



A Guide for Small and Medium-Sized Enterprises Doing
Responsible Business in Myanmar: A Rights-Based Approach

This guide was produced by EarthRights International.

ERI is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as “earth rights.” We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, ERI seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in the communities where we work.

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Doing Business in Myanmar

This guide is aimed at small and medium-sized enterprises (SMEs) investing or doing business in Myanmar. It gives an overview of the issues that EarthRights International (ERI) has encountered working in Myanmar. It focuses on investments involving land acquisition and on compliance with environmental laws. It does not offer a comprehensive guide to all environmental and social issues that a business may encounter in Myanmar and should address in order to fulfill its responsibility to respect human rights (such as labor conditions, supply chain management, and child labor). The guide provides general recommendations that should serve as a starting point for developing strong and continuous due diligence. More resources can be found at the end of this Guide.

This Guide does not attempt to provide legal advice; it broadly identifies environmental and social risks inherent in investing in Myanmar and provides a starting point to address these risks with a rights-based approach.

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Overview of the Investment Climate in Myanmar

In 2010 the people of Myanmar elected a semi-civilian government which was followed by political and economic reform, including a peace process aimed at ending 60 years of ethnic armed conflict, and the lifting of many western economic sanctions. This move toward democracy culminated in elections in 2015, which brought the National League of Democracy (NLD) to power.

Despite these changes, Myanmar is still a difficult place to do business and manage social and environmental risks. Ethnic armed conflict continues, the constitution leaves the military with broad powers, domestic legislation falls far below international standards and the laws that are in place suffer irregular implementation and enforcement due to capacity and corruption issues. Myanmar is ranked 136 out of 176 countries by Transparency International's 2016 Corruption Perceptions Index¹. These institutional weaknesses result in continued widespread human rights abuses, a weak rule of law, corruption and the exploitation of people and the environment. Although freedom of expression and assembly have improved since military rule, protests, particularly relating to land rights, often result in arrests and since the 2015 election, conditions for free speech have deteriorated with many journalists and even politicians being targeted by oppressive criminal charges. Business activities carry even greater risk when they involve extractives, infrastructure, energy, and plantation agriculture projects which have a history of being *“frequently carried out unilaterally, without consultation or information disclosure; are often associated with militarization at project sites; have limited benefits for local communities; and cause widespread displacement. Local communities commonly suffer serious additional human rights impacts”* which include environmental degradation, physical threats and arbitrary detention, and destruction of livelihoods.

It is therefore important for SMEs investing in Myanmar to conduct social and environmental risk assessments and produce mitigation plans based on international standards and in compliance with Myanmar law.

¹ <https://www.transparency.org/country/MMR> (Accessed August 2017)

² Testimony of Marco Simons, ERI General Counsel, in Front of the Tom Lantos Human Rights Commission: Business and Human Rights in Burma (Myanmar) available at <https://www.earth-rights.org/sites/default/files/Written-Testimony-of-Marco-Simons-Lantos-Commission-Business-and-Human-Rights-in-Myanmar-2.26.13.pdf> (Accessed August 2017)

ONGOING ETHNIC ARMED CONFLICT

Myanmar is extremely ethnically diverse. The 2008 Constitution recognizes 135 ethnicities, which comprise approximately 40 percent of the population and are predominantly located in Myanmar's seven ethnic states. These states have high concentrations of natural and mineral wealth. The 60 years of ongoing armed conflict across Myanmar has seen ethnic states and groups seek independence and, in more recent years, a federal system of governance. The 2015 elections must be seen in this context. In short:

Rural and mountainous areas across many of Myanmar's non-Bamar regions are contested by multiple governance actors with overlapping claims to territory, including: the Myanmar government and armed forces, countless state-backed ethnic militia, and dozens of opposition ethnic armed groups. Many of the varied ethnic armed actors have much deeper relations with local communities than the state does, and in numerous cases, have been the only administrative authorities of these regions in the country's history. Very few of their territories have clearly agreed borders, and none are sanctioned officially by law or in the constitution³.

In the lead-up to the 2015 elections, the government pushed a "Nationwide Ceasefire Agreement" (NCA) which was signed in October 2015. However, seven of 15 groups invited to sign did not (including some of the most powerful armed groups), and many other stakeholders were not permitted to take part in negotiations. Following the 2015 elections, the NLD government made the peace process a key priority. However, military offensives in Kachin and Shan have seen conflict reach its worst level in decades.

Many civilians have been, and continue to be, killed or displaced from their lands. Human rights abuses by all parties to the conflict continue to be reported, including land grabs and forced displacement, forced labor, arbitrary detention and torture. Activists and community members continue to be imprisoned under draconian laws for speaking out against these abuses. In early 2017, key groups that had not signed the NCA rejected it and called for a new peace process. Constitutional reform and a more federal system of governance are seen by many as a precondition for lasting peace.

³ The Asia Foundation, *Ethnic Armed Conflict and Territorial Administration in Myanmar*, Kim Jolliffe, July 2015

MILITARY POWER UNDER THE 2008 CONSTITUTION

Myanmar's 2008 Constitution was adopted following a referendum widely seen as being neither free nor fair. Drafted by the military, the Constitution has been heavily criticized as undermining key international human rights norms, reserving substantial powers for the Military and centralizing power in direct opposition both to demands of ethnic groups in the peace process and the power relations and political systems that exist in ethnic areas. The criticisms of the role of the Military include that:

- › The Military is automatically awarded 25 percent of the seats in each house of Parliament, giving it the power to veto constitutional amendments.
- › The Military has retained control of the key Ministries of Defense, Home Affairs and Border Affairs.
- › The Military has retained control of the General Administration Department (GAD) and with it, control of key administrative positions in all government departments.

So, despite the 2015 elections themselves being widely regarded as free and fair, the powers of the NLD government are severely curtailed. In addition to the powers under the Constitution, the Military also remains deeply entrenched in Myanmar's economy through its ownership of business interests. Business men and women with links to the military, (known as "cronies") are entrenched in the private sector and are often well placed to benefit from new investment whilst breaking laws with relative immunity (including on drug trafficking and money laundering).

INADEQUATE DOMESTIC LEGISLATION

Myanmar has a sparse legislative framework, with many laws dating from the colonial era. Recent years have seen some significant reforms, but these primarily facilitate investment rather than seeking to safeguard human rights or the environment. Laws to protect the rights of individuals and communities, such as on land tenure, employment and public health generally are either absent or inadequate, with those in place frequently failing to meet international standards. These new laws are often drafted and adopted with little to no public participation or parliamentary debate. Myanmar is also yet to sign and ratify key international human rights instruments such as the International Covenant of Civil and Political Rights.

IRREGULAR IMPLEMENTATION AND ENFORCEMENT OF EXISTING DOMESTIC LEGISLATION

Where legislation is in place, its implementation and enforcement is irregular and weak. The government lacks the capacity to implement legislation, the court system is hugely underfunded and the capacity of lawyers and judges is low after decades of neglect and active suppression from successive military governments. Citizens are rarely able to access legal advice. The allocation of government duties and decision-making processes is not transparent. Together, this means that the rule of law is weak, corruption in both government and the judiciary is widespread and government and private sector accountability is largely non-existent.

Where to Start? - The UN Guiding Principles

Due to the weak institutions, a legacy of military rule and government corruption in Myanmar, investors must be acutely aware of the unique operating risks and the need for its business activities to respect human rights and the environment. They should conduct social and environmental risk assessments and implement mitigation plans that comply with international law. The starting point for this is the UN Guiding Principles on Business and Human Rights. In 2008, the UN Human Rights Council approved a framework on business & human rights⁴, which was supplemented in 2011 with the **UN Guiding Principles on Business and Human Rights** (UNGPs). Both the Framework and the UNGPs rest on three pillars:

The 'Protect, Respect and Remedy' Framework—3 pillars

1. The state duty to protect against human rights abuses by third parties, including businesses;
2. The corporate responsibility to respect human rights; and
3. Greater access by victims to effective remedy, both judicial and non-judicial.

⁴ <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>

The second pillar identifies the corporate responsibility to respect human rights. The UNGPs should be read, understood, and implemented by any company investing in Myanmar. They can be found on the website of the Office of the United Nations High Commissioner for Human Rights and include the following foundational principles⁵:

- › Business enterprises should respect human rights, using recognized international standards as a minimum.
- › The responsibility to respect human rights requires that business enterprises:
 - (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and
 - (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.
- › Businesses should have in place policies and processes appropriate to their size and circumstances, including:
 - (a) A policy commitment to meet their responsibility to respect human rights;
 - (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and
 - (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

The UNGPs set out further guidance (“Operational Principles”) on how to implement these foundational principles⁶. The UNGPs reflect the broad international consensus on the business responsibility to respect human rights and all businesses operating in Myanmar should have a policy to implement them. Further guidance is widely available.

⁵ http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁶ *ibid.*

In addition to the fundamental importance of respecting human rights as an end in itself, businesses that fail to respect these rights leave themselves open to risk of litigation or being the target of a community or NGO campaign, inadvertently being involved in bribery and corruption, administrative penalties and greater regulation, disruptive protests or labor disputes. In this context, carrying out proper due diligence and putting in place management procedures to respect human rights and the environment is part of risk management and value creation, and therefore good business.

Earth Rights Abuses in Myanmar

LAND RIGHTS AND LAND GRABS

ERI's work in Myanmar focuses on land and the relationship of people with their land which, for many people in Myanmar, is a very close one. Seventy percent of Myanmar's population is found in rural areas and farming and related activities account for 70 percent of employment⁷, yet many people only have what are effectively land "user-rights" rather than any form of ownership. Many land users claim customary land rights which are not recognized in Myanmar law and include communal usage and hunting, gathering and fishing. Even where land is lawfully sold for development, land users who previously used the land with permission of the landowner will often lose their livelihoods. Land users who have been displaced by conflict, environmental harms or land grabs are particularly vulnerable to further displacement.

A complex web of laws and rules that govern **land tenure** in Myanmar and recent legal reforms, including on domestic and foreign investment and land tenure, now overlap confusingly with colonial-era laws. These reforms are primarily designed to facilitate investment, resulting in arbitrary and inadequately compensated alienation of land.

LAND TENURE

The laws and rules by which people own and access land.

⁷ <http://www.mm.undp.org/content/myanmar/en/home/countryinfo.html> (Accessed August 2017)

Further uncertainty arises in areas under the control or partial control of ethnic groups, such as the Karen National Union (KNU) or Kachin Independence Organization (KIO) which may also have separate land use policies⁸. Even where land users do have some rights, the implementation and enforcement of laws is weak and irregular.

A company doing business in Myanmar should take care to understand the issues faced by land users and communities in Myanmar which include⁹:

1. A complex and long registration process resulting in low land registration rates.
2. Rigid land classifications that do not reflect the reality of existing land use.
3. A lack of legal recognition of widely occurring **customary land use**¹⁰.
4. Weak protection of registered land use rights.
5. Inefficient land administration and procedural flaws or corruption in the acquisition process.
6. Active promotion of large-scale land allocations without adequate safeguards.

CUSTOMARY LAND USE

Rules, often unwritten, based on tradition including methods used by rural communities to regulate co-ownership, use, access and transfer of land and resources.

⁸ The KNU has a formal land use policy, including a land registration system.

⁹ <http://www.oecd.org/countries/myanmar/investment-policy-reform-in-myanmar.htm> (Accessed August 2017)

¹⁰ Myanmar's National Land Use Policy provides for the recognition of customary land rights and protections for, amongst others, ethnic groups and women. This policy has yet to be implemented.

ERI frequently encounters land grabs that are either illegal or where land users receive no compensation, inadequate compensation, or compensation is lost through corruption. This has taken place on a vast scale; by some estimates, the military government allocated two million acres to the private sector¹¹. As a consequence, the majority of complaints received by the Myanmar National Human Rights Commission relate to land grabs (both historic and recent). There is no recognized definition of a land grab, but they generally include land acquisitions or concessions that are one or more of the following¹²:

1. In violation of human rights, particularly the equal rights of women.
2. Not based on free, prior and informed consent of the affected land-users.
3. Not based on a thorough assessment, or are in disregard of social, economic and environmental impacts.
4. Not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing.
5. Not based on effective democratic planning, independent oversight and meaningful participation.

Land Rights - The Legal Framework in Myanmar

The 2008 Constitution provides that all land belongs to the State, which can grant leasehold, user rights, and rights to cultivate land, subject to prior approval from the local government. Where land is not covered by more specific legislation, the starting point for land acquisitions is the colonial-era **Land Acquisition Act 1894 (LAA)**. Although it provides for compensation measures, including a right to challenge the amount, land can be acquired for business purposes even where this is not in the public interest and compensation, even when paid, is inadequate to replace livelihoods.

¹¹ <https://www.ihrb.org/pdf/Myanmar-Burma-Multi-stakeholder-workshops-on-responsible-investment.pdf>

¹² As per the Tirana Declaration, which was agreed by governments, international organisations and civil society as part of a conference on land rights in 2011 (“Securing land access for the poor in times of intensified natural resources competition”).

In 2012, two new laws, the **Vacant, Fallow and Virgin (VFV) Lands Management Law** and the **Farmland Law**, were enacted in support of the government's policy to maximize land use. Like the 1894 Land Acquisition Act, these two laws contain little or no protections for land users and fall far short of recognized international principles on security of tenure and compulsory acquisition.

The VFV law allows the government to give tenure of unregistered "Vacant, Fallow and Virgin" land to private investors and to repossess it for "special projects required in the interests of the state". It does not recognize customary rights, so land that is unregistered (often used for shifting cultivation or traditional farming practices) can be characterized as vacant and seized. The Farmland Law puts in place a system of land use certificates and registration for rural land. It establishes a private right for individuals and business to transfer land title which often results in poorly advised or exploited farmers selling land for short-term gain. It allows for repossession of farmland "in the interests of the state or the public" – this broad power facilitates land grabs.

These laws have limited rights for objecting to administrative decisions, acquisitions or compensation awards before the courts. They leave land users exposed to land grabs, evictions, and loss of livelihood, all without an effective remedy. Encroaching on transferred land can lead to criminal sanctions which have been used to target land rights protestors with harsh prison terms. Land committees have been set up at various levels to address historical and new disputes, but they are mired in controversy and are generally dominated by committee members appointed from sections of government that remain under Military control, with officials settling disputes in which they themselves have been accused of land grabs.

“I was afraid that my plantation and inheritance would be taken at a very low price. But, it’s better than losing my land without [any] compensation. I signed the agreement at their price. The notice letter did not say who or which department issued the order¹³.”

- Farmer, Dawei

Risks for investors to monitor:

- › Government bodies failing to follow statutory requirements such as notification periods or allowing land users the right to object to land transfers, sometimes with a community being unaware of a development until the bulldozers arrive.
- › Government bodies and private individuals registering land rights over unregistered land because they know that the people entitled to register have not done so.
- › Local officials retaining commission to cover ‘fees and expenses’ or registering common land as farmland under ‘a ghost name’ and making a fraudulent payment to the ghost name.
- › Land users signing agreements that they do not understand or signing under duress.
- › “Temporary” seizures for access/construction works becoming permanent.

¹³ Mizzima <http://archive-1.mizzima.com/news/myanmar/6032-authorities-of-dawei-deep-seaport-threaten-land-owners-to-sell-at-low-price>

Even where compensation is paid, it is normally insufficient for farmers to replace what they have lost and they are left without a livelihood. This is being exacerbated by rising land prices.

Other human rights abuses frequently accompany land grabs and affect surrounding land users. These include forced labor (with victims of land grabs being forced to work on the land they lost¹⁴), physical threats, and arbitrary detention (often linked to militarization around project sites). Environmental degradation of land, rivers, forests, and fisheries is common; it is caused by landslides, erosion, pollution and poor post-construction remedial works. Projects are also often of limited benefit for local communities in terms of employment and livelihoods.

The 33 farmers

In an example of the type of small land seizures that take place across Myanmar, 33 farmers living and farming on land next to the Thilawa Special Economic Zone are facing charges of criminal trespass simply for farming the land that they claim is still theirs. The charges follow attempts by successive Myanmar governments to acquire the land using the colonial-era Land Acquisition Act in 1996/1997 and then again in 2015. Yet even the basic procedural safeguards in the Act were not followed; the farmers were not given proper notice of or the right to object to the acquisition or amount of compensation. Compensation was not paid when the seizures were alleged to have taken place in 2015. Even if followed, the provisions of this Act would not give enough compensation to enable the farmers to replace their livelihoods and would leave them surrounded by industrial land and unable to buy new farmland.

This case, like many others in Myanmar, demonstrates that it is never enough to just follow a chain of land title back to an official acquisition by the government.

¹⁴ The Asian Legal Resource Center (2012) “Myanmar at Risk of Land-Grabbing Epidemic”

POLLUTION

ERI has encountered severe pollution issues in Myanmar. The privatization of government industries and increased foreign investment have seen an increase in pollution. Examples of severe pollution include *“the drainage of water or chemicals used in mineral extraction; overuse of pesticides; industrialization; excess siltation from watershed erosion caused by logging, mining, and large-scale agriculture; and the dumping of industrial and human wastes and garbage”*¹⁵.

Myanmar has taken concerted steps to improve its environmental legislation, with the Environmental Conservation Law 2012 and Environmental Conservation Rules 2014 providing a basic framework, supported by emissions guidelines. Myanmar is, however, far from having the full range of environmental legislation that would be required to meet international standards. The new laws have wide exemptions available for both new projects and those that were in operation when the Rules were enacted. There is a lack of clarity regarding how new laws interact with a web of colonial-era and more recent laws (including those for Special Economic Zones), as well as over the division of responsibility between government departments and between national, regional and municipal bodies. The courts and government agencies lack the capacity, funding, and independence to enforce the laws.

¹⁵ USAID, Country Profile, Land Tenure and Property Rights, BURMA (at page 31), found at <https://www.usaidlandtenure.net/country-profile/burma/> (accessed November 2017)



Tin Mining in Tanintharyi

The Tanintharyi region in south-east Myanmar has a history of tin mining and a strong network of community-based organizations. The Heinda tin mine near Dawei shows the challenges they face. Communities downstream of the mine have filed lawsuits claiming that their land has been inundated with toxic sludge, destroying water sources and farmland and wrecking livelihoods. Despite seeking redress in the courts, engaging with local government and filing a complaint with the Thai National Human Rights Commission against the mine operator and its Thai owners, they are yet to receive any compensation. Journalists reporting on the story face defamation charges. The battle communities face to regulate the ongoing operations of the mine is shown below in the section on EIAs.



Mandalay Industrial Zone

An industrial zone on the outskirts of Mandalay contains a huge range of factories and industries, including tanneries, distilleries, sugar processing plants and alcohol production, which produce highly contaminated effluent. Many of these businesses pump effluent with little or no treatment directly into canals and pipelines which flow straight into local reservoirs and rivers. This results in contamination of vital water resources, with a loss of access to clean water for drinking, domestic use, and irrigation, as well as mass fish die-offs, loss of livestock, intolerable odors, and impacts to health including skin ailments and respiratory problems.

Communities have repeatedly raised these issues with government stakeholders with little effect. A water treatment facility has been proposed but remains a long-term solution and only a small number of factories have been suspended since the NLD came to power. Most factories continue to operate in clear breach of environmental legislation and emissions guidelines. Government action has mostly been limited to moving an effluent pipe to discharge further downstream by a different community and allowing the discharge of untreated effluent to continue, but limiting it to specific times of day.

The fact that at least some factories were suspended, however, shows that companies breaching Myanmar law may increasingly find their activities being halted and suffer financial losses.

ENVIRONMENTAL IMPACT ASSESSMENTS

“...the farmers did not get any information about the profile of the foreign companies involved, the nature and extent of oil and gas pipeline construction, and the start and end dates for the construction. They were also not given enough information to calculate how much the pipeline construction could destroy their farmlands and affect their livelihoods and incomes. There is no evidence that [the pipeline operator] disseminated the Project information or conducted consultations with the affected communities along the pipeline route prior to the construction”¹⁶.

Environmental Impact Assessments (EIA) were envisaged under the Environmental Conservation Law 2012 and detailed procedures were set out in the 2015 EIA Procedures. EIAs in Myanmar incorporate environmental and social issues. They are defined as a systematic study of potential or actual impacts and processes that may affect the physical, human, biological and socioeconomic environment. An assessment is required for any new project that requires government approval or is subject to licensing, restrictions or regulation and which might cause “Adverse Impacts”. Adverse Impacts are broadly defined and include environmental, social and cultural impacts. For some projects, the free, prior and informed consent (FPIC) of affected communities should (and sometimes must) be obtained. (See pages 17-18).

There are different procedures and varying levels of investigation and public consultation depending on the scale of a project, with some smaller projects requiring a less onerous “Initial Environmental Examination” or IEE. For both EIAs and IEEs, the process must be carried out by a government-approved third-party consultant, although many of these are ill-equipped for the task.

As part of the EIA process, projects must produce an Environmental Management Plan (EMP) for their operations to deal with Adverse Impacts. They must also acquire an Environmental Compliance Certificate (ECC), setting out the terms within which they must operate. Existing projects can also be required to carry out an EIA and/or produce an EMP and acquire an ECC.

¹⁶ Myanmar China Pipeline Watch Committee - *In Search of Social Justice Along the Myanmar China Pipeline*

The Ministry of Natural Resources and Environmental Conservation (MONREC) is responsible for reviewing and approving EIAs and EMPs and granting ECCs, all of which should then be published. MONREC is also in the process of finalizing a guideline on public participation which could add much-needed specificity to the broad obligation in the EIA Procedures to carry out “appropriate public consultation”.

Environmental Impact Assessments: Issues with Implementation

The EIA procedures, if followed, have the potential to significantly improve environmental regulation in Myanmar. Communities affected by existing mining operations in Myanmar have reported a huge increase in ‘consultations’ and this appears to be a response to orders from the Department of Mines for existing mines to produce EIAs and/or EMPs and suggests that the NLD-led government is pushing for improvements. All EIAs should be reviewed for approval by the Ministry of Natural Resources and Environmental Conservation (MONREC), yet in the year following the enactment of the 2015 EIA procedures, not a single EIA was officially approved and made public and mining operators alone are reported to have submitted hundreds of EIA reports. This raises serious concerns over whether MONREC currently has the capacity to ensure that EIAs comply with Myanmar law.

Communities also report that government-approved consultants are conducting grossly inadequate EIA processes. For example, communities affected by mining operations in the Tanintharyi region in south-east Myanmar have reported ‘consultations’ taking place with little or no notice, no written information being provided, presentations in foreign languages without translation, and no explanation of the EIA process, or even that an EIA is taking place. EIA consultants have refused even to consider Adverse Impacts that have already occurred as part of the consultation. There are also widespread examples of projects continuing without approved EIAs. A non-compliant EIA process for at least one suspended mining operation in Tanintharyi region has been halted by the Myanmar government following pressure from communities and CSOs, showing the risks that companies can face when confronted by organized community opposition.

EarthRights International, working with the Mekong Legal Network, has produced a guide for practitioners in the Mekong region that specifically targets government decision-makers, investors, lawyers and other professionals working on the implementation of EIAs.

What is FPIC?

Free—without coercion, intimidation or manipulation and through a process led by the affected community.

Prior—sought far enough in advance of any authorization or activities, taking account of the time requirements and need for consensus from a community.

Informed—all information relating to the activity is provided to communities and the information is objective, accurate and presented in a way that is understandable to the community. Relevant information includes:

1. the nature, size, pace, duration, reversibility and scope of any proposed project;
2. the reason(s) or purpose of the project;
3. the location of areas that will be affected;
4. a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits;
5. personnel likely to be involved in the implementation of the project; and
6. procedures that the project may entail.

Consent—communities have agreed to the activity having had the prerogative to withhold consent or to offer it with conditions after a participatory process which communities can enter through their own freely chosen representatives and customary or other institutions. The inclusion of women, the elderly and youth are all essential in the process.

When Should FPIC be Used?

FPIC should be obtained when a community's rights to use and control land and other natural resources are affected, usually through developments involving the acquisition of land or rights over land. It is a process of consultation and consent that protects the rights of a community. Developments in the 'public interest' should not be used to negate FPIC requirements and evict tenure holders; instead, the public interest should include the protection of community rights.

FPIC was conceived in relation to indigenous and tribal communities with a less rigorous consultation and participation processes being proposed for other communities. Where an EIA/IEE is required, Myanmar law states that projects that might have adverse impacts on indigenous people must comply with international good practice. The World Bank's Environmental and Social Framework states that it "will not proceed further with the aspects of the project that are relevant to those Indigenous Peoples for which FPIC cannot be ascertained." Some companies and institutions are now implementing FPIC for all affected communities, regardless of whether the project affects indigenous peoples. In Myanmar, where many people have customary relationships with the land and natural resources amidst a complex web of ethnic groups, FPIC should be applied to all communities (many of which will fall within the meaning of indigenous).

Where land will be acquired by the Myanmar government, investors must work with the government to obtain FPIC, and where land has already been acquired, they must do due diligence to make sure FPIC has been obtained and address the situation if it has not.

TRANSPARENCY

Myanmar is ranked 136 out of 176 countries in Transparency International's 2016 Corruption Perceptions Index¹⁷. Although improvements are being made (Myanmar is now a candidate country with the Extractive Industries Transparency Initiative¹⁸), transparency and accountability remain poor.

¹⁷ https://www.transparency.org/country/#MMR_DataResearch

¹⁸ Myanmar had to push back the deadline for its second EITI report over a year to 31 March 2018.

Documents such as EIAs and EMPs are frequently unavailable to the public, as are tender processes and contracts with the government (including details of payments) and financial audit reports. A 2014 survey by the Myanmar Centre for Responsible Business found that only one of 35 local companies made its financial report public and only one published its tax payments¹⁹.

THE NEW INVESTMENT LAW FRAMEWORK

The NLD government introduced a new Investment Law in 2016 and new implementing Rules in 2017. Although this framework is primarily aimed at facilitating investment, it contains a number of core provisions to foster the development of responsible investments which do not cause environmental or social harm²⁰.

Under the new framework, certain investments will require an Investment Permit from the Myanmar Investment Commission (MIC²¹). Applicants will need to submit a Proposal, a summary of which must be publicly disclosed by the MIC and published on the investor's website. Before issuing a Permit, the MIC must consider whether the investor is "of good character and business reputation²²," which entails a consideration of whether the investor has previously broken the law in Myanmar or another country, including any environmental, labor, tax, anti-bribery, and corruption or human rights law²³. Foreign investors seeking a land lease longer than one year, and domestic investors seeking long-term land leases, will also need to obtain a 'land rights authorization' from MIC.

All investors operating in Myanmar have certain duties under the Investment Law²⁴, including a duty to respect and comply with the customs, traditions and cultures of the ethnic groups. Investors operating with a Permit have

¹⁹ Myanmar Centre for Responsible Business (2014) Transparency in Myanmar Enterprises

²⁰ 2016 Myanmar Investment Law, section 3(a).

²¹ The Investment Law sets out the general categories of investments that will require a permit (section 36). These are then further defined in the Investment Rules (rules 3-5).

²² 2017 Myanmar Investment Rules. rule 64(g).

²³ 2017 Myanmar Investment Rules. rule 66.

²⁴ 2016 Myanmar Investment Law, Chapter XVI.

additional duties, such as to submit an Annual Investment Report²⁵ to the MIC and disclose it to the public. The Report must include matters relevant to the investors' duty to respect human rights - such as impacts on the environment and the local community, and evidence of how it has acted in a responsible and sustainable manner.

The framework also has functions relevant to the Third Pillar of the UNGPs, which seeks to guarantee victims' right to a remedy in both judicial and non-judicial forums. An Investor Assistance Committee is to be established as part of the MIC, which is charged with conciliating issues between investors and other aggrieved parties, as well as establishing a functioning grievance mechanism for project affected people who have submitted 'complaint letters' about investments. Investors have a duty, under the Rules, to fully assist in the setting up of grievances with local communities.

However, the fact that an investment has been permitted, or has not been censured by the MIC, in no way guarantees that it can be characterized as responsible.

- › Many smaller investments may well be outside the remit of the MIC.
- › Owing to Myanmar's fraught legacy of irresponsible and corrupt investment practices, key governance challenges remain.
- › The MIC has very broad powers, its decision-making process is opaque, transparency is a major concern, and rigorous parliamentary oversight of the MIC is not guaranteed.
- › Concerns have been raised about the capacity and independence of the MIC to monitor and address compliance with the framework; its powers and duties are untested, and much work will need to be done to bring them in line with best practice.

²⁵ There is as yet no guidance on the form that this report must take.

- › The land rights authorization does not appear to add any substantial protections to prevent the land rights abuses inherent in the existing land laws; the framework falls drastically short of enshrining a right to FPIC for affected indigenous communities and makes no provision for customary land.
- › The provisions on grievance mechanisms are far from being operational and will be very challenging to implement successfully.
- › The framework leaves scope for investment in areas subject to conflict, potentially without a permit, and excludes key stakeholders such as ethnic armed groups.

Nevertheless, the new framework does make it clear that investors in Myanmar should be prepared to embrace a number of key ideals that are inherent in a rights-based approach to project governance, including transparency, accountability and responsiveness to community concerns.

Recommendations

The following list of recommendations serves as a starting point for companies investing in Myanmar, and provide information and considerations that should assist in a company's due diligence efforts. These recommendations alone do not constitute sufficient due diligence. It is important for companies to take consistent active measures in consultation with project-affected communities to ensure that their investments do not cause earth rights abuses.

The recommendations should be implemented for all new investments and projects. Where investments are made in existing projects, investors should demand to see, or carry out themselves, the same due diligence to ensure that international standards were met, or that any breaches are rectified. It is also crucial that processes are in place to deal with the potential for future abuses in order to avoid, or at the very least mitigate these harms.

Understand and follow the UN Guiding Principles and all international standards and relevant obligations—Compliance with Myanmar laws alone will not meet the business' responsibility to respect human rights. Under the UN Guiding Principles, companies should have a robust human rights policy in place, carry out thorough due diligence, and set up adequate processes to deal with adverse effects that cannot be avoided. Companies in OECD signatory states²⁶, or who are signed on to other voluntary instruments such as UN Global Compact or industry guidelines have additional responsibilities to follow. Projects with funding from international financial institutions must comply with those mandatory guidelines. These standards must be applied regardless of the size of the project.

Establish a human rights due diligence policy with staff and budget to implement it—creating a responsible culture within the company will help ensure that the policy is followed. Make sure to take a proactive approach to due diligence, not one limited to policies on paper. This means not only knowing what your commitments are but taking actions to follow them adequately, allocating sufficient staffing and financial support.

Actively engage with affected communities and where appropriate obtain free, prior and informed consent (FPIC). Good-faith consultations and participatory dialogues are crucial to establish that land grabs and other abuses have not taken/will not take place, and to develop a positive relationship with affected communities. Meaningful engagement entails: identifying who is actually affected, and their concerns and preferences; allowing genuine participation and decision-making opportunities for the affected communities; carrying out consultations in accordance with international standards. This may also entail working with CBOs, as communities may be wary of both government and private sector involvement. Some NGOs working in Myanmar are listed in Annex 1.

Undertake a conflict assessment to establish whether the investment has or will contribute to or affect ongoing conflicts in Myanmar.

²⁶ See OECD Guidelines on Multinational Enterprises (2011 edition) <https://www.oecd.org/corporate/mne/48004323.pdf>

Actively work to ensure that the project benefits the community—for example, are new jobs created for local people, is there an adequate livelihood restoration plan, including relevant vocational training for affected communities who must leave land-based livelihoods, or have benefits been guaranteed in an agreement freely negotiated with the community? With advice and input from the affected community, identify where you can help promote these benefits.

Do not implement “CSR” projects without community input—CSR activities often do not match the actual needs of the affected community or address impacts caused by the project. By working together with the community, this type of project can be more successful.

Consider the background situation in Myanmar, including the ongoing ethnic armed conflict, the continued role of the military in government, the lack of legislation and weak implementation of laws that are in place. Use this knowledge to ensure that the investment does not exacerbate tensions or lead to a lack of compliance with Myanmar and international law.

Land title cannot be taken at face value for any investment—the history of land grabs and lack of recognition of customary land rights makes title unreliable. Transfers are frequently illegal or take place without consultation, under duress, in contravention of customary land rights or without adequate compensation, with land rights held by women often being particularly insecure. Ascertaining whether land title is being/was acquired in good faith requires comprehensive due diligence. This includes where land title is transferred from the government. Land title will often be relevant to an investment even where land is not being acquired. This due diligence could be carried out through local CBOs to ascertain that the title to land is not disputed.

Minimize land use—this is the simplest way to avoid involvement with land grabs and to minimize negative environmental impacts.

Ensure that the Myanmar requirements for an EIA/IEE have been met— even though the EIA laws in Myanmar generally follow good practice, there is still a lack of capacity in Myanmar in terms of their implementation and enforcement. Investors should satisfy themselves that both Myanmar and international standards have been met before investing, rather than relying on the findings of the EIA consultants and government ministries. This could mean reviewing the EIA to ensure it has been carried out diligently, seeking assurances from the relevant EIA consultants, enlisting an additional EIA expert to review it, and meeting with CBOs.

Ensure that the EIA/IEE include social and cultural impacts as well as environmental impacts with particular attention to those in vulnerable situations, including women. Where the project involves resettlement of communities, ensure that an appropriate resettlement and livelihood restoration plan is developed in consultation with those affected in accordance with international human rights standards, and that it is in place with the appropriate financial and technical support prior to starting the project.

Conduct a suitable environmental and social impact assessment, even where Myanmar law does not require one if there is a risk of adverse impacts. This should ensure *“the impacts and risks associated with the generation, use, storage, release, and/or disposal of pollutants are identified”* with a management plan in place to prevent and abate pollution, including measures to identify, evaluate, and address unforeseen impact and risks.

Ensure that measures are in place to implement an EMP and ensure compliance with any conditions of an ECC. Where an existing project has not yet been required to produce an EMP, investors should insist upon one. It should be publicly available.

Establish an adequate remedial mechanism, such as an Operational-Level Grievance Mechanism (OGM), to provide a remedy for negative impacts and harms caused by the project, in accordance with the Third Pillar of the UN Framework on Business and Human Rights. Ideally, participate in a Community-Driven OGM (CD-OGM), where the impacted community takes the lead in its creation²⁷. As a bare minimum, the remedial mechanism should

²⁷ ERI is developing a model for a Community-Driven Operational-Level Grievance Mechanisms (CD-OGM). For details, see e.g., <https://www.earthrights.org/legal/community-driven-ogms>.

be the result of extensive and meaningful community participation and should meet all eight of the UNGPs' Effectiveness Criteria. A poorly designed and implemented OGM poses a number of operational, reputational, and legal risks for the investor, and will likely lead to further violations of human rights for the affected people.

Operate transparently—disclose EIAs, EMPs, financial audit reports, and payments to government and the public. The disclosure methods should be accessible to affected communities (in their own language) who may not have internet access.

Annex 1—Further Guidance

LAND RIGHTS AND LAND GRABS

There are many community-based organizations in Myanmar that investors should seek to engage. These can be found through network groups such as the Myanmar Alliance for Transparency and Accountability (MATA) and Land in Our Hands (LIOH).

EarthRights International has more guidance and publications on our website in relation to Myanmar and earth rights. Other international or non-community-based groups include:

CARE	International Commission of Jurists (ICJ)
Global Witness	The Transnational Institute (TNI)
NAMATI	Myanmar Centre for Responsible Business (MCRB)
Action Aid	

PUBLICATIONS

General Guidance—Corporate Accountability

- › Shift and Mazaars (2015) - *UNGP Reporting Framework*
- › International Finance Corporation - *Performance Standards, particularly 1,3,5 and 7 (Assessment and Management of Environmental and Social Risks and Impacts / Pollution Prevention and Abatement / Land Acquisition and Involuntary Resettlement / Indigenous Peoples)*
- › OECD (2013) - *Calling for Corporate Accountability: A Guide to the 2011 OECD Guidelines for Multinational Enterprises*

General Guidance—Myanmar

- › Myanmar Centre for Responsible Business / Danish Institute for Human Rights (2015) *Human Rights and Business Country Guide – Myanmar*
- › International Trade Union Confederation (2015) – *Foreign direct investment in Myanmar: What impact on human rights?*

Land Tenure and FPIC

- › Myanmar Centre for Responsible Business - *Briefing Paper on Indigenous People's Rights and Business in Myanmar* (2016)

- › Myanmar Centre for Responsible Business - *Briefing Paper on Land* (2015)
- › Transnational Institute has numerous reports including *The Meaning of Land in Myanmar* (2015)
- › NAMATI - *Myanmar's foray into deliberative democracy: citizen participation in resolving historical land grabs* (2017)
- › Action Aid (2015) *Act On It: 4 Key Steps to Prevent Land Grabs*
- › Food and Agriculture Organization (FAO) (2014) *Respecting free, prior and informed consent, Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition*, FAO Governance of Tenure Technical Guide 3
- › FAO (2012) *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*.

Guidance on Community Participation and Engagement

- › Wilson, E, Best, S, Blackmore, E and Ospanova, S (2016) *Meaningful community engagement in the extractive industries: Stakeholder perspectives and research priorities*. International Institute for Environment and Development (IIED), London.
- › International Finance Corporation (IFC) *Performance Standards on Environmental and Social Sustainability* (2012)
- › Davis, Rachel and Daniel M. Franks (2014) *Costs of Company-Community Conflict in the Extractive Sector*, Corporate Social Responsibility Initiative Report No. 66. Cambridge, MA: Harvard Kennedy School.
- › The Organization for Economic Cooperation and Development (OECD), *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (2015)

Guidance on Grievance Redress Mechanisms

- › EarthRights International, *Community-Driven Operational Level Grievance Mechanisms (CD-OGM)* (forthcoming 2017)
- › United Nations Guiding Principles on Business and Human Rights (UNGPR), Principles 29-31 (2011).
- › Compliance Advisor Ombudsman (CAO), *Grievance Mechanism Toolkit* (2016).
- › Wilson, E, Blackmore, E (2013) *Dispute or Dialogue? Community perspectives on company-led grievance mechanisms*. International Institute for Environment and Development (IIED), London.
- › IPIECA, *Operational Level Grievance Mechanisms, IPIECA Good Practice Survey* (2012).

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