹⁸ Currently, the new Environmental Conservation Law is said to be in the process of revision.¹¹⁹

Recently enacted foreign investment rules do require ESIA specifically for large projects according to the rules of the Ministry of Environmental Conservation and Forestry (article 33 of FDI regulations).

ESIA Implementation

The aforementioned two recently enacted laws and rules still need to be enforced. According to scholars, most of the environmental and social problems associated with extractive industries have been attributed to a lack of ESIA or inadequate ESIA over the past decades.

Some critics have pointed out the weak enforcement of the existing mining laws and regulations, the lack of provisions in the 1994 mining law for EIA or SIA and the lack of provisions for prosecution or fines in case of pollution releases such as mercury.¹²⁰ Although the 1996 Myanmar Mines rules mention the duty of large scale mineral production to “backfill arrange, vegetation or reclaim the land in the areas already mined out to the satisfaction of the Ministry,”¹²¹ no grievance or enforcement mechanisms and no formal requirements for EIA is mentioned.

According to the Ministry of Mines, environmental problems are related to artisanal miners and illegal

gold miners.¹²² The Ministry said it has issued directives prohibiting use of cyanide by artisanal and small-scale miners with effect from 1st January 2000. However, the Ministry admits that “it is rather difficult to impose environmental rules on them unless action is taken according to law.”¹²³ Under section 32 of the Mining law 1994, there are provisions that the holder of a permit who violates any of the rules relating to section 13 will be punished with one year imprisonment or with a fine of 10,000 kyats or with both. One of the rules under section 13 is related to environmental conservation.¹²⁴ However, there are no specific provisions for punishment for using toxic chemicals.

The Ministry of Mines also said that it is the policy of the Ministry that require all large scale mining projects to undertake EIA as part of their feasibility study. “The foreign companies either follow the World Bank standards or standards not lower than those existing in their countries.”¹²⁵ However, as having seen in the earlier examples, in practice, this rule was weak and ineffective. Recently, the Ministry of Mines issued an order in March 2012, banning mining along the country’s four major river courses or closer than 90 meters to the river banks.¹²⁶ To what extent this rule can be enforced is yet not clear.

Similar problems with weak SIA or EIA practices were found in the oil and gas sectors and hydropower project sites.¹²⁷ According to a remark of U Win Myo Thu, efforts to prevent social problems were not encouraged, or SIA or EIA were not done effectively.¹²⁸ ERI has also documented the failure of the then government to do SIA and EIA or encourage multinational companies to do

118 Nay Lin Aung, “Burma’s Environmental Law Undergoes Revisions,” *Mizzima*, 25 July 2012, accessed July 30, 2012, <http://www.mizzima.com/news/inside-burma/7596-burmas-environment-law-undergoes-revisions.html>.

119 Nay Lin Aung, “Burma’s Environmental Conservation Act Undergoes Revisions,” *Mizzima*, 25 July 2012, accessed July 30, 2012, <http://www.mizzima.com/news/inside-burma/7596-burmas-environment-law-undergoes-revisions.html>.

120 BEWG, “Burma’s Environment”; KDNG, “Valley of Darkness.”

121 Soe Mra, “Status and Current Issues of Mining Regulatory Regime in Myanmar,” Department of Mines, accessed July 20, 2012, <http://www.freewebs.com/myanmarmines/regulatory.htm>.

122 Ibid.

123 Ibid.

124 Ibid.

125 Ibid.

126 Yawdlao, “Myanmar Bans Mining on Four Major Rivers,” *Mizzima*, March 30, 2012, accessed <http://howdyasia.com/buram-bans-mining-on-four-major-rivers/>.

127 The Burma Environmental Working Group (BEWG), “Burma’s Environment.”

128 Win Myo Thu at the ceremony calling for stopping Letpadaungtaung Mine Project organized by 88 students on 30, Sep. 2012.

so.¹²⁹ Even if EIA and SIA were done, it was neither disclosed to the public nor did it include public consultation. For instance, one SIA done by China National Petroleum Corporation (CNPC) that is building the crude oil pipeline in collaboration with the MOGE in Arakan State, was a needs assessment for socio-economic programs for villagers rather than assessment of potentially negative impacts of the pipeline projects.

Extractive Industries Transparency Initiative (EITI)¹³⁰

Table 3: Existing Major Laws related to ESIA assessments

Issue	Recently enacted laws	Laws under review or drafting ¹³²	Law Repealed	Existing Laws
Laws Relevant to ESIA	Environmental Conservation Act, Pyidaungsu Hluttaw Law No. 9/2012, The 8 th Waxing day of Tagu 1373, M.E. (30 th March, 2012). The Myanmar Mines Law, 1994, The State Law and Order Restoration Council Law No. 8/94, the 2 nd Waxing Day of Tawthalin, 1356 M.E. (6 th September, 1994) Foreign Investment Law (2012) Foreign Investment Rules (2013)	The Myanmar Mines Law, 1994, The State Law and Order Restoration Council Law No. 8/94, the 2 nd Waxing Day of Tawthalin, 1356 M.E. (6 th September, 1994)		Constitution 2008 The Conservation of Water Resources and Rivers Law (2006) ¹³³ Protection of Wildlife and Conservation of Natural Areas Law (1994) ¹³⁴

In spite of such problems during the past regime, the new government has shown its commitment to adopt good practices in extractive industries including incorporating ESIA measures in its legislation. Especially, the government is determined to be a member of EITI and for this purpose, EITI Leading Authority was formed with Union Minister of President Office as Chairman and Union Minister of Ministry of Finance and Revenue as Secretary and

3 Union Members from Ministry of Environmental Conservation, Ministry of Energy and Ministry of Mines as members.¹³¹ Main tasks of the Committee include ensuring better management for extractive industries by developing responsible environment and cooperating with relevant stakeholders from both private and public sectors.

Recent Developments and challenges ahead

The new quasi-civilian government has started to undertake a series of economic and political reforms since it took office in March 2011 ending the military rule after more than half a century.

Several measures are being undertaken to strengthen the rule of law and to move towards a more open society. For instance, hundreds of political prisoners

129 ERI, “The Burma China Pipelines,” p.14, 15
130 See also Section 6 (6.1) about EITI initiative mechanisms the state started to adopt.

131 ‘Formation of Extractive Industry Transparency Initiative Leading Authority,’ Notification No 99/2012, 1st Waxing of Nadaw, 1347 ME (14 December 2012).
132 Note: This list is not exhausted, just only based on information available, the list was drawn. Other existing laws might or might not be reviewed.
133 Although no ESIA assessments are included in the law, the law contains penalty provisions for causing damage to water resources and rivers (Article 25-29).
134 The Law also contains for penalty provisions for causing damage to any ecosystems within a natural area (Article 36).

have been released although there are still remaining ones. Peace talks are ongoing with ethnic rebels in spite of difficulties and problems that remain to be solved.¹³⁵ Other measures include easing media and internet control to some extent, legalizing protests, and reforming decades of complicated dual exchange rate system to a managed floating rate. Such reform measures have given hope for a democratic future in Myanmar. As a reward, many countries lifted the sanction imposed in the 1990s and now allow investments in Myanmar¹³⁶

Attracted by such new developments and rich natural resources, foreign investors show great interest in Myanmar and are prepared to engage in various business sectors that are still underdeveloped. The most attractive sector is extractive industries especially in oil, gas and mining. At the same time, incoming investors face many challenges, most importantly inadequate physical,¹³⁷ financial and legal infrastructures to support trade and business presence; and human rights related risks associated the existing and ongoing investment projects as seen in the above.

135 "CSW Calls on Burma Army to Stop Attacks on Kachin and Begin a Peace Process after One Year of War," Christian Solidarity Worldwide, <http://dynamic.csw.org.uk/article.asp?t=press&id=1378>

136 See also ADB, "Myanmar in transition."

137 Access to electricity is only 13% of the whole population in 2009 and internet user is only 1 person per 100 people in 2011 although it has increased from 0.1% in three consecutive years since 2007 and 0.3% in 2010. ("Access to Electricity (% of population)," The World Bank, 2012, accessed Sep 30, 2012, data.worldbank.org/indicator/EG.ELC.ACDS.ZS.) As of 2011, mobile cellular user is only 1.244 million out of around 6 million population ranking 148 out of 218 countries, "The World Factbook: Myanmar," Central Intelligence Agency." In the past, while SIM cards were affordable to almost everybody in neighbouring countries like Thailand, SIM cards were incredible expensive in Myanmar and it was a luxurious thing and a symbol of status and power. A SIM card alone could cost around US \$ 2000 about 5 years ago. Nowadays, situation is much improved and more accessible to the grass root level compared with the past. Even that, percentage of the population that can use mobile is still very low). Given this backdrop, if the capital that will be coming in Myanmar cannot reach out to remote areas and if it only concentrates in few big cities, gap between the rich and the poor will be getting wider and wider. Consequently, it can lead to social unrest.

Myanmar is still at the beginning stage to upgrade and improve its infrastructure needs in line with the 21st century.¹³⁸ Similarly, improving legal and financial systems will take some time. In the meantime, cronyism and rent seeking is still a remaining issue. Recent privatization of SOEs was still under control of companies closely associated with the authorities.¹³⁹ Eradicating widespread poverty, improving public health, education and providing adequate social services still need to be carried out effectively.

Given this backdrop, in this transitional period, human rights principles and standards such as participation, non-discrimination, transparency, accountability and the rule of law need to be integrated and complied with in the country's economic and social development process. To create a fair and equitable society, it is of utmost importance to eradicate corruption and establish an independent judicial system.

I. How has the State reacted to the UN "Protect, Respect and Remedy" Framework ("Framework")?

Even though the state has not made an official endorsement of the UN "Protect, Respect and Remedy" Framework, the government recognizes the importance of the principles and its implementation. During 2012, the Institute for Human Rights and Business, IHRB, held several

138 Patricia Lee, "Corruption and Unsophisticated Legal System Topped List of Risks in Myanmar, Experts Say," *Thomson Reuters*, June 21, 2012, accessed July 21, 2012, <http://www.trust.org/trustlaw/news/corruption-and-unsophisticated-legal-system-topped-list-of-risks-in-myanmar-experts-say/>; Flavia Krause-Jackson, "Myanmar's Corruption Legacy Shadows Opening to Investors," May 17, 2012, accessed July 20, 2012, <http://www.businessweek.com/news/2012-05-17/myanmar-s-corruption-legacy-shadows-opening-to-investors>.

139 "Burmese Government "Cronies" Said Benefiting from Privatization," *BBC Morning Asia Pacific*, July 22, 2010, <http://www.accessmylibrary.com/article-1G1-232373247/burmese-government-cronies-said.html>; Zaw Htaik, "An Official from World Bank said Myanmar needs an effective strategy for successful economic reform," *Yangon Times*, Vol 8, No. 30. August 15, 2012.

multi stakeholder workshops on the UN Guiding Principles and their application to Myanmar, both inside and outside of the country. During those workshops, senior level government officials have expressed their intention to adhere to the UN “Protect, Respect and Remedy” framework.

II. Is the State duty to protect against human rights abuses by third parties, including businesses (“State Duty to Protect”), recognized in the country’s domestic legal system?

1. Do any of the State’s domestic laws, including the Constitution / basic law of the State, provide a basis for a State Duty to Protect ?

Myanmar has not enacted human rights and anti-discrimination laws yet.

The 2008 Constitution

Although the 2008 Constitution contains some provisions on human rights including education, health, security, privacy, freedom of expression, association, religion, culture, language and literature,¹⁴⁰ There is no general provision on the state duty to protect but several Articles implicitly refer to it: Articles 34 and 354 grants freedom of opinion, freedom of speech, peaceful assembly, freedom of association, and freedom to profess and practice religion. Under Article 372, the state guarantees property rights and under article 19, the right to access to independent justice is guaranteed.

Regarding the acceptance, granting and guarantee of the rights, there is concern about some clauses that can impose limitations on rights and freedom, such as state security, prevalence of law and order, community peace and tranquillity or public order, public morality, health and the other provisions of the Constitution.¹⁴¹ Most of the rights are subject to

140 2008 Constitution, Section 34, 353, 354, 365.

141 2008 Constitution, Section 34, 354.

limitations provided for in other laws. This has raised critique because laws issued by the former military regime did not follow democratic procedures and may result in overruling the Constitution.¹⁴² Although the government recently repealed Martial Law Order 2/88 that was used to sentence dissidents to long prison terms, a number of such draconian laws and rules targeting opposition groups, rights activists and journalists, such as the Electronic Act, Section 5 (j) and Section 505 (b) of the Penal Code, and Article 17/1 of the Illegal Organization Act remain in place.¹⁴³ Even laws promulgated by the parliament such as the new laws on labour, land and environment,¹⁴⁴ still need to be reviewed so that they can give adequate legal protection.

However, article 23 (a) and 24 of the 2008 Constitution state “The Union shall enact necessary laws to protect the rights of the peasants,” and “The Union shall enact necessary laws to protect the rights of workers.” These two provisions indicate the state’s recognition of their duty to protect the rights of workers and peasants by promulgating laws and regulations. On the other hand, rights of indigenous peoples, minorities, children and the disabled are not specifically mentioned in the Constitution.¹⁴⁵

142 Yash Ghai, “The 2008 Myanmar Constitution: Analysis and Assessment,” http://www.burmalibrary.org/docs6/2008_Myanmar_constitution--analysis_and_assessment-Yash_Ghai.pdf

143 Saw Yan Naing, “Ban Repeal Welcomed, Amid Calls for More Reform.” *The Irrawaddy*, January 30, 2013, accessed February 1, 2013, <http://www.irrawaddy.org/archives/25598>; “Discussion on Old Laws to Be Repealed,” *Radio Free Asia*, 15 August, 2012, accessed 17 August 2012, <http://www.rfa.org/burmese/news/parliament-law-discuss-08152012113221.html>.

144 Refer to Table 1, 2 and 3 for detailed references of the recently enacted laws related to labour, land and environment.

145 Yash Ghai, “The 2008 Myanmar Constitution: Analysis and Assessment,” http://www.burmalibrary.org/docs6/2008_Myanmar_constitution--analysis_and_assessment-Yash_Ghai.pdf.

Laws on Labour Rights Issues

According to Article 24, three new laws relating to labour protection have been enacted.¹⁴⁶ The Labour Organization Law of 2011¹⁴⁷ was drafted based on the ILO Convention No.87 on Freedom of Association. It grants legal rights to a worker to form and to be a member of labour organizations. Under articles 18 and 44 (d), workers' freedom of association is protected. However, as Phoe Phyu, a lawyer and activist points out, the law does not provide adequate protection to the rights of workers in performing organizational activities to establish a union.¹⁴⁸ In some cases, worker leaders found themselves being dismissed or transferred to remote workstations. In such cases, employers claimed disturbances at workplace or breach of contracts – even in cases where there was no written contract – as reasons for the dismissal.¹⁴⁹ According to the affected workers, the real reason is their role as leaders to initiate and organize unions. Two such cases happened in the ADK garment factory in Yangon Region and Aung Sein Factory in Mandalay Region. In both cases, worker leaders who organized the unions were dismissed.¹⁵⁰ In the case of Aung Sein Factory, workers got their jobs back after interventions by labour associations all over the country.¹⁵¹ However, in the case of the ADK factory, only seven workers were allowed to go back

146 Refer to table 1.

147 The Labour Organization Law, The Pyidaungsu Hluttaw Law No.7/2011, The 14th Waxing day of Thadinkyut 1373, M.E. (11th October, 2011)

148 An informal interview with Phoe Phyu, a lawyer and activists on 23, September, 2012

149 An informal interview Ma Moe Wai, a labour activist on 23, September, 2012

150 Informal Conversation with Ma Moe Wai; “Decision of Yangon Region on Labour Dispute at ADK Garment Factory,” The Ministry of Labour, July 17, 2012, accessed September 30, 2012, <http://www.mol.gov.mm/adk/>; “Decision of Mandalay Region on Labour Dispute at Aung Sein Factory,” The Ministry of Labour, July 25, 2012, accessed September 30, 2012. <http://www.mol.gov.mm/mm/departments/central-trade-disputes-committee/>

151 Informal Conversation with Ma Moe Wai on 23 September 2012.

to work while two leaders lost their jobs.¹⁵²

Another thing critics point out is the provisions on registration and the requirement to give notice to the employer prior to a strike. In case of workers in a public utility service, notice needs to be given at least 14 days in advance under section 38 (a) and in case of workers outside of the public utility service is at least three days in advance under section 39. In addition, applying for registration of a union seems to be a burdensome process.

Protection against forced labour is provided under the “Law amending Ward or Village Administration Act”.¹⁵³ According to ILO, the definition of “forced labour” under the Act is directly derived from Article 2 of the 1930 Forced Labour Convention that Myanmar ratified in 1955. Section 27 (A) criminalizes forced labour and foresees the same penalties as section 374 of the penal code pertaining to forced labour, which amount to “imprisonment, of either description for a term which may extend to one year, or with fine, or with both.”¹⁵⁴ The ILO Committee noted that these penalties were not in line with the Labour Convention, reiterating that “the imposition of just a fine or a maximum one-year prison sentence could not be considered effective, given the seriousness of the offence and the dissuasive effect that the penalties should have”.¹⁵⁵ The Committee also observed that article 359 of the Constitution of Myanmar still permits forced labour imposed by the State in the interest of the public, which “amounts to a blanket authorization for the use of forced labour”.¹⁵⁶

152 Kyaw Phone Kyaw, “Union-level Tribunal Rules in Labour Dispute,” *Mizzima*, August 01, 2012, accessed September 20, 2012, <http://www.mizzima.com/business/7653-union-level-tribunal-rules-in-labour-dispute.html>

153 Law amending Ward or Village Administration Act, The Pyidaungsu Hluttaw Law No.7/2012, The 6th Waxing day of Tagu 1373, M.E. (8th March, 2012).

154 ILO, “Report of the Committee on the Application of Standards,” 101st Session of International Labour Conference, Geneva, May-June 2012.

155 Ibid.

156 Ibid.

Exploitation of labour is protected under the Anti Trafficking in Persons Law of 2005.¹⁵⁷ Myanmar acceded to United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime on 30 March 2004. In compliance with the UN Trafficking Protocol, the Anti-Trafficking in Person Law of 2005 covers all aspects of trafficking, including trafficking in men, women and children, domestic and international trafficking, and trafficking for all forms of exploitation.¹⁵⁸

Under section 11 and 12, dignity, physical and mental security of women, children and youth trafficked survivors are protected. Section 16 provides special protection of women, children and youth survivors and the necessary assistance.¹⁵⁹ However, under section 13(b) of the Anti-Trafficking in Persons Law (2005), it is stated that the Law “shall determine whether or not it is appropriate to take action against the trafficked victims for any other offence arising as direct consequences from trafficking in persons.”¹⁶⁰ It shows limited protection since trafficked survivors might be prosecuted with trafficking related offences such as prostitution.¹⁶¹ Prostitution is illegal in Myanmar and punishment is 1-5 years in prison, with the liability of a fine.¹⁶²

157 The Anti Trafficking in Persons Law, The State Peace and Development Council Law No. 5/ 2005, The Waxing Day of Tawthalin, 1367, M.E., September, 2005

158 Fiona David, “ASEAN and Trafficking in Persons: Using Data as a Tool to Combat Trafficking in Persons,” IOM, 2006, p. 86; Gerard Smith, “The Criminal Justice Response to Human Trafficking.”

159 2005 Anti Trafficking in Persons Law, Section 11, 12 and 16.

160 UNIAP (2010, 60-63) cited in Gerard. Smith, “The Criminal Justice,” p. 11; CEDAW, “Second and Third Periodic Reports of the State Party,” para. 83, subsection e.

161 Gerard. Smith, “The Criminal Justice,” p. 11.

162 Burma Lawyers’ Council and Human Trafficking cited in Human Rights Foundation of Monland (HRFM), “Report: Why Burmese Women Become Sex Workers,” 2009, accessed January 5, <http://rehmonnya.org/archives/1156>.

2012 Foreign Investment Law, FIL and 2013 FIL Rules

According to the 2012 FIL Law, foreign investment is prohibited in business which can affect the traditional culture and customs of the national ethnic groups within the Union; business which can affect the public health.¹⁶³ These two provisions indicate that the state has acknowledged that they have to prohibit potential abuses of right to health and right to cultural practices by businesses specifically foreign and joint venture investments. Although the law does not explicitly mention that the state has the duty to protect the above mentioned rights against abuses by businesses, the criteria for allowing foreign investment can be regarded as an implicit protection mechanism provided by the state. Article 126 of the 2013 FIL law also contains provisions to protect farmers from being evicted or relocated forcibly without consent as the result of land concession to foreign and local joint ventures.

2. Has the State Duty to Protect been recognized by the State’s courts?

No information is available whether the court has already recognized or applied some aspects of a state duty to protect. See more in Section III, No.1 on “Court.”

163 2012 Foreign Investment Law, Article 4.

III. Is the State taking steps to prevent, investigate, punish and redress business-related human rights abuses through effective policies, legislation, regulations and adjudication?

1. Are there government bodies and/or State agencies that have the responsibility to prevent, investigate, punish and redress business-related human rights abuses? If so, how have they done so?

Court

Under the Union Judiciary Law (2000), the Supreme Court, State and Divisional Courts, District Courts, Township Courts and other law courts were formed. Since the inception of the new government, in accordance with the Section 293, Chapter 6 of the Constitution, the Supreme Court of the Union, High Courts of Regions, High Courts of the State, Courts of Self-Administered Divisions, the Courts of Self-Administered Zones, District Courts, and Township Courts were established. The Supreme Court is the highest organ of judiciary and the final court of appeals for the decisions, judgments and orders of the lower courts. The Courts adjudicate criminal and civil cases under the provisions of the Criminal Procedure Code, the Civil Procedure Code and the Evidence Act.

Especially throughout the former military regime, the state judiciary has somewhat lost its reputation with regard to impartiality, independence, and accountability, both domestically and internationally.¹⁶⁴ With the intake of the new government, a Parliamentary Committee, *the Rule of Law and Stability Committee*, was formed on 7 August, 2012.¹⁶⁵ Within one month it received over 10,000 complaint letters relating to courts within

164 Human Rights Resource Centre, "Rule of Law for Human Rights in the ASEAN Region: The Republic of the Union of Myanmar," 2011.

165 See also *the Rule of Law and Stability Committee* at supra notes 212-216 and accompanying texts.

the Yangon Division.¹⁶⁶ The committee undertook fact-finding trips to investigate the country's judicial system. It recently pointed out that the executive branch still dominates the judiciary which is in contradiction with the provision of the 2008 Constitution that establishes the separation of powers.¹⁶⁷

Myanmar National Human Rights Commission (MNHRC)

The Myanmar National Human Rights Commission (MNHRC) was established on 5 September 2011¹⁶⁸ by Notification No.34/2011 of the Government of the Republic of the Union of Myanmar.¹⁶⁹ There is no legal framework for its foundation; hence, the Commission is currently in the process of drafting its founding legislation.

MNHRC has received over 1700 complaints in the first six months of its operations and the majority of cases concerned land grabbing.¹⁷⁰ The Commission cannot punish and redress human rights abuses including business related ones. The Commission can investigate complaints raised by citizens and contact the concerned person, company or government department to take action.¹⁷¹ If those who committed human rights abuses do not adhere to MNHRC's recommendation, a letter can be sent to the president advising him to take action.

166 Lawi Weng, "Rule of Law Probe Inspects Rangoon Courts," *The Irrawaddy*, September 28, 2012, accessed October 3, 2012, <http://www.irrawaddy.org/archives/15129>.

167 "Separation of power is still lacking with dominance of the executive branch of the government over the judicial branch," *Weekly Eleven*, Vol 8, No.18, February 6, 2013. (Burmese)

168 "Notification No. (34/2011), Myanmar National Human Rights Commission Formed," *New Light of Myanmar*, September 6, 2011, accessed November 10, 2011, <http://www.myanmar.com/newspaper/nlm/>.

169 Presentation by U Win Mra, Chairman of the Myanmar National Human Rights Commission http://www.iseas.edu.sg/myan_forum/Win%20Mra.pdf

170 MNHRC cited in the Asian Legal Resource Center (ALRC), "Myanmar at Risk of Land-Grabbing Epidemic."

171 Myanmar National Human Rights Commission, "The Republic of the Union of Myanmar: Myanmar National Human Rights Commission Accepting of Complaint," *New Light of Myanmar*, October 6, 2011, accessed November 12, 2011, <http://www.myanmar.com/newspaper/nlm/>.

Without a legal framework, there has been concern over an independent and effective operation of the Commission¹⁷² and organizations such as the EU, OHCHR, the Asia Pacific Forum and National Human Rights Institutions (NHRIs) in other ASEAN countries have already initiated programs to build up the capacity of MNHRC with the aim of promoting its role in accordance with the development of the country's political situation.¹⁷³

Ministry of Labour, Employment and Social Security

i) Department of Labour

Various departments under the Ministry of Labour have are responsible for protecting labour rights. The Local and Overseas Employment Sub-Division in the Department of Labour is responsible for migrant workers' affairs. The Department of Labour overseas the licensed agencies so that they practice in accordance with existing laws and regulations.

The deputy labour minister of Myanmar and the Myanmar ambassador to Thailand lead the Protection Committee for Myanmar migrant workers in Thailand.¹⁷⁴ The Committee works with labour protection groups in Thailand¹⁷⁵ According to the government's data, from 10 July 2009 to 28 February 2011, temporary Myanmar passports and identity cards have been issued to 408,160 migrant

172 "2012 Concluding Observations of the CRC Committee," para.15.

173 See at Asia Pacific Forum, Myanmar Rights Body Charts Path Ahead, 14 August, 2012 <http://www.asiapacificforum.net/carousel/news/myanmar-rights-body-charts-path-ahead>; Charile Campbell, "Empowering the Myanmar Human Rights Commission," *The Irrawaddy*, May 9, 2012, accessed July 16, 2012, <http://www.irrawaddy.org/archives/3860>.

174 "Burmese migrant (127) received estimated (3) millions Baht for their allowance!," *Democracy For Burma*, 2011, accessed January 10, 2012, <http://democracyforburma.wordpress.com/2011/10/20/burmese-migrant127-received-estimated-3-millions-baht-for-their-allowance/>.

175 Nay Thwin, "Burma Appoints Labour Official for Thailand," *Democratic Voice of Burma*, 2011, accessed January 10, 2012 <http://www.dvb.no/uncategorized/burmese-embassy-in-thailand-appoints->

workers in Thailand.¹⁷⁶

The department of labour encourages adopting a systematic employment contract to prevent disputes between the employer and the employee in industrial settings in the country. Township Workers' Supervisory Committees have been formed consisting of an official from the Ministry of Labour as its secretary, the employer or his or her manager and the employee.¹⁷⁷ Committees have settled 317 disputes resulting in 2,540 workers being paid 15.1 million of Kyats.¹⁷⁸ According to the Ministry of Labour's official website, Township Workers' Compensation Scrutiny Committees were formed to settle workplace fatalities and Workers' Welfare Association to look after welfare and grievances of workers and dependents.¹⁷⁹

ii) The Factories General Labour Laws Inspection Department

The Factories General Labour Laws Inspection Department has responsibility for the enforcement of labour laws and for providing occupational safety and health training and advisory services.¹⁸⁰ However, critics have noted a lack of systematic labour inspection mechanisms to prevent, punish

176 "21st Day Session of Pyidaungsu Hluttaw Held," *The New Light of Myanmar*, 17 March 2012, accessed March 10, 2012, www.burmalibrary.org/docs13/PYIDH-NLM2012-03-17-day21.pdf.

177 Human Rights Council, "National Report," at para.63.

178 Ministry of Labour, <http://www.mol.gov.mm/en/departments/department-of-labour/>

179 According to the official Website of the Ministry of Labour, through township Workers' Compensation scrutiny Committees, within the period 1 April 1995 to 14 November 1997, out of 362 compensation cases, 321 cases were settled and 177 workers got 1,302,050 kyats as compensation. A total of 2,234 Workers Welfare Association were formed with 483,283 members. "Department of Labour, Ministry of Labour, Employment and Social Security", <http://www.mol.gov.mm/en/departments/department-of-labour/> Note: The official website lacks information on whether those committees are still in operation or not and analysis on the quality of services they provide.

180 "FGLLID Function Ministry of Labour, Employment, and Social Security," <http://www.mol.gov.mm/en/departments/factories-general-labour-laws-inspection-dept/fglid-main-function/>

and redress labour rights abuses effectively.¹⁸¹ The Minister of Labour also noted an inadequate institutional structure to effectively monitor labour rights issues.¹⁸²

iii) Department of Labour Relations

The central Trade Disputes Committee was reorganized as the Department of Labour Relations in 2012 in order to facilitate dispute settlement between the employer or employer organizations on the one hand and the worker or the Labour Organizations on the other hand¹⁸³ in accordance with the 2012 Settlement of Labour Dispute Law.

iv) The Supplementary Understanding Mechanism

The Ministerial Working Group (WG) chaired by the Deputy Minister for Labour, headed by the Director General of the Department of Labour and comprised of officials from related departments, has responsibility to investigate force labour cases submitted through the Supplementary Understanding (SU) mechanism in coordination with ILO. Upon receipt of a complaint the WG instructs the enquiry team to investigate the case and recommend appropriate action to seek for legal redress for the victim and punishment for the perpetrator.¹⁸⁴ During the former military regime, there were cases reported in which the filing of a complaint led to intimidation, harassment, prosecution or other form of reprisal or retaliation. However, there have not been any such cases since

181 Lynn Bo Bo, "Industry Minister Calls for Trade Union Support," *Mizzima*, 5 June 2012, accessed 20 June 2012, <http://www.mizzima.com/business/7255-industry-minister-call>; see also U.S. Department of State, "2010 Country Reports on Human Rights Practices: Burma," p. 47; "2008 Concluding Observations of the CEDAW Committee," para.37; "2012 Concluding Observations of the CRC Committee," paras. 85 and 86.

182 "21st Day Session of Pyidaungsu Hluttaw Held," *The New Light of Myanmar*, 17 March 2012, accessed March 10, 2012, www.burmalibrary.org/docs13/PYIDH-NLM2012-03-17-day21.pdf.

183 Ministry of Labour, <http://www.mol.gov.mm/en/departments/department-of-labour/>

184 ILO, "Forced Labour Complaint Mechanism," accessed <http://www.ilo.org/yangon/complaints/lang--en/index.htm>.

2011.¹⁸⁵

The National Committee on the Rights of the Child

The National Committee on the Rights of the Child (NCRC) that was formed in 1993 and reactivated recently after being inactive for a long period,¹⁸⁶ is responsible for protecting children from human rights abuses including business related abuses, such as labour exploitation. State, Regions, District and Township level committees were set up and voluntary social welfare officers were assigned in 10 States and Regions.¹⁸⁷ According to the 2012 Concluding Observations of the CRC Committee, systematic collaboration of different ministries is still needed to implement child rights protection.¹⁸⁸ The Committee has indicated the need to improve the sustainability, mandate, resources and effectiveness of the Child Rights Committees. Official assessment data on the work and impact of these committees in business related cases is not yet available.¹⁸⁹

Land Confiscation Investigation Commission

The Parliamentary Commission on Land Confiscation Investigation was formed on 8 August 2012. The commission consists of 60 members and will last for one year term. The duty of the commission is to investigate land confiscation cases occurred from 1989 onwards with a particular focus on the purpose, compensation and compliance with existing laws.¹⁹⁰ The Commission has no mandate to decide on the merits of a case after investigation. Instead, it has to submit its findings to the Parliament

185 U.S. Department of State, "2012 Trafficking in Persons Report."

186 "2012 Concluding Observations of the CRC Committee," para.11.

187 Human Rights Council, "National Report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Myanmar," para.46.

188 "2012 Concluding Observations of the CRC Committee," para.11.

189 See also detail in Ministry of National Planning and Economic Development and UNICEF, "Situation Analysis of Children in Myanmar," 2012; "2012 Concluding Observations of the CRC Committee."

190 See also Food Security Working Group's Land Core Group, "Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law."

which will discuss them and submit them to the President. As of January, 2013, out of about 4'000 cases over 300 have been investigated.¹⁹¹ Difficulties the Commission has to face are unwillingness of local authorities to cooperate and poor education of farmers.¹⁹²

The Commission started an investigation in Rakhine State in December and found that in most cases of land confiscation, families of former military generals were the beneficiaries.¹⁹³ According to the military, about 4000 acres were returned and 999.258 million kyats were given for crop compensation in 2012.¹⁹⁴ Out of 280 complaints sent directly to the military 42 cases were settled. Another 551 complaints sent to the Commission were also settled. The Commission has encouraged the military to investigate the cases of land confiscated for economic benefits and to take action accordingly. And the chief military officials have also responded to the request of the Commission by stating that they will continue giving compensation accordingly.¹⁹⁵

*Land Allotment and Utilization Security Committee*¹⁹⁶

A cabinet level Committee on Land Allotment and Utilization Security was formed within the executive branch of the government with the purpose of managing land distribution in investment projects in accordance with existing laws and policies. The

191 Noe Noe Aung, "Commission Will Report Over 300 Land Grabs to Myanmar MPs," *The Myanmar Times*, December 17-23, 2012, accessed January 10, 2013, <http://www.globalpolicy.org/component/content/article/217-hunger/52166-commission-will-report-over-300-land-grabs-to-myanmar-mps-html>.

192 Ibid.

193 Tun Tun Win, "Land Grabbing Cases of Military and Private Companies," *Eleven*, 08 January 2013, accessed January 30, 2013, <http://elevenmyanmar.com/component/article/53-top-events-2012/business/2039-land-grabbing-cases-of-military-and-private-companies>; Nyein Zaw Linn, Zin Bo Lwin, "Giving Compensation to Farmers For farmed Land Confiscated by the Military," *The Weekly Eleven*, Vol 5, No.44, February 1, 2013. (Burmese)

194 Nyein Zaw Linn, Zin Bo Lwin, "Giving Compensation to Farmers For farmed Land Confiscated by the Military."

195 Ibid.

196 Ibid.

Committee consists of 12 members including the Union Minister of Environmental Conservation and Forestry Department. According to the news, the Committee will carry out reviewing existing laws on land management, taxation law, regulations and it is also supposed to cooperate with the relevant organizations. A local expert welcomes the formation of committee with the hope that land distribution and utilization will be effectively monitored so that it can prevent misuse and abuse in land distribution and utilization.¹⁹⁷

The Ministry of Mines

Under the existing mining law, the Ministry of Mines has the responsibility to ensure that mining operations by businesses do not jeopardize the environment. As mentioned in afore,¹⁹⁸ the Ministry of Mines needs to encourage an effective implementation of EIA and SIA among businesses and to cooperate effectively with all the stakeholders including the other Ministerial departments such as the Ministry of Environmental Conservation and Forestry, civil societies and most importantly with local people to prevent, investigate and punish mining related human rights abuses.

Ministry of Environmental Conservation and Forestry

The Ministry of Environmental Conservation and Forestry that was renamed from the Ministry of Forestry in September, 2011 is responsible for environmental conservation, and in cooperation with other relevant Ministries such as the Ministry of Mines, for preventing environmentally hazardous behaviour of extractive industries. In the past, the Ministry focused only on forest conservation and protection and environmentalists urged the Ministry to commit more strongly to addressing environmental issues.¹⁹⁹ The newly released Foreign

197 "Land Distribution Management Committee was formed for effective land management in investment projects," *Weekyleven*, No.43, vol.7, August 1, 2012. (Burmese)

198 See more in "ESIA Implementation."

199 Ei Ei Toe Lwin, "Green Groups Call on Govt to Expand Ministry Activities," *The Myanmar Times*, September 12-18, 2011, accessed July 30, 2012, <http://www.mmmtimes.com/2011/news/592/news59213.html>.

Investment Rules give the Ministry the mandate to issue recommendations to the Myanmar Investment Commission (MIC) on whether permits should be granted to businesses in investment projects with potential social and environmental risks.²⁰⁰ The Ministry has to scrutinize EIA and SIA assessments conducted by permit applicants as required by the FIL rules.²⁰¹

*Letpa Taung Inquiry Commission*²⁰²

The Commission was formed on 3rd Dec 2012 as the response to the public outcry for action after a violent crackdown of protesters in the Letpadaung Project area in late November. Some of the monks were severely burned due to the alleged use of tear gas, water cannons and incendiary devices by the riot police.²⁰³ Protesters have been demanding the closure of the mine project jointly operated by China's Wan Bo Company and the military-owned Union of Myanmar Economic Holdings Ltd.

After the incident, the official government commission was formed and is led by Aung San Suu Kyi. It includes some MPs, one senior consultant, government officials from the relevant ministries, a member of the Myanmar National Human Rights Commission (MNHRC), and three local persons. The Commission is mandated to investigate whether the project is being implemented in accordance with the international standards for environmental protection and what the social and environmental impacts of the projects are.²⁰⁴

200 2013 Foreign Investment Rules, Article 42 and 44.

201 Article 37, Chapter 5 of the 2013 FIL rules.

202 "Reforming the Inquiry Commission, Notification of the President Office of the Union Myanmar, No.95/2012, the 5th Waning of Tazaung Mone, 1374, December 3, 2012,"; The President Office, The Union of Myanmar, accessed January 20, 2013, www.president-office.gov.mm/briefing-room/notifications/2012/12/03/id-2050.

203 Zarni Man, "Thousands Gather To Mark Copper Mine Crackdown." *The Irrawaddy*, January 30, 2013, accessed February 3, 2013, <http://www.irrawaddy.org/archives/25560>.

204 "Reforming the Inquiry Commission, Notification of the President Office of the Union Myanmar, No.95/2012, the 5th Waning of Tazaung Mone, 1374, December 3, 2012,"; The President Office, The Union of Myanmar, accessed January 20, 2013, www.president-office.gov.mm/briefing-room/notifications/2012/12/03/id-2050.

According to the notification of the President, if necessary, the Commission can appoint scholars and experts from the related fields and the investigation can be carried out in accordance with the legal procedures such as summoning witnesses, requiring documents and having field visits. The legal report of the Commission was set to be released by 31st January 2013. However, it is not released yet as of 8 February 2013.²⁰⁵

*Parliamentary Committees relating to human rights protection and rule of law in general*²⁰⁶

The Rule of Law and Stability Committee

The Committee was formed on 7 August, 2012 and its tenure is for one year. The Committee consists of 15 members and is chaired by Daw Aung San Suu Kyi.²⁰⁷ One of the duties of the Committee is to oversee "law enforcement among Pyithu Hluttaw (House of Representatives) representatives, judicial bodies, government employees and the media."²⁰⁸ If the committee concludes that matters need to be followed up, they will have to be submitted to the Parliament. One of the duties of the Committee is to review laws as applied by various government departments and to report to the Parliament on laws to be repealed and redrafted.

The Rule of Law and Stability Committee serves as a mechanism for the general public to lodge complaints against various government departments. As of 21st October 2012, the Committee had received 1,700 complaint letters mostly on judicial and legal matters and land confiscation cases.²⁰⁹ The Committee plans to seek cooperation with related ministries to

205 See also, Daniel Scharf, <http://www.voanews.com/content/copper-mine-confusion-tests-burma-democracy-leader/1595342.html>

206 Some of the Committees of the Parliament have some overlapping tasks.

207 "Rule of Law and Stability Committee," Pyithu Hluttaw, 2012, accessed 11 September, 2012, www.pyithuhluttaw.gov.mm

208 "Daw Suu to Chair Newly Formed Parliament Committee," *Eleven News*, 07 August 2012.

209 "Rule of Law Committee Handling 1,700 Complaints," *Eleven Myanmar*, October 21, 2012, accessed Dec 30, 2012, <http://elevenmyanmar.com/politics/1020-rule-of-law-committee-handling-1-700-complaints>.

respond to those complaints. The Committee plans to submit its findings on the inspection on courts to the Parliament.²¹⁰

Committee on the citizens' rights, democracy and human rights

The Committee consists of 15 members. Its tenure lasts for one year. The duties of the Committee include the promotion of citizens' rights, democracy and human rights, ensuring citizens' access to justice and right to non discrimination, reviewing laws practiced by the various government departments and reporting to the Hluttaw for laws to be repealed, amended and drafted.²¹¹ The Committee also has the power to investigate complaints and appeals of the public against various government departments and report to the Parliament accordingly. The duty of the Committee is quite similar to the Committee of the Rule of Law and Stability Committee.

National Parliamentary Committee on Matters regarding Complaints and Appeals of the Public

The functions of the Committee formed in May, 2012 include accepting complaints and appeals from the public and sending them to the Union Government to take appropriate action. The Committee would then reply to the public in regard with the decision of the Union Government. Within three months, the Committee received 1693 complaints mostly related to grievances such as treatment of public servants towards the public, bribery and corruption involved by police and judicial officers in court cases and land confiscation cases. The complaints related both to the past and the present regime.²¹² The Committee urged the Union Government to handle these complaints expeditiously in accordance with laws and regulations.

²¹⁰ Ibid.

²¹¹ "Committee on Citizens' Rights, Democracy and Human Rights," Pyithuhluttaw, 2012, accessed September 15, 2012, www.pyithuhluttaw.gov.mm

²¹² "Union Government Needs to Respond to Complaint and Appeal Letters Expeditiously," *Eleven Myanmar*, August 19, 2012, accessed August 19, 2012, http://www.weeklyeleven.com/index.php?option=com_content&view=article&id=15026:2012-08-19-06-15-16&catid=42:2009-11-10-07-36-59&Itemid=112.

2. Are there laws and/or regulations that hold business enterprises and individuals accountable for business-related human rights abuses, and are they being enforced?

2.1 To what extent do business enterprises and company organs face liability for breaches of laws by business enterprises?

2.1.1 Can business enterprises be held legally accountable as legal persons?

In the case of *the Union of Myanmar Inland Transportation Group (Plaintiff) v. People Service Co.Ltd. (Respondent)* (1967),²¹³ the court clarified that a company is an artificial legal entity, created and recognized by law. The court said that the acts of the managing director bind the company since the managing director is appointed to carry out business on behalf of the company. Consequently, the court decided that the defendant company was liable since it had purchased the goods from the plaintiff and it had to pay for the cost of goods purchased.

2.1.2 Do organs of a business enterprise (e.g. owners - shareholders, partners, proprietors) face liability when their businesses breach laws?

A law suit was filed by 22 local farmers against six gold-mining companies claiming that the companies had contaminated their land with mining discharge that contains mercury.²¹⁴ The farmers' petition was made in May, 2012, under Section 55 of the Specific Relief Act of 1877, amended in 1954 that allows the court to issue injunctions in cases involving disputes

²¹³ Thein Han, *Myanmar Law Digest*, 1967, B.L.R (C.C) 484 cited in Ma Ma Thant, "Directors' Duties and Shareholders' Remedies in Myanmar: A Comparative Approach to Reform" (PhD diss., The University of Nagoya, 2011).

²¹⁴ "Mines Halt Operations as Court Hears Contamination Case," March 24, accessed 25 July, 2012, <http://howdyasia.com/mines-halt-operations-as-court-hears-contamination-case/>.

over property rights.²¹⁵ In those cases, the managing directors of the companies were sued as defendants.

Labour laws and regulations such as the 1951 Factories Act and 1951 Leave and Holidays Act states that owners, managers, directors or shareholders are liable for failing to adhere to provisions provided by these laws and regulations to protect the rights of workers regarding leaves and holidays, workplace safety and security measures and health care measures.²¹⁶

2.2 Do laws and/or regulations: (a) require business enterprises to avoid causing or contributing to adverse human rights impacts through their activities, or to prevent or mitigate adverse human rights impacts directly linked to their operations, products or services, and (b) require individuals to ensure their business enterprises do so?

Labour

Migrants

The Law relating to overseas employment aims to curtail malpractice of employment agencies and ensure that migrant workers receive the rights they are entitled to. Under section 29, any service agent licence holder is punishable with imprisonment for a term extendable to 1 year or with a fine of Kyats 5,000 or with both in case of violations of any rules, procedures, orders or directives issued under the law relating to overseas employment.²¹⁷ Recently, the Ministry of Labour, Employment and Social Security announced its plan to encourage employment agencies to educate migrant workers

²¹⁵ Ibid.

²¹⁶ Factories and Labour Laws Inspection Department, *Regulations and Instructions for Factories, Establishments and Workstations within and outside the Industrial zone*. n.d. (Burmese)

²¹⁷ Law Relating to Overseas employment, The State Peace and Development Council Law No 3/99, The 12th Waning Day of First Waso, 1363 M.E. (9th July, 1999)

before sending them abroad.²¹⁸

Women and Children

The Social Security Law of 2012,²¹⁹ and the Leave and Holiday Act (1952) include provisions on maternity benefits and maternity leave. Articles 93 of the 2012 Social Security Law penalize employers who fail to contribute to the related social security fund and fund to compensate work related damages, with imprisonment of not more than one year or fine or both. The Shops and Establishments Act, 1951 does not allow children under 13 years old to work at any industrial setting. Regulations imposed by the Factories Labour Law Inspection Department states that child workers older than 13 years are only allowed to work with a medical certificate guaranteeing their ability to work. No work between 6pm and 6am is permissible for them. Child workers above 13 years and under 15 years old cannot be asked to work more than four hours a day. If the regulations are breached, managers and owners will be punished with imprisonment for not more than 3 months or Kyats 500 or both.²²⁰

Workers at Factories, Shops and Establishments within and outside Industrial Zones

In accordance with the 1951 Factories Act, measures to protect workplace safety and security; welfare and health care provisions for workers; working hours, day off and overtime payment are adopted.²²¹ Labour Inspection officers from the Factories and

²¹⁸ "Myanmar to Train Migrate Workers about their Rights," *Eleven Myanmar*, February 12, 2013, accessed February 14, 2013, <http://elevenmyanmar.com/business/2445-myanmar-to-train-migrate-workers-about-their-rights>.

²¹⁹ The Social Security Law, The Pyidaungsu Hluttaw Law No.15/2012, The 14th Waxing day of Wargaug 1373, M.E. (31st August 2012)

²²⁰ Factories and Labour Laws Inspection Department, *Regulations and Instructions for Factories, Establishments and Workstations within and outside the Industrial zone*. n.d. (Burmese) "13 years old and above Child Workers cannot be asked to work for more than four hours a day," *Business Today*, No. 26, Vol. 2, 13 July, 2012. The imprisonment term is inadequate and should be amended to curtail child labour exploitation.

²²¹ The 1951 Factories Act; Factories and Labour Laws Inspection Department, *Regulations and Instructions* (Burmese).

Labour Laws Inspection Department are authorized to inspect factories as needed. The punishment for breach of regulations is 2 year imprisonment in maximum.

The 1951 Shops and Establishments Act and its rules and regulations also provide working hours, overtime fee, regular payment of wages for workers at shops and establishments.²²² In case of breaching such regulations, the punishment is up to 2 year imprisonment.

Similarly, the 1951 Leaves and Holidays Act provides rights to leaves and holidays for workers at factories, shops and establishments and in the case of breaching laws and regulations, the punishment is 2 year imprisonment in maximum.²²³

Labour Organizations

The Labour Organization Law (2011) aims to protect the rights of the workers by establishing good relations among the workers or between the employer and the worker. Under section 44, employers cannot “dismiss a worker for his membership in a labour organization, for the exercise of organizational activities or participating in a strike in accordance with this Law.”²²⁴ Any employer who violates provisions in section 44 is punishable with imprisonment for a term not more than one year or a fine not more than Kyats 100,000 or both under section 51.

Land

Article 126 of the new Foreign Investment Rules explicitly prohibits land confiscation and forced relocation by not permitting the lease of land for the investment purpose if there is objection from affected communities.²²⁵ The provision also requires

222 See more detail for types of relevant workplace at The 1951 Shops and Establishment Acts; Factories and Labour Laws Inspection Department, *Regulations and Instructions* (Burmese).

223 The 1951 Leaves and Holidays Act; Factories and Labour Laws Inspection Department, *Regulations and Instructions* (Burmese).

224 2011 Labour Organization Law, Section 44, Chapter XII.

225 2013 Foreign Investment Rules, Article 126, Chapter 15.

the consent from communities and permission from the relevant government departments in giving compensations in market rates. Besides, investors need to ensure relocation and resettlement of local people and provide jobs to them in their investment projects.²²⁶

Environment and Social Protection

To prevent negative social and environmental impact assessment, the 2012 Environmental Conservation Act require governmental departments, organizations or individuals to conduct environmental and social impact assessments for their intended projects and programs.²²⁷ According to Article 22, owner or a responsible person who are in charge of factories, workplace or establishments that are identified by the government as businesses that have risk of damaging environment are required to obtain a permit. Article 32 states that anyone who breaches rules and regulations issued in accordance with the Environmental Conservation Act 2012 is punishable to up to 1 year imprisonment or fine or both punishments. Article 34 imposes imprisonment from 3 to 5 years or MMK 100,000 to 2,000,000 or both on anyone who imports or exports or produces or stores or trades any substance that is restricted due to its negative environmental affect. On the other hand, Article 37 gives some businesses of government departments and individuals an exemption or relaxation in observing some provisions of the Act with approval of the Union government for the benefit of the state and the public. This broad exemption opens the door for abuses and corruption.

The 2013 Foreign Investment Rules require large investment projects to conduct SIA and EIA assessments.²²⁸ The existing Mining Laws and regulations have some provisions on preventing hazardous mining operation.²²⁹

226 Ibid.

227 2102 Environmental Conservation Act, Article 7 (13) Chapter 4.

228 2013 FDI Rules, Article 33, Chapter 5.

229 See *Implementation of ESIA*.

Other Major Existing Laws and Laws Under Review Relating to Businesses²³⁰

Existing Laws	Under Review or Being Drafted
The Myanmar Citizens Investment Law, The State Law and Order Restoration Council Law No.4/94, the 5 th Waning Day of Tabaung, 1355 M.E. (31 st March, 1994)	The Myanmar Citizens Investment Law, The State Law and Order Restoration Council Law No.4/94, the 5 th Waning Day of Tabaung, 1355 M.E. (31 st March, 1994)
The Myanmar Special Economic Zone Law (MSEZ), The State Peace and Development Council Law No.8/2011, 8 th Waxing day of Partho, 1372, M.E.(27 th January, 2011)	The Myanmar Special Economic Zone Law (MSEZ), The State Peace and Development Council Law No.8/2011, 8 th Waxing day of Partho, 1372, M.E.(27 th January, 2011)
The Dawei Special Economic Zone Law (DSEZL), The State Peace and Development Council Law No.17/2011, 8 th Waxing day of Partho, 1372, M.E.(27 th January, 2011)	The Dawei Special Economic Zone Law (DSEZL), The State Peace and Development Council Law No.17/2011, 8 th Waxing day of Partho, 1372, M.E.(27 th January, 2011)
State-Owned Economics Enterprises Law (1989), The State Law and Order Restoration Council Law No.9/89, The 10 th Waning Day of Tabaung, 1350 M.E) (13 th March, 1989)	
The Private Industrial Enterprise Law (1990), The State Law and Order Restoration Council Law No. 22/90, The 10 th Waxing Day of Nadaw, 1325 M.E. (26 th November, 1990)	
the Promotion of Cottage Industries Law (1991), The State Law and Order Restoration Council Law No.13/91, The 2 nd Waxing Day of Thadinkyut, 1353 M.E. (10 th October, 1991)	

One of the basic principles of the Private Industrial Enterprise Law (1990) is avoiding or reducing environmental pollution.²³¹ Duties and powers of Supervisory Body which has a responsibility to grant or terminate the registration of private industrial enterprises include ensuring that private industrial enterprises do not cause harm to public health in the vicinity of their operations, avoid environmental damage and pollution, and ensure workplace safety.²³² If private industrial enterprises operate without registration, in the case of a small scale private industrial enterprise, it is punishable

230 The list is not exhaustive and specifically includes laws mostly related to human rights impact.

231 1990 Private Industrial Enterprise Law, Section 3. Chapter II.

232 Ibid., Section 11 (c), Chapter V.

with a fine from a minimum of Kyats 5,000 to a maximum of Kyats 10,000. In the case of a medium enterprise, the fine starts with Kyats 10,000 and goes up to a maximum of Kyats 20,000. In the case of a large enterprise, the fine starts at Kyats 20,000 to a maximum of Kyats 50,000.²³³ If enterprises violate the rules and regulations issued by the Ministry of Industry and the Director General of the Directorate of Regional Industrial Co-ordination and Industrial Inspection, actions will be taken such as warnings, payment of damages and suspension or cancellation of registration.²³⁴ There is no specific provision on prohibiting environmental damage or negative human rights impacts in the 1989 State Owned

233 Ibid., Section 28, Chapter XIII.

234 Ibid., Section 30, Chapter XIII.

Economic Enterprises Law.

The 2011 Myanmar Special Economic Zone Law (MSEZ) has been amended and approved by the Parliament in order to improve compliance with international standards for both local and foreign firms.²³⁵ A Draft for a Common Industrial Zone Law is also under way. Its goal is to streamline working procedures of all industrial zones including Thilawa, Kyaukphyu and Dawei special economic zones across the country.

The 2011 MSEZ and DSEZ contain some provisions on environmental protection and labour rights. Section 8 (g) of MSEZ states that the State will encourage businesses to conserve and protect the natural environment. Accordingly, the functions and duties of the Management Committees²³⁶ of MSEZ and DSEZ include supervising and inspecting environmental conservation, waste control, health, education, and security.²³⁷ DSEZ law requires the Management Committee to scrutinize the disposal system of industrial wastes and ensure that the developer or investor performs in conformity with the stipulations.²³⁸ Both MSEZ and DSEZ Laws require the developer or investor to take “responsibility for not causing environmental

235 “Parliament to Review Amended Law on Economic Zones,” *Eleven Myanmar*, January 11, 2013, accessed January 30, 2013, <http://elevenmyanmar.com/politics/2086-parliament-to-review-amended-law-on-economic-zones>.

236 It is not clear who will serve on the committee of MSEZ. There is no provision as such except the provision that the central body will form the Central Working Bodies and Management Committees with the approval of the Government. The Central Body will also be formed by the Government with a suitable person as Chairman and suitable persons from the relevant ministries, Government departments and organizations as members (Article 9 (a), Article 10c). Under article 9 (3) of the DSEZ Law, the Management Committee consists of the Chairman, and the Secretary and the Joint-Secretary from the stipulated government departments and organizations for enabling to carry out the duties contained in the Law. The Chairman is determined as the level of Union Minister. There will be a representative from the Government of the Tanintharyi Region in the Committee.

237 Section 13 (c), Chapter IV, MSEZ Law, Section 10 (c), (j), Chapter IV, DSEZ Law

238 Section 10 (j), Chapter IV, DSEZ Law

pollution and air pollution in respect of his enterprise.²³⁹ However, the law does not provide an enforcement mechanism or any penalties for violation of these duties.

Management Committees of the MSEZ and DSEZ are required to inspect and supervise businesses to ensure the rights of employees, technicians and staff in accordance with existing labour laws and regulations including minimum wages, bonus, leave, holiday, overtime fees, compensation for dismissal and workers’ compensation etc. ²⁴⁰ The Committees are required to serve as mediators facilitating settlements in disputes between employers and employees, technicians or staff.²⁴¹

2.3 To what extent, how, and by whom have the laws and/or regulations identified in Question 2 above been enforced by the State?

Labour Issue

Employment Agencies

In 2008, the Department of Labour warned 110 licensed employment agencies that used clandestine methods in sending female migrants abroad that they could lose their license or face imprisonment.²⁴² In 2011, altogether 14 overseas employment agencies that violated licenses’ provisions were terminated and in a total of 17 cases, brokers sent workers overseas illegally and they were charged in accordance with the laws.²⁴³ On the other hand, according to some news, Myanmar agents reportedly sent underage maids to Singapore²⁴⁴

239 Section 34, Chapter VI, MSEZ Law; Section 31, Chapter VI, DSEZ Law

240 Section 48, Chapter XI, MSEZ Law; Section 47, Chapter XI, DSEZ Law

241 Section 48 (c), Chapter XI, MSEZ Law; Section 47 (c), Chapter XI, DSEZ Law

242 Irrawaddy cited in NCGUB, “The Situation of Migrant,” p. 977.

243 “Minister for Labour Responds to Question of Dr Myat Nyana Soe,” accessed June, 10, 2012, http://www.burmalibrary.org/docs12/PYIDH-NLM2011-03-migrant_workers-29.pdf.

244 Amelia Tan, “Myanmar Agents Send Underage Maids,” *The Strait Times*, July 23, 2012.

and some officials in Myanmar were alleged to help forged the age of such maids in their passports.²⁴⁵

Child Labour

During an inspection of factories in Hlaing Tharyar Industrial Zone, the Department of Factories and Labour Laws Inspection found 47 child workers under the age of 13.²⁴⁶ According to the news, children were asked to leave the job and given a salary and compensation. However, no information on whether and what actions were taken against the employers is available. A key problem lies in the fact that child labour will not simply disappear by asking children to leave their jobs even if they are being paid and compensated. In fact, the situation may worsen because some of these children will be forced into street begging and eventually leave them more vulnerable to international trafficking. Only a twofold action plan which aims at addressing poverty as the root of the problem on the one hand and prosecuting and punishing the employers that benefit from exploitative child labour. Many children need to work in order to contribute to their family income but they also have a right to education. Providing them with access to schools while they can still work is therefore essential.²⁴⁷

Labour Organization and Dispute Settlement

New labour laws still need to be enforced although there are altogether 396 basic workers' associations, 17 basic employers' associations, four township workers' associations, one workers' federation and one employers' federation as of February, 2013.²⁴⁸

245 Ibid.

246 "13 years old and above Child Workers cannot be asked to work for more than four hours a day," *Business Today*, No.26, Vol.2, 13 July, 2012.

247 Aung Mint Htwe, "Challenges of New Generation that have been far away from school bells," *The Voice*, No.35, September 3-9, 2012.

248 The Ministry of Labour, "Workers' Federation, Employers' Federation, Basic Workers' Associations and Basic Employers' Associations." accessed February 5, 2013, <http://www.mol.gov.mm/mm/wp-content/uploads/downloads/2013/01/Org-List24-1-2013.pdf>.

As in the example mentioned afore,²⁴⁹ some worker leaders who started organization activities for forming a union were dismissed at two factories. According to the procedure mentioned in the Settlement Dispute Act of 2012, when the case could not be settled by the Conciliation Body, the case was lodged at the Dispute Settlement Arbitration Body²⁵⁰ which consists of workers' representatives, employers' representatives and personnel from the Ministry of Labour. The Arbitration Body upheld the dismissal.²⁵¹ According to Ma Moe Wai, a labour activist and Phoe Phyu, a lawyer and activist, worker representatives have little voice in those bodies. Such cases prompted an action from labour activists to ask the ILO for assistance in effectively implementing the new labour laws. According to the ILO technical adviser, the ILO has plans to organise trainings on new Laws for the relevant parties including employers and importantly to the Dispute Settlement Arbitration Body.

For the implementation of other labour laws, please see the section on the Ministry of Labour, Employment and Social Security.²⁵²

Environmental and Social Impact Assessment

Please refer to the section on "ESIA Implementation"²⁵³. Recently the government announced that an environmental impact assessment, EIA for Yangon Region's Thilawa Special Economic Zone is going to be conducted with the lead of Japan in one month's time.²⁵⁴ The Thilawa Special Economic Zone will cover 2,400

249 Supra notes. 151 to 154 and accompanying texts.

250 The Dispute Settlement Arbitration Body was formed under the Trade Dispute Act, 2011 consisting of the government officials, employer and worker representatives.

251 An informal interview Ma Moe Wai, a labour activist on 23, September, 2012 and the accompanying texts at Section II, No.1.

252 See notes 175-186 and accompanying texts at Section III, No.1.

253 See notes 121-130 and accompanying texts.

254 "Officials Ready to Move on EIA for Massive Economic Zone," *Eleven Myanmar*, January 25, 2013, accessed January 31, 2013, <http://eversion.news-eleven.com/business/2242-officials-ready-to-move-on-eia-for-massive-economic-zone>.

hectares and will cost an estimated US \$ 12.6 billion. However, at this point in time, three villages and approximately 200 acres of farmland around Thilawa SEZ are threatened by forced evictions requiring the villagers to leave within 14 days. According to a government official, the land had been taken by the government from the villagers “with fair compensation” many years ago.²⁵⁵

3. Is the State periodically assessing the adequacy of the laws and/or regulations identified in Question 2 above, and addressing any gaps?

As mentioned earlier, Myanmar is in a transition period emerging from a decade long authoritarian rule. It is currently in the process of reviewing its existing laws and drafting, consulting and enacting new laws related to labour rights, land rights and environmental protection. Parliamentary Committees and Commissions such as the Committee on the citizens’ rights, democracy and human rights, the Rule of Law Committee; the Commission on Assessment of Legal Affairs and special cases have all mandates related to assessment of law, rules and regulations and their relevance with the current situations of the country.²⁵⁶

4. Is the State using corporate governance measures to require or encourage respect for human rights?

4.1 Is the State requiring or encouraging directors of business enterprises to exercise due diligence in ensuring that their business enterprises respect human rights?

No information as such so far.

255 Noe Noe Aung, “Impending Evictions Taint Thilawa Economic Zone,” *Myanmar Times*, February 17, 2013, accessed February 11, 2013, <http://www.mmtimes.com/index.php/national-news/4046-impending-evictions-taint-thilawa-economic-zone.html>.

256 “Committees and Commissions,” Pyithuhluttaw, 2012, accessed September 15, 2012, <http://www.pyithuhluttaw.gov.mm/committees>.

4.1.1 What are the general legal due diligence obligations that directors have to comply with?

The Myanmar Companies Act 1914 was modelled on the UK Companies Act 1908 which had “no provision specifically articulating directors’ duties or providing for minority shareholders’ remedies.”²⁵⁷ Although the Company Act has been updated several times, the core provisions related to directors’ duties and minority shareholders’ remedies have remained unchanged. Since detailed directors’ duties are not specifically codified in Myanmar, the sole source of law governing directors’ duties is case law. In this regard, the case law is not sufficiently developed.

Although there are some specific provisions regulating particular behaviours that fall within the general ambit of fiduciary duties such as the regulation of loans to directors and the disclosure of conflicts of interest, broader provisions related to fiduciary duties are absent both in the Company Act and case law.²⁵⁸

The general law governing directors’ duties is mainly found in a very limited body of case law. Specific provisions that obligate directors to act in the interests of shareholders rather than their own self-interests can be found in the company’s memorandum and articles of association and the Myanmar Companies Act.²⁵⁹ The articles of association also known as Table A are applied to all companies public and private under the Myanmar Companies Act.

Specific provisions relating to the duty of directors are not tantamount to more general directors’ duties, and they are specifically tailored to particular types of behaviours or situations.²⁶⁰ The Act requires directors to hold a specific amount

257 Ma Ma Thant, “Directors’ Duties and Shareholders’ Remedies in Myanmar: A Comparative Approach to Reform” (PhD diss., The University of Nagoya, 2011).

258 Ibid, p.19.

259 Ibid, p.20.

260 Ibid, p.21

of shares in the company to qualify as a director and in the case of failure to do so, the liability is a fine.²⁶¹ A direct conflict of interest is prevented by restricting a company to make a loan to one of its directors in the case of public companies.²⁶² In case of failure to comply with the rule, there is a fine not exceeding five hundred kyats and the director will be disqualified. . A director is required to make a general disclosure of interests in any transaction entered into by or on behalf of the company. If the provision is contravened, directors are liable to a fine not exceeding one thousand kyats.²⁶³ However, there are no more detailed statutory provisions or extensive case law to guide enforcement of these provisions enforceable.²⁶⁴ Every company has to maintain books of account in Myanmar or English and if any director or directors contravene the provision, they are liable to a fine not exceeding one-thousand kyats.²⁶⁵

4.1.2 Do directors have specific legal obligations to consider their business enterprises' human rights impacts in carrying out their duties?

No information as such.

4.1.3 Do directors have specific legal obligations to take into account the human rights impacts of subsidiaries, suppliers and other business partners, whether occurring at home or abroad (supply chain)?

No information as such.

²⁶¹ The Myanmar Companies Act 1914, Schedule I, Table A, art. 70 cited in Ma Ma Thant, "Directors' Duties."

²⁶² The Myanmar Companies Act 1914, s.86D cited in Ma Ma Thant, "Directors' Duties."

²⁶³ The Myanmar Companies Act 1914, s.91A (1) and (2) cited in Ma Ma Thant, "Directors' Duties."

²⁶⁴ Ma Ma Thant, "Directors' Duties," p.24.

²⁶⁵ The Myanmar Companies Act 1914, s. 130 and Schedule I, Table A, art. 105.

4.1.4 Have any of the directors' duties identified above been enforced by the State in relation to business-related human rights abuses?

4.1.5 Has the State provided non-binding guidelines encouraging directors to take into account (a) their businesses' human rights impacts in carrying out their duties, and/or (b) the human rights impacts of subsidiaries, suppliers and other business partners, whether occurring at home or abroad (supply chain)?

No information.

4.2 Does the State require or encourage business enterprises to communicate their human rights impacts, as well as any action taken to address those impacts?

No information.

4.3 Is/are the country's stock exchange regulator(s) taking steps to require or encourage business enterprises listed on the stock exchange to respect human rights? If so, what are these steps?

No stock exchange yet.

5. Has the State adopted other non-binding measures to foster corporate cultures respectful of human rights?

5.1 Is the State implementing any non-binding initiatives requiring or encouraging business enterprises to respect human rights?

As part of economic reform of the new government, workshops and fora on corporate social responsibility, Green Economy and Green Growth were held with the support of the Hanns

Seidel Foundation (HSF). International experts and the government agencies such as the Ministry for Environmental Conservation and Forestry and business organizations including the UMFCFI participated.²⁶⁶ The UN launched the UN Global Compact (UNGC) in Myanmar on 1 May 2012 and the UMFCFI and 14 other local Myanmar companies signed the UNGC charter.²⁶⁷

HSF signed an MOU with UMFCFI to increase capacity building efforts for the creation of a better business environment, enhance knowledge sharing and targeted grassroots level development.²⁶⁸ With the cooperation and support of the HSF, the Ministry of Hotel and Tourism promote responsible tourism aiming to encourage every travel company, operator, hotel and destination to take action not only for the sustainability of tourism but also not to have a negative impact on the communities.²⁶⁹

With the facilitation of the British Government, the government of Myanmar participated in a workshop around the UN Guiding Principles and their application to Myanmar. The workshop was jointly held by the Institute of Human Rights and Business in London, the French Delegation and the UK Trade Delegation. The chairman of the Myanmar Investment Commission and some economic and political advisers of the government attended workshops held by the IHRB on responsible investment measures both domestically and

266 "Workshop Enhances Integration of Corporate Social Responsibility in Myanmar's Economic Development," accessed July 30, 2012, <http://www.hss.de/southeastasia/en/myanmar.html>; "First Green Economy and Green Growth Forum in Myanmar," accessed July 30, 2012, <http://www.hss.de/southeastasia/en/myanmar/news-events/2011/first-green-economy-and-green-growth-forum-in-myanmar.html>.

267 "Launch of the UN Global Compact in Myanmar," accessed July 27, 2012, <http://www.csr-singapore.org/c/resources/newsletters-archive-2012/archive/view/listid-1-mailinglist/mailed-22-may-2012>.

268 "Memorandum of Understanding signed with Union of Myanmar Federation of Chambers of Commerce and Industry," accessed July 30, 2012, <http://www.hss.de/southeastasia/en/myanmar.html>.

269 "The Draft Responsible Tourism Policy for Myanmar Formulated Successfully," accessed July 30, 2012, <http://www.hss.de/southeastasia/en/myanmar.html>.

internationally and express their political will and commitment to help foster responsible investment practices in Myanmar.

The government recently established an EITI (Extractive Industry Transparency Initiative) leading authority, with the aim of developing good investment environment; better management of extractive industries and "create opportunity for a frank and transparent discussion between private investors and the people and join hands with the public-based societies of the private sector so as to be able to affectively deal with the tasks of extractive industry transparency initiative on behalf of the State."²⁷⁰

5.2 Is the State providing guidance to business enterprises on how to respect human rights throughout their operations?

No information.

6. Is the State taking steps to require or encourage business respect for human rights in its own relationships and dealings with businesses?

6.1 Does the State require or encourage State-owned or controlled business enterprises to respect human rights?

Although the State has not adopted measures that require State-owned Economic Enterprises to conduct human rights due diligence or human rights impact assessment, the new government has taken some initial steps to curtail malpractices related to SOEs during the former military regime. During the military government, SOEs mostly in the extractive industries and some other sectors were

270 "Formation of Extractive Industry Transparency Initiative Leading Authority, President Office, Republic of the Union of Myanmar, Notification No 99/2012, 1st Waxing of Nadaw, 1374 ME (14th December, 2012)," *The New Light of Myanmar*, Vol. XX, No. 239, December 15, 2012.

alleged for their lack of transparency, corruption and lack of adequate measures to prevent or reduce negative impact of joint venture business enterprises on local communities and the environment.²⁷¹ In spite of some remaining shortfalls, initiatives taken by the current government include starting the EITI membership application process, measures to eradicate corruption and the newly introduced requirement for ESIA assessments.

As part of the economic reform process, the government plans to sign up to the Extractive Industries Transparency (EITI) standards.²⁷² EITI will enable people to be in a position to hold the government accountable for the management of resources and revenues overseen by a multi-stakeholder group of government, companies and civil society.²⁷³ Better management in natural resources is highly related to the government's capacity to protect social and economic rights of its citizens. In the case of Myanmar, transparency in the government's income from the extractive industries can pave the way to better allocation of those revenues and can help increase expenditure on basic necessities for development such as health and education.²⁷⁴

During the former regime, proceedings and revenues from SOEs were not made public especially in oil and gas sector. Presumably, revenue lost has occurred and it has negative effect on revenue allocation. Consequently, the former regime spent very little on

271 See notes and accompanying texts under "Oil and Gas"; also notes and accompanying texts under "ESIA Implementation."

272 See note 131-132 and accompanying texts about EITI. EITI mechanism requires companies and governments to disclose payments for natural resources through an EITI report, where tax and royalty payments are independently verified and reconciled.

273 "Govt Gives Positive Signals on EITI," *The Myanmar Time*, July 24, 2012, accessed July 30, 2012, <http://www.shwe.org/news-update/govt-gives-positive-signals-on-eiti/>.

274 Revenue allocation is not part of the EITI's requirements. Critics also raised concern over the government's ability to effectively create a functional, independent multi-stakeholder group to oversee the EITI process. (Kate Kelly, "Burma Set To Join Transparency Initiative," July 18, 2012 accessed July 30, 2012, <http://www.dvb.no/news/burma-set-to-join-transparency-initiative/22942>).

health and education and the fundamental rights of children's access to education and health has been violated. For instance, for years, only 1.3 per cent of the government budget was spent on education while about 25 per cent was allocated to the armed forces.²⁷⁵ Although the budget for education was increased in April, 2012 from \$ 340 million to \$740 million, it is still criticized as inadequate.²⁷⁶

According to the IMF, the military regime did not accurately include gas revenue in its national budgets by using old official exchange rate of 6 Kyats per dollar.²⁷⁷ In 2008, the annual Yadana Project income was estimated at US \$ 1.7 billion in of which, an estimated US \$ 1.02 billion reportedly went directly to the military regime without being used for the public.²⁷⁸ Revenue was reportedly kept in two leading offshore banks in Singapore.²⁷⁹ However, the current government made its gas revenue public it amounts to US \$800 million from April 1 to July 13 of the 2012-2013 fiscal year.²⁸⁰

A second initiative adopted by the government is the eradication of corruption practices and bribery in governmental organizations. The government recently organized an Action Committee against Corruption with the vice president as Chairman and including union members, the Union Attorney General and a legal advisor to the President as

275 "Myanmar Pays Price for Lost Generation of Educated," *Associated Press*, June 28, 2012, accessed September,30, 2012. www.foxnews.com/world/2012/06/28/myanmar-pays-price-for-lost-generation/

276 Ibid.

277 Confidential Report of IMF received by ERI, cited in "Total Impact," p.42,43.

278 Earth Rights International (ERI), "Total Impact," p.42, 43.

279 Ibid.

280 "Myanmar Estimates US \$ 800M From Gas Revenue," *Eleven News*, July 25, 2012, accessed August 11, 2012, www.elevenmyanmar.com/business/383-myanmar-estimates-us-800m-from-gas-revenue.

members.²⁸¹

Although the 1989 State Owned Economic Enterprise Law has no provision on EIA and SIA, it has become the policy of the new government to conduct them. According to the Nay Pyi Taw Accord for Effective Development Cooperation presented to development partners by the Minister of National Planning and Economic Development and approved at the First Myanmar Development Cooperation Forum in Nay Pyi Taw on 20th of January 2013, adequate ESIA needs to be undertaken and designed and delivered development activities need to be in line with the result.²⁸²

281 "Organizing Action Committee against Corruption, Notification of the President Office of the Union Myanmar, No.9/2013, the 11th Waning of Nadaw, 1374 ME, January 8, 2013," The President Office, Republic of the Union of Myanmar, accessed January 20, 2013, www.president-office.gov.mm/briefing-room/notifications/2013/01/09/id-1377.

After a few days of its formation, complaint letters were sent to the committee against the custom department under the Ministry of Finance and Revenue. The allegation said that cumbersome customs procedures and corruption practices have triggered grievances to the public and sustaining heavy losses of the government revenue. ("Please Tell the President that now is the Best Time to Start Handling Bribery and Corruption Cases," *Eleven Myanmar*, January 30, 2013, accessed January 31, 2013, <http://elevenmyanmar.com/national/2294-an-interview-on-bribery-and-corruption-of-myanmar-customs-department>.)

Other complaints are related to red tape and inconsistent procedures of the department that foster corruption and put small and medium businesses at a disadvantage. Meanwhile big businesses including cronies and joint venture businesses have allegedly got exemption from custom duties with the permission of the Myanmar Investment Commission (MIC) gaining a comparative advantage. ("Red Tape procedures of the Custom Department foster Corruption Practices putting small and medium import businesses at a disadvantage," *Bi Weekly Eleven*, No.43, Vol.5, January 25, 2013 (Burmese).

Exemption is granted from customs duty on machinery and other capital goods imported as part of operation under the 1988 foreign investment policy. Most of the policy framework remains are the same under the 2013 foreign investment policy. Most of the foreign investments are Joint Venture businesses operating large projects with SOEs or large private investors.)

282 "Nay Pyi Taw Accord for Effective Development Cooperation," The President Office, The Union of Myanmar, accessed January 30, 2013, www.president-office.gov.mm/en/briefing-room/announcements/2013/01/29/id-1493.

At the third Planning Commission Meeting basic framework for economic and social reforms were approved on 26th Dec, 2012. The Committee emphasized the need to conduct ESIA in implementing industrial zones and urbanization.²⁸³ New environmental law and foreign investment rules also require investments and development projects to adopt ESIA practices.²⁸⁴

6.2 Does the State require or encourage businesses that receive substantial support and services from State agencies ("beneficiary enterprises") to respect human rights?

The government has recently formed the Central Committee and the Work Committee for development of small and medium enterprises.²⁸⁵ SMEs will be receiving support and services from the government and private banks. The Committee and Work Committee are assigned to formulate and promulgate laws, regulations and procedures for SMEs development. It remains to be seen whether SMEs are required to comply with the international standards and codes and conducts to respect human rights.

6.3 When services that may impact upon the enjoyment of human rights are privatized, is the State taking steps to ensure that the business enterprises performing these privatized services respect human rights?

Myanmar is in the privatization process and has plans to increase the role of the private sector in industries such as telecommunication, energy, forestry, education and health. There is political

283 "Industrialization is a Must to Improve Economic Performance of the Nation," *The New Light of Myanmar*, Vol XX, No.252, December 28, 2012.(Burmese)

284 See notes and accompanying texts under "ESIA Legal Framework."

285 "Formation of Central Committee and Work Committee for Development of Small and Medium Enterprises, No.11/2013, the 12th Waning of Nadaw, 1374 ME, January 9, 2013," The President Office, The Union of Myanmar, accessed January 20, 2013, www.president-office.gov.mm/en/briefing-room/notifications/2013/01/03/id-1382.

will to improve the privatization process. For instance, with the support of Swedish International Development Cooperation Agency, SIDA, the Ministry of National Planning and Economic Development held a workshop on “Privatization Process” in mid- October 2012. Civil society also had an opportunity to provide their input to the process.

A new Privatization Commission led by the vice-president was set up and tasked to evaluate privatized enterprises as to whether they promote national interests and to report their pros and cons to the higher bodies concerned.²⁸⁶ On the other hand, privatization process is still subjected to criticism due to lack of transparency and it is reportedly beneficial mostly to crony businesses.²⁸⁷ Most of the privatised services lack is not regulated by law, except for the Private School Registration Act.²⁸⁸ Although the Act provides clauses for assurance of quality education, boarding and monitoring mechanisms, there is no provision related to equal right to quality education for both the poor and the rich.²⁸⁹

6.4 Does the State require or encourage respect for human rights in carrying out public procurement?

Until this point in time, no policy guidelines that promote respect for human rights in public

286 Min Thiha Zaw, and Kyaw Thura, “Privatized Enterprises in National Interests,” *Eleven Myanmar*, July 30, 2012, accessed August 8, 2012, http://eversion.news-eleven.com/index.php?option=com_content&view=article&id=1004:privatized-enterprises-in-national-interests&catid=42:weekly-eleven-news&Itemid=109.

287 “Privatization Schemes Fuelling Inflation and Mistrust, Business People Say,” *Eleven Myanmar*, January 16, 2013, accessed January 30, 2013, <http://elevenmyanmar.com/business/2144-privatisation-schemes-fuelling-inflation-and-mistrust-business-people-say>; See also Jason Szep and Andrew R.C. Marshall, “Special Report: An Image Makeover For Myanmar Inc.,” *Reuters*, April 12, 2012, accessed Oct 7, 2012, www.reuters.com/article/2012/04/12/us-myanmar-cronies-image-idUSBRE83BOYU20120412

288 The Private School Registration Act, Pyidaungsu Hluttaw No.14, The 7th Waxing Day of Nadaw, 1373, December 2, 2011.

289 Ibid.

procurement, have been developed.²⁹⁰ However, according to the Nay Pyi Taw Accord for Effective Development Cooperation approved at the First Myanmar Development Cooperation Forum in Nay Pyi Taw on 20th of January 2013, the government stated its policy commitment to strengthen public administration by enhancing the transparency and effectiveness of government programs and foreign assistance.²⁹¹ The government said misuse of development cooperation will be prevented by improving public procurement and implementing the anticorruption law. Laws and regulations that prohibit government corruption in public procurement include the Penal Code,²⁹² the Suppression of Corruption Act (1948), the Control of Money Laundering Law and Rules and the Public Property Protection Act.²⁹³

290 A paper on corruption control in public procurement presented by an official of the Attorney General office of Myanmar in 2008, includes a sample of “Invitation to Tender” advertised in dailies by the government ministries and departments. Although specifics are given in the advertisement such as the name of the government agency, the items that will be purchased, the quantity of the items, tender closing date, tender documents that are required and other details, there is no information on conditional requirements that contractors comply with such as environmental, social and governance standards. (Phyu Mar Wai, “Corruption Control in Public Procurement,” (paper presented at second regional seminar on Good Governance for Southeast Asian Countries, Bangkok, July 23-25, 2008), p. 87); See also Tender advertisement in “Open Tender from Public Construction Work, Tanintharyi Region,” *MyanmarAlinn Daily*, Vol.52, No.134, February 11, 2013.

291 “Nay Pyi Taw Accord for Effective Development Cooperation,” The President Office, The Union of Myanmar.

292 Section 162 to 165 of the Penal Code provides that offence of bribery and corruption committed by public servants is punishable with a maximum of three years imprisonment.

293 The Control of Money Laundering Law, The State Peace and Development Council Law no.6/2002, The 7th Waxing Day of Nayon, 1364 M.E. June 17, 2002; The Public Property Protection Act (1947), Burma Act LXXXIII, December 24, 1947.

7. Is the State taking steps to support business respect for human rights in conflict-affected and high-risk areas?

There is no information on what steps the current government has taken to support business respect for human rights in operating in such areas. However, as mentioned afore, there is now a political commitment to conduct ESIA assessments in extractive industries.²⁹⁴ Extraction businesses in Myanmar such as logging, mining, hydropower projects, and oil and gas extraction are mostly operated in conflict affected and high risk, resource-rich ethnic areas. Throughout the former military regime, no regard had been shown in relation to negative human rights impact on local communities incurred by extractive industries.²⁹⁵ There was no regulatory oversight over businesses in those areas and local communities had no access to redress to seek compensation for their injuries.²⁹⁶

294 See notes and accompanying texts under “*ESIA Legal Framework*.”

295 ERI, “Capitalizing on Conflict: How Logging and Mining Contribute to Environmental Destruction in Burma,” 2003; ERI, “The Burma-China Pipelines.” KDNNG, “Valley of Darkness.”; ERI, “Energy Insecurity”; ERI, “Broken Ethics: the Norwegian Government’s Investments in Oil and Gas Companies Operating in Burma (Myanmar),” December 2010.

296 Resource extraction was a lucrative business for both the military and the insurgent groups to reinforce their own armed forces and groups. And it had increased tension in an attempt of controlling over natural resources. For instance, cease fire groups with the military were allowed to retain their weapons, control some territory, and granted business concessions. They have become significant fighting forces against their rival groups and frequently acted as proxies for the military. (See BEWG, “Burma’s Environment.”)

In many cases, increased military security along gas pipelines and hydropower projects had increased tension. (ERI, “The Burma-China Pipelines.” “Investors’ Haste to Build Big Dams is Undermining Fragile Peace Process in Karen State,” *Karen Rivers Watch*, March 14, 2012, accessed July 10, 2012, <http://www.burmapartnership.org/2012/03/investors-haste-to-build-big-dams-is-undermining-fragile-peace-process-in-karen-state/>). For instance, there was a violent conflict in the vicinity of “the China-Burma pipelines” project between the Shan State Army-North (SSA-N) and the army and between the ethnic Kokang armed group and the army in 2009. And over 30,000 refugees fled to China. (ERI, “The Burma-China Pipelines.”p.18, 19)

Since the inception of the new government, significant efforts have been made to foster peace talks with insurgent groups that aim to lead to political dialogue. But the real political dialogue still needs to be developed.²⁹⁷ Particularly the fighting in Kachin State still needs to come to an end.

Both the president and Daw Aung San Suu Kyi have stated that it is crucial to ease ethnic conflicts and establish national reconciliation for economic development and democratic processes. It is one of the national priorities to ‘accelerate peace-building, political reforms and development initiatives to promote reconciliation and national harmony in recent conflict and cease fire areas.’²⁹⁸ It aims to establish mechanisms to provide transparent and equitable assistance in cease fire and conflict affected areas.

7.1 Is the State engaging with business enterprises operating in conflict-affected and high-risk areas in relation to identifying, preventing and mitigating the human rights-related risks of their activities and business relationships?

No information.

7.2 Is the State providing assistance to business enterprises operating in conflict-affected and high-risk areas to assess and address the heightened risks of human rights abuses, including gender-based and sexual violence?

No information.

297 See “Kachin Groups Asks UN to take ‘action’ to Stop Conflict,” *Mizzima News*, September 26, 2012, accessed October 2, 2012, www.mizzima.com/special/kachin-battle-report/8104-kachin-group-ask-un-to-take-action-to-stop-conflict.html.

298 “Nay Pyi Taw Accord for Effective Development Cooperation,” The President Office, The Union of Myanmar.

7.3 Is the State denying access to public support and services for business enterprises operating in conflict-affected and high-risk areas that they are involved with human rights abuses and refuse to cooperate in addressing the situation? Are there laws, regulations and/or policies that have the effect of doing so?

No information.

7.4 Has the State reviewed its policies, legislation, regulations and enforcement measures with a view to determining whether they effectively address the risk of business involvement in human rights abuses in conflict-affected and high-risk areas, and taken steps to address any gaps?

No information.

8. Is the State taking steps to ensure coherence in its policies domestically and internationally such that it is able to implement its international human rights obligations?

According to the government during the Universal Periodic Review process, the “Law review has been made by all ministries with a view to submission to the Hluttaw either to amend, repeal or promulgate new laws. They review whether existing laws are compatible with the Constitution²⁹⁹ and international norms.”³⁰⁰

299 The constitution itself is in controversy in terms of its human rights protection provisions. See also under “*The 2008 Constitution*.”

300 Human Rights Council. “Report of the Working Group on the Universal Periodic Review: Myanmar,” A/HRC/17/9. 24 March, 2011, para. 103 (d).

8.1 Is the State taking steps to ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates?

According to the then Minister of Labour in 2011, the Ministry of Foreign Affairs, the Ministry of Home Affairs and the Ministry of Immigration and Population are working closely as a task force on the protection of migrant workers. An association for safeguarding Myanmar workers was formed including Myanmar ambassadors in receiving countries as patrons and Myanmar entrepreneurs as members.³⁰¹

The new foreign investment rules give mandate the Myanmar Investment Commission (MIC) to form a scrutiny body to study the investment permit application.³⁰² The body includes the government departments such as the Directorate of Investment and Company Administration (DICA), the Customs Department, the Revenue Department, the Department of Labour, the relevant department from the Ministry of Electric Power, the Department of Human Settlement and Housing Development, the Directorate of Trade, and the department of environmental conservation. When the new body examines the application, it can invite experts and scholars from the government and non government organizations if necessary. However, the MIC has the decision power over granting the permit or not.³⁰³ One of the requirements for the investment permit application is to carry out ESIA for large investments and investments are required to conduct ESIA in under the rules of the Ministry of environment and forestry department to do ESIA.³⁰⁴

301 “Minister for Labour Responds to Question of Dr Myat Nyana Soe,” accessed June, 10, 2012, http://www.burmalibrary.org/docs12/PYIDH-NLM2011-03-migrant_workers-29.pdf.

302 2013 Foreign Investment Rules, Chapter 5 and 6, Article 37, 38, 39, 40 and 41.

303 Ibid., Chapter 8, Article 48.

304 Ibid., Chapter 5, Article 33.

8.2 Is the State taking steps to maintain adequate domestic policy space to meet its human rights obligations when concluding economic agreements with other States or business enterprises?

Economic agreements made between the State and other States or business enterprise still need to be made transparent as the reformist government has taken some political and economic reform steps. The government of Myanmar and Thailand government signed a Memorandum of Understanding (MOU) on the comprehensive development of the Dawei Special Economic Zone and adjacent areas during the president's visit to Thailand in late July 2012. A ministerial-level working group was set up to implement projects.³⁰⁵ Meanwhile, local people near the Dawei-deep-sea port area called on the governments to provide details of the MOUs since it has already caused widespread concern among the local population with regard to their agriculture-based livelihoods due to lack of adequate consultation and information sharing by the government and companies concerned in the past.³⁰⁶

The MOU signed by the new government is mainly to boost a US\$80-billion project on building an industrial zone and a deep-sea port in Dawei agreed by Thailand and the former military government in 2008. Aung San Suu Kyi made a remark at the World Economic Forum in June 2012 that Italian-Thais investors planned deep-sea port excluded people in regard to the content of the contracts.³⁰⁷

305 Supalak Ganjanakhundee, "Sweeping Cooperatoin Deal with Myanmar," *The Nation*, July 24, 2012, accessed July 30, 2012, <http://www.nationmultimedia.com/business/Sweeping-cooperation-deal-with-Myanmar-30186843.html>.

306 "Dawei Residents Want a Seat at the Table," *Mizzima News*, July 25, 2012, accessed July 30, 2012, <http://www.mizzima.com/business/7597-dawei-residents-want-a-seat-at-the-table.html>.

307 Daniel Ten Kate, "Thailand Seeks Concrete Progress on Dawei Port, Yingluck Says," *Bloomberg*, July 23, 2012, accessed <http://www.bloomberg.com/news/2012-07-22/myanmar-president-to-meet-yingluck-over-stalled-deep-sea-port.html>; Piyanart Srivalo, "Countries Want Japan in Dawei Port Project," *The Nation*, December 18, 2012, accessed January 10, 2013, <http://www.nationmultimedia.com/national/Countries-want-Japan-in-Dawei-port-project-30196340.html>

A 4,000 megawatt coal-fired plant was included in the project without considering its environmental impact and it has only been cancelled with the decision of the new government on environmental ground.³⁰⁸

Meanwhile, the new government has made a policy commitment to conduct ESIA for investment projects with a potential risk for negative environmental and social impacts. In this light, the government has proposed to the Indian government to conduct an ESIA for Kaladan River multi-purpose transport project with the administration of a Third Party. The project will include road construction from Sittwe in Arakan State of Myanmar to India border that is expected to finish by 2016.³⁰⁹

Meantime, the existing problems such as land grabbing and negative environmental and social impacts mainly arose because of a lack of transparency, adequate participation of communities and lack of adequate or inadequate ESIA or human rights due diligence process in extractive industry projects and large economic zone projects.³¹⁰ Economic agreements concluded during the former military regime appear to have neglected human rights obligations.

One case is that of the Myintsone dam project, a Chinese funded project. Environmentalists and activists had raised concern on the negative environmental and social impacts of the project on local people not only in Kachin State where the dam would be built, but also in the regions along the Ayeyarwaddy River. As the result, in September 2011, the president announced that the project had

308 Jason Szep and Amy Sawitta Lefevre, "Exclusive-Japan, Thailand Race to Rescue of Myanmar's Struggling Dawei," *Reuters*, Sep 21, 2012, accessed Sep 30, 2012, in.reuters.com/article/2012/09/21/Myanmar-thailand-dawei-idINL4E8KL2AL2012091?rpc=RSS&feedName=domesticNews&rpc=401.

309 "Myanmar asked India to do EIA and SIA by Third Party for Kaladan River Project" *Weeklyeleven*, No.42, vol.7, July 25, 2012 (In Burmese).

310 See more at "Overview of Myanmar's Business and Human Rights Landscape."

to be halted during the tenure of his government. Until the implementation of the project, affected local people were not informed of the construction of the project let alone consulting them in conducting EIA that was inadequately done.³¹¹ The implementation of the project started in 2007 by Asia World Company and the China Power Investment Corporation in spite of objections of environmentalists and local residents. An estimated 12,000 people from 63 villages had been relocated until the project was halted in 2011.³¹²

Another example is the project known as “Burma-China pipelines.” The economic agreement between China and former regime had not been made public. According to an expert from World Wildlife Fund, damage to local people such as forest and soil depletion, losses of farmlands and people’s livelihoods and possible extensive ecosystem degradation could be substantial. Activists claim that the project will result in an overall loss for Myanmar since the projected income of US \$13.8 million is unjustifiably low in relation to the damage that the project has already incurred and will incur. An opposition MP has called for reviewing the project.³¹³

8.3 Is the State taking steps to ensure and promote business respect for human rights when acting as members of multilateral institutions that deal with business-related issues?

Not relevant.

311 “Irrawaddy Myintsone Dam,” *International Rivers*, Sep 30, 2011, accessed Aug 11, 2012, www.internationalrivers.org/campaigns/irrawaddy-myintsone-dam-0

312 “Burma to Halt Myintsone Dam Project: Media Reports,” *Mizzima*, September 30, 2012, accessed Oct 1, 2012, http://eversion.news-eleven.com/index.php?option=com_content&view=article&id=941:myanmar-china-gas-pipeline-project-calls-for-review&catid=43:bi-weekly-eleven-news&Itemid=110.

313 “Myanmar-China Gas Pipeline Project Calls for Review,” *Shwe Gas Movement*, July 20, accessed July 30, 2012, <http://www.shwe.org/news-update/myanmar-china-gas-pipeline-project-calls-for-reviewhttpwww-shwe-orgwp-adminpost-new-php/>

9. Is the State taking steps to ensure, through judicial, administrative, legislative or other appropriate means, that when business-related human rights abuses occur within their territory and/or jurisdiction those affected have access to effective remedy?

9.1 What are the legal and non-legal State-based grievance mechanisms available to those seeking remedy for business-related human rights abuses?

Non-Legal State-Based Grievance Mechanisms

Labour Dispute Settlement Mechanisms under Trade Dispute Act, 2011

Under section 10, Chapter III of the 2011 Trade Dispute Act, the Region or State Government shall form the *Conciliation Body* in the townships within the Region or State. It is chaired by a person assigned by the relevant Region or State Government. Members include three employer representatives; three worker representatives; two distinguished persons trusted and accepted by employer and labour organizations; a relevant departmental representative of the township level and a person assigned by the Ministry of Labour as Secretary. The Conciliation Body has a two-year tenure. Disputes that cannot be settled under the mechanism of the Coordinating Committee³¹⁴ are to be submitted to the Conciliation Body. The cases submitted to the Body need to be settled within 3 days excluding the official holidays.³¹⁵ In case of non settlement through the mechanism of the Conciliation Body, the detailed report of the case file needs to be handed over to the relevant Arbitration Body within two

314 Under Section 3 to 9, Chapter II, Trade Dispute Act, 2011, a non state based mechanism is formed at workplace stations as Workplace Coordinating Body that is consisted of representatives of workers and employers. Workers or employers can lodge complaint their grievances to the Body. Only when the Body cannot settle the dispute, the case will be submitted to the Conciliation Body.

315 2012 Settlement and Labour Dispute Law, Article 24, Chapter VI

days, excluding the official holidays and also submit the summary report to the relevant Region or State Government.³¹⁶

Under Section 16 (a), Chapter IV, The Ministry, with the approval of the Union Government, shall form a Dispute Settlement Arbitration Body in the Regions or States. The composition of Chair, Members and Secretary is similar to that of the Conciliation Body. The Arbitration Body also has a two-year tenure. The Body needs to make decision on the case file that cannot be settled under the Conciliation Body within seven days not including the official holidays and inform the concerned parties within two days excluding the official holidays.³¹⁷

Working methods, procedures and program of the Arbitration Body are stipulated by the Dispute Settlement Arbitration Council.³¹⁸ The Council shall be formed by the Ministry of Labour with the approval of the Union Government, with 15 qualified persons of good standing from legal experts and experts in labour affairs. They are five persons selected by the Ministry, five selected by the employer organizations and five by the labour organizations.³¹⁹ The term of the Council is two years. The Arbitration Council is assigned to act as the independent and impartial organization based on social justice, decent work and principles of equity in making decisions.³²⁰

If either party of the dispute is not satisfied with the decision of the Arbitration Body, except for a decision in respect of essential services, they can apply to the Arbitration Council within seven days not including official holidays or carry out a lock out or strike in accordance with the relevant law.³²¹ In respect of essential services, they can apply to the Arbitration Council within seven days, but they are

not allowed to strike.³²² The Council then forms and assigns a Tribunal with three people from the Council members.³²³ The Council prescribes the working methods, procedures and programs of the Arbitration Body and the Tribunal while the Council is act in accordance with the procedures stipulated by the Ministry.³²⁴ The Tribunal needs to make a decision on the dispute, except for a decision in respect of essential services, within fourteen days, not including the official holidays and in regard to essential services, within seven days.³²⁵ After three months from the day of coming into force, the decision of the Arbitration Body or the Arbitration Council can be amended.³²⁶ The Body and the Council are authorized to enter the workplace and examine the documents or persons related to the case file.³²⁷

Article 52 gives access to mechanisms based in the law at the same time by stipulating that “No party shall be barred to proceed with the right to institute criminal proceedings in respect of such dispute during conciliation or arbitration.” And according to the article 53, The Ministry of Labour can coordinate with the Supreme Court of the union to establish Labour Courts to try the labour disputes. The article 55 prohibits charging fees to the parties in respect of the process of negotiation, conciliation and arbitration of the dispute.

Supplementary Understanding mechanism (SU)

(Please Refer to Section III, No.1), notes 185 and 186 and accompanying texts.

Land Confiscation Investigation Commission

(Please Refer to Section III, No.1), notes 191-198 and accompanying texts.

316 Ibid., Article 25, 26, Chapter VI.

317 Ibid., Article 26, 27, Chapter VI.

318 Ibid., Article 18, Chapter IV, Article 21 (c), Chapter V.

319 2012 Settlement and Labour Dispute Law, Article 19, Chapter V.

320 Ibid., Article 21 (a), Chapter V.

321 Ibid., Article 28, Chapter VI.

322 Ibid., Article 29, Chapter VI.

323 Ibid., Articles 19-20, 21 (b), Chapter V, Article 30, Chapter VI.

324 Ibid., Articles 21 and 22, Chapter V.

325 Ibid., Articles 31 and 32, Chapter VI.

326 Ibid., Article 36, Chapter VII.

327 Ibid., Articles 44 and 45, Chapter VIII.

Letpataung Copper Mine Inquiry Committee

(Please Refer to Section III, No. 1), notes 203-206 and accompanying texts.

Legal State-Based Grievance Mechanisms

Court (Please Refer to Section III, No.1), notes 169-174 and accompanying texts.

9.2 What barriers to access to remedy through these State-based grievance mechanisms have been reported?

While there is prospect for improvement with the formation of the new Anti Corruption Committee,³²⁸ up to now corruption, bribery and influence of the executive branch over the judicial branch have still been the main barriers to access to independent judicial remedy.³²⁹ Labour Dispute Mechanisms formed under the Trade Dispute Act of 2012 still need to be applied effectively to ensure access to remedy for affected workers.³³⁰ According to ILO and labour activists, awareness and understanding about the freedom of organization and assembly is still weak among employers and some authorities. Hence, there have been cases of workers who were dismissed from their jobs for organizing union formation. And in such cases, affected workers could not get access to justice and remedy through labour dispute mechanisms due to lack of systemic arbitration procedures and due to discrimination against workers.³³¹

328 The anti bribery law to be approved at the Parliament, as of February 8, the bill is not yet approved.

329 Kim Jolliffe, "Law Without Order in Myanmar," *Asia Times*, accessed August 10, 2012, http://www.atimes.com/atimes/southeast_Asia/NG26Ae02.html; "Courage and Cowardice in the Courtroom," *The Irrawaddy*; Khin Hnin Htet, "Court cheats Yuzana Land Grab Victims." According to the Transparency International, Myanmar ranks 180 out of 183 countries for the 2011 Corruption Perceptions Index that is the perceived levels of public-sector corruption. Transparency International, "Corruption Perceptions Index 2011," 2011.

330 See also notes.249-253 and accompanying texts.

331 Ibid.

9.3 Are there laws, regulations, policies and/or initiatives requiring or encouraging the establishment of non-State-based grievance mechanisms?

Section 3 to 9, Chapter II, Trade Dispute Act, 2011 contains detailed provisions on the formation of Workplace Coordinating Body consisting of workers' and employers' representatives. Workers or employers can lodge complaints to the Body. Only when the Body cannot settle the dispute, the case will be submitted to the Conciliation Body.³³²

Under the president's notifications, Letpa Taung Inquiry Commission was formed.³³³

10. Is the State giving the country's National Human Rights Institution powers to enable it to contribute to the area of business and human rights?

About MNHRI, please refer to Section III.1, supra notes 172-177, accompanying texts.

11. What are the efforts that are being made by non-State actors to foster State engagement with the Framework and the Guiding Principles?

The Institute for Human Rights and Business (IHRB) in cooperation with the British Council Yangon held two multi stakeholder workshops to engage the UN guiding principles to the State, businesses and civil societies. The Chairman and the Myanmar Investment Commission, some economic advisors of the government and the Chair of the Myanmar National Human Rights Commission (MNHRC) attended the workshops and gave opening speeches at both workshops. On these occasions, they have mentioned that it is necessary for the State to adhere to the international norms including the UN guiding principles to

332 2012 Settlement of Labour Dispute Law, Article 3 to 9, Chapter II.

333 See notes 203-206 and accompanying texts.

promote responsible investment. A local NGO called Spectrum has also started initiating guiding principles to the government, MNHRI and businesses by holding workshops and seminars on extractive industries.

Conclusion and Summary

As part of its political and economic reform process, Myanmar has been promulgating new laws and reviewing or updating the outdated laws to be in accordance with the current situations of the country. The 2008 Constitution recognizes the state duty to protect the rights of workers and peasants by promulgating laws and regulations. Except this, the Constitution does not contain an explicit, general provision on the state duty to protect. Two new laws on forming labour associations and settling labour disputes have been enacted while Minimum Wage Act, Employment and Skill Development Act and the Occupational and Skill Development Law have been drafted. Two newly enacted land laws, Farmland law and Vacant, Fallow and Virgin Lands Management Law are controversial due to their inadequate protection for small holding farmers. The state has established non legal based labour dispute settlement mechanisms to safeguard the rights of workers and to establish good working relationship between employees and employers and to offer grievance mechanisms to the affected parties. . Yet, implementation is still weak due to lack of adequate knowledge about the newly enacted laws by the parties concerned. To respond to land confiscation cases, a parliamentary committee on land confiscation inquiry was formed, however without a mandate to give binding decisions.

The Court is the legal grievance mechanism of the state. Its main challenges include bribery, corruption and influence of the executive branch over the independent decisions of the judicial branch. Meanwhile, an anti-corruption committee was formed and an anti-bribery law is soon to be approved by the Parliament. The state has shown its political and policy commitments to carry out Environmental and Social Impact Assessments in accordance with international norms. The state also encourages businesses to adhere to non-binding CSR mechanisms such as the Global Compact. And recently an EITI leading initiative authority was formed to promote transparency and accountability in the extractive industries. In spite of such initiatives, the outdated 1914 Myanmar company law and 1940 and 1957 Myanmar company rules have very scant provision on general legal obligation of directors let alone specific legal obligations to take into account the human rights impacts of their business enterprises. Until this point in time, the state has not taken steps to encourage business respect for human rights in conflict affected and high-risk areas. However, the state has recognized the need for accountability when acting in these areas. To improve public procurement is one of its policy priorities. Although there is no official endorsement of the Framework and the UN guiding principles, there is some recognition on this by high level officials. While the state has shown its effort to solve problems on labour, land and environmental issues, barriers such as lack of transparency in privatization process still hinder progress and eventually the creation of a fair and just society that adheres to human rights.