Special Economic Zones in Myanmar and the State Duty to Protect Human Rights

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This report was researched and drafted by Sean Bain. Legal review was provided by Sam Zarifi, Daniel Aguirre, Alex Conte and Ian Seiderman. Colleagues from Oxfam, the Myanmar Centre for Responsible Business, EarthRights International and the Vermont Law School also provided input that helped inform the report.

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Myanmar's 2014 Special Economic Zones (SEZ) Law does not conform to the State's international law obligations to protect human rights. The legal framework for SEZs in Myanmar does not establish clear procedures and lines of responsibility and accountability. This has contributed to human rights violations and abuses at Myanmar's three SEZ sites in Dawei, Kyauk Phyu and Thilawa.

Civil society groups have documented human rights violations by the State and human rights abuses by companies resulting from a lack of meaningful consultation, inadequate compensation and limited access to remedies for persons displaced in the development of SEZs in Dawei and Thilawa. People living on land acquired for these SEZs were displaced without proper planning for involuntary resettlement and before an Environmental Impact Assessment (EIA) was undertaken. This report finds similar problems occurring during preparations for the development of an SEZ in Kyauk Phyu, Rakhine State.

Minor infrastructure facilities constructed for the Kyauk Phyu SEZ in 2014 resulted in deterioration in living standards for persons displaced from farmland. The current land acquisition process for the SEZ, initiated in 2016, lacks transparency and contravenes national law governing land acquisition. If this process persists, land acquisition will result in further human rights violations.

Denying persons affected by development projects opportunities to participate in decision-making, and depriving them of adequate compensation or other reparation when resettlement occurs, is incompatible with human rights. It also contravenes international human rights standards. These include rights protected in the International Covenant on Economic, Social and Cultural Rights – which Myanmar has signed and is in the process of ratifying.

The Government of Myanmar can avoid human rights violations in SEZs by ensuring that SEZs are developed in line with the State's international human rights law obligations, and with international standards on involuntary resettlement that are recognized in the 2015 EIA Procedure and thus form part of Myanmar's national laws.

Further human rights violations abuses could be avoided in Kyauk Phyu by suspending the current land acquisition process and ensuring that the SEZ is developed and implemented in line with rule of law principles. In Rakhine State, one of Myanmar's poorest provinces and the site of widespread rights violations, the protection of human rights will be critical if the SEZ in Kyauk Phyu is to create economic opportunities and not contribute to the existing grave human rights situation.

The change in Myanmar's Government, transition in national governance structure and the reconstitution of SEZ governance bodies, in 2016, presents opportunities to reform and implement a legal framework for SEZs that protects human rights. In order to comply with Myanmar's human rights obligations, and with international standards on involuntary resettlement recognized in national law, the Government must amend the SEZ Law and 2015 SEZ Rules.

Further development of Myanmar's SEZs, and related investment agreements, should wait until legislative amendments are in place to facilitate the full protection of the rights of residents and workers in the zones.

The ICJ in this report identifies the legal framework for SEZs in Myanmar, including applicable national and international law. A case study of the Kyauk Phyu SEZ illustrates human rights concerns with the legal framework and its implementation in SEZs. The ICJ makes a series of recommendations directed towards government officials, investors and civil society actors with a view to protecting human rights in SEZs.

The report is based on both legal and factual research. The research includes interviews with over 100 people, from affected communities as well as actors from the business sector and government officials.

The report has two overall objectives: 1) to encourage and support effective measures by the Government of Myanmar aimed at bringing the development of SEZs into line with its international human rights law obligations; and 2) to provide a legal resource that supports efforts by affected communities, lawyers, civil society actors, NGOs, Government and investors to enable and ensure accountability for rights violations and abuses in SEZs.

Special Economic Zones

An SEZ is a delineated geographical area with a special legal regime for business activity. Many Southeast Asian countries have adopted SEZs, which typically involve major investments in infrastructure and demand large amounts of land. Proponents say that SEZs facilitate rapid economic development by creating investment incentives, while others say their economic success has been mixed. Human rights violations and abuses have often accompanied SEZs, both in Myanmar and elsewhere in Southeast Asia.

In the late 2000s, Myanmar's military government initiated the development of SEZs. The military-dominated Union Solidarity and Development (USDP) Government, which governed from 2011 to March 2016, enacted the 2014 SEZ Law to govern all of Myanmar's SEZs, replacing two previous SEZ laws. The SEZ Rules were issued in 2015 and provide further regulations.

In November 2016, the National League for Democracy (NLD)-led Government affirmed its commitment to SEZ projects previously initiated in Thilawa (operative since 2016), in Dawei and in Kyauk Phyu (both non-operative). In late 2016 plans for a fourth SEZ near Yangon were reported but the Union Government have made no formal announcements confirming these reports.

Law and governance in Myanmar

Myanmar's legal system is derived from the British common law system. However certain standard elements of this system, such as stare decisis (judgments based on precedent), have rarely been given effect since the 1962 military coup. The executive and military still wield significant influence over the judiciary and the legal profession, which lack independence. Public confidence in the legal system is very low and few people use the courts to access remedy.

The 2008 Constitution establishes a five-level system of national and subnational governance. The Union Parliament enacts legislation, promulgated by the Union President. Legislation often authorizes Ministries to issue bylaws providing further rules for implementation of laws. The General Administration Department (GAD) forms much of Myanmar's civil service, particularly at the state/region and township levels. The GAD reports to the Ministry of Home Affairs, which is headed by one of the three Ministers who are constitutionally appointed by Myanmar's military, the Tatmadaw.

Myanmar's international law obligations

Like all States, Myanmar has a duty to respect, to protect, and to fulfil human rights. Myanmar is also party to three international human rights treaties: the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

Despite Myanmar's relatively low rate of adherence to the principal international human rights treaties, many of the treaty rights form part of general international law and customary international law, and are therefore applicable in Myanmar.

International law also recognizes the rights of people affected by development projects to access timely and transparent information, have opportunities to be involved in meaningful consultations, and to participate in decision-making related to project developments and the resulting changes for the affected population.

Myanmar signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2015. The right to an adequate standard of living, enshrined in the ICESCR, protects the right to an adequate standard of living, including adequate food, water, clothing and housing. These rights also include security of tenure and protection against

forced eviction. The rights to health and to education are also important ESC rights that require protection.

In the development of SEZs, several international standards apply that are derived from international human rights law. These include the UN Guiding Principles and Guidelines on Development-Based Displacement, which reaffirm the prohibition on forced eviction in international law. The UN Guiding Principles on Business and Human Rights are also applicable, and reflect the consensus that States must protect the rights of people who may be adversely affected by economic activities.

Safeguard policies of the Asian Development Bank, the International Finance Corporation and the World Bank also provide commonly accepted standards. Myanmar's national laws require compliance with these safeguard policies in the development of SEZs.

These safeguard policies, and therefore Myanmar's national law, share the objectives of avoiding involuntary resettlement and/or minimising its adverse impacts. They include the principle that the livelihoods of displaced persons should improve or at least be restored. Persons experiencing relocation must be provided with secure tenure for replacement land, regardless of whether they previously possessed or did not possess formal land tenure rights.

Every right must be accompanied by the availability of effective remedies and reparation in the event of a rights violation or abuse. Human rights violations and abuses must be addressed by judicial mechanisms provided by the State, or by non-judicial mechanisms provided by States and/or business enterprises – these must always allow for recourse to judicial measures.

Myanmar's legal framework for SEZs

The SEZ Law must be read in connection not only with international law and standards, but also with other national laws. Multiple provisions in the SEZ Law reaffirm the applicability of national laws on land, environment and labour. This Law contains three chapters on investor's benefits but does not mention human rights. The SEZ Rules mainly elaborate investment procedures.

Key aspects of the legal framework for SEZs:

- The legal framework combines the SEZ Law, SEZ Rules and national laws such as on land, environment and labour.
- The SEZ laws establish governance bodies to facilitate investment, but do not clarify accountability for rights violations.
- The SEZ Law does not contemplate establishing governance arrangements where SEZ bodies may interfere with the authority of Ministries in SEZs: line Ministries retain their legal powers, such as for issuing approvals and enforcing environmental and labour standards.
- Myanmar's Environmental Impact Assessment (EIA) Procedure requires involuntary resettlement to comply with international standards of the Asian Development Bank and World Bank.
- Article 83 of the EIA Procedure provides that an SEZ Permit can only be granted to a Developer after the issuance of an Environmental Compliance Certificate by the Environment Ministry.
- To ensure compliance with the objectives of international standards on involuntary resettlement, recognized in national law, land acquisition in SEZs should occur only after the completion of a resettlement plan.
- The SEZ Management Committee must ensure worker's rights and entitlements, including wages, are not lower in SEZs.
- SEZ bodies govern SEZs; the Myanmar Investment Commission has no authority.

Governance & investment arrangements

The SEZ Law establishes a three-tier governance structure for the administration of SEZs. The Central Body is a multi-ministerial peak body that authorizes the development of SEZs and supervises implementation by lower bodies. The Central Working Body develops and provides policy advice to the Central Body, while each SEZ Management Committee manages and supervises the development and implementation of its respective SEZ.

The SEZ Law directs each Management Committee to establish a One Stop Service Centre (OSSC). The OSSC hosts representatives of various government departments in order to provide investors with all services in one place. The SEZ Law does not permit deviations from procedures and powers established in other laws applicable in SEZs, such as for company registration or environmental permits.

The special investment regime established by the SEZ Law is independent of the 2016 Myanmar Investment Law. The Myanmar Investment Commission (MIC) has no authority in SEZs, and its notifications and prohibitions do not apply in SEZs.

Land laws

The SEZ Law confers responsibility for land acquisition to the Ministry of Home Affairs. The Law does not specify which of the over fifty national laws governing land, overlapping and often conflicting, apply in SEZs. In practice, the 1894 Land Acquisition Act is the primary law used for State land acquisition in SEZs. Land laws enacted in 2012 – the Farmland Law and the Vacant, Virgin and Fallow Land Law – have also been applied in practice to determine compensation entitlements for persons affected by the acquisition of land for SEZs.

The SEZ Rules detail procedures for leasing land to investors in SEZs, but neither the Rules nor the SEZ Law considers procedures for planning or carrying out resettlement for persons whose home, land and/or livelihoods are displaced.

Environmental laws

The SEZ Law reaffirms the applicability of environmental laws in SEZs, without qualification. Under the 2015 Environmental Impact Assessment Procedure, the Government may commission a Strategic Environmental Assessment (SEA) to assess the cumulative environmental and social impacts of the SEZ and related developments. In each SEZ, an initial EIA must be undertaken for the entire zone while subsequent EIAs may also be required for individual business activities within the zone. The Environment Ministry determines when an EIA is required and issues an Environmental Compliance Certificate for projects it deems to be compliant with the 2012 Environmental Conservation Law.

The EIA Procedure mandates that EIA-type projects comply with international standards on involuntary resettlement, as accepted by the World Bank and Asian Development Bank. To comply with these standards, resettlement planning should occur prior to land acquisition, to ensure that alternatives have been explored and livelihood restoration plans are in place before any displacement. An EIA may explore alternatives to displacement, and so the EIA Report should also be finalized prior to commencing preparations for land acquisition.

While under international standards the State has ultimate responsibility for resettlement, the EIA Procedure and SEZ Law do not clearly delineate responsibilities between the SEZ developer, investors and the State.

Labour laws

While Myanmar's labour laws generally apply in SEZs, the SEZ Law provides for the Management Committee to be the first instance arbiter in disputes between employers and employees. It is unclear if this arrangement undermines or complements mechanisms under existing laws.

The Management Committee has a mandated duty to ensure labour rights and entitlements, such as the national minimum wage, are not diminished for employees in SEZs.

Human rights & the legal framework for SEZs

An analysis of the legal framework for SEZs in Myanmar reveals that it does not comply with the State's international law obligations to protect human rights. Checks and balances to accompany the discretionary powers of government bodies are inadequate. There are also concerns regarding the compliance of the SEZ Law with the principle of legality, which is a universal general principle of law requiring laws to be clear and unambiguous.

This report identifies five principal human rights concerns with the legal framework for SEZs:

1) Management Committee members exercise significant authority directing the development and implementation of SEZs, but the SEZ Law does not establish responsibilities for them to protect human rights in SEZs or provide for accountability for adverse human rights impacts.
2) Human rights protections in national laws are undermined because there is no clear guidance aimed towards the coordination of the application of land acquisition, EIA and involuntary resettlement procedures in SEZs.
3) Administrative arrangements for SEZ-level OSSCs could enable deviation from national laws protecting human rights and the environment.
4) The national minimum wage does not protect the right to just and favourable conditions of work and is insufficient to ensure a decent living.
5) Provisions in some national laws, including the 1894 Land Acquisition Act and the 2012 land laws, unlawfully challenge the constitutional jurisdiction of the courts, via finality clauses stating the decision of statutory bodies is final.

SEZ Committees have unclear accountability

Management Committees have various duties to supervise and coordinate the development and implementation of SEZs, while ensuring compliance with applicable laws. But the nature and scope of many of these duties are ambiguous. This makes it difficult for persons adversely affected by the SEZ to discuss, challenge or litigate in response to administrative decisions in the SEZ. This may also make it difficult for the Central Body to effectively manage Committees and ensure accountability.

Management Committees exercise significant influence over the development and management of SEZs. In each of Myanmar's three SEZ areas, the Committee has coordinated land acquisition and resettlement arrangements, in some instances in violation of national laws as well as international law and standards on involuntary resettlement.

While Management Committees instruct the GAD to acquire land, and have played a central role in coordinating EIAs, the SEZ Law does not clearly define the functions and duties of Committee members in these procedures. Nor does the SEZ Law establish

clear lines of authority and responsibility between the Committee members and other directly concerned actors such as companies and government departments. There is no formal means of accountability where Management Committee members fail to protect the rights of people in the zones.

Uncoordinated application of laws

The SEZ Law reaffirms that the development of an SEZ is subject to national land laws including those governing land acquisition, EIA and involuntary resettlement. The SEZ Law does not provide guidance or assign responsibility to coordinate these procedures, and the application of these laws tends to be uncoordinated.

To be compliant with international standards on involuntary resettlement, required by Myanmar's EIA Procedure, a resettlement plan should be developed prior to any land acquisition. Such a plan informs key decisions on where land acquisition will occur and how it will be implemented. An EIA may also lead to changes in development plans and so this should also precede any land acquisition involving resettlement. However, in each of Myanmar's three SEZs, land acquisitions have been carried out before the completion a resettlement plan. This is inconsistent with international standards, which form a part of national law, and with the State's international human rights law obligations.

The SEZ Rules undermine national laws

The SEZ Rules instruct Ministries to fully devolve statutory powers from the Ministry to departmental representatives on the OSSC. Article 22 provides that OSSC staff will issue permits and permissions in SEZs 'without getting any approvals or recommendations from the relevant Ministries.' This procedure undermines national laws and may weaken critical human rights and environmental protections.

Take for example decisions related to a developer's compliance with the EIA Procedure. The implementation of Article 22 would see a number of powers devolved to a small team sitting in the site-level OSSC Office. These include: the authority to determine whether an EIA is required; technical review of EIA reports and Environmental Management Plans; and critical decision-making on the issuance of an Environmental Compliance Certificate.

This arrangement undermines the principle of accountability because, unlike the relevant Minister, OSSC representatives do not have clear or formal systems or procedures for legal accountability in respect of their decisions. Without support from the responsible Ministry, the OSSC is unlikely to have the technical capacity and human resources to make considered and lawful decisions on issuing permits and approvals.

A conflict of interest may also arise between the dual roles of OSSC representatives. Under the SEZ Law the OSSC is 'supervised by' the Management Committee. Since the reconstitution of these Committees in October 2016, some OSSC representatives also serve as Committee members. They therefore have dual roles of promoting the zone as a Management Committee member, while also regulating the zone as an OSSC representative. Promoting while regulating the zone may present a conflict of interest, for example when an OSSC representative is considering issuing an approval, repealing a permit, or levying fines for a legal breach.

While the 2008 Constitution states that bylaws must conform to parent legislation, the Article 22 arrangements are not contemplated in the SEZ Law. For this reason, and because the provision interferes with other applicable laws, on its face Article 22 appears to be unconstitutional.

Minimum wage cannot protect livelihoods

Many recent studies show that minimum wage employment in Myanmar does not protect the right to just and favourable conditions of work. For people displaced by the development of SEZs, minimum wage employment appears to be the most likely potential opportunity for an alternative livelihood, for instance in garment factories.

However these jobs tend to be exploitative in Myanmar, particularly for women, and are insufficient to restore the livelihoods of persons who have experienced involuntary resettlement.

Administrative bodies do not displace courts

The jurisdiction of Myanmar's courts is provided for and described in the 2008 Constitution. Parts of the legal framework for SEZs, such as the 1894 Land Acquisition Act and the 2012 land laws, include a finality clause stating that the decisions of concerned statutory bodies are final, thus notionally exempt from judicial review. These provisions do not conform to the authority constitutionally conferred to courts and therefore the decisions of these bodies should not be considered as final.

Courts must have some power of review, at least to ensure that administrative bodies are acting reasonably and in accordance with the law, whilst respecting and protecting human rights. While few administrative disputes are referred to the courts in Myanmar, the judiciary nonetheless has authority to review administrative decisions, particularly through the application of constitutional writs.

Human rights concerns at Kyauk Phyu SEZ

This report provides an overview of the planned Kyauk Phyu SEZ in Rakhine State. Unlike Myanmar's two other SEZ sites, the ICJ is unaware of any widespread or systematic practice of involuntary resettlement or human rights violations associated with its development to date.

However this report identifies human rights concerns associated with the Kyauk Phyu SEZ, including recent preparations for land acquisition that do not comply with Myanmar laws and international standards. If these concerns are not addressed, there is a risk that human rights violations associated with the development of other SEZs will be replicated in Kyauk Phyu. This is particularly concerning in the context of Rakhine State, where there are significant ongoing human rights violations and an unstable security environment associated with the presence of armed forces and relations between Bhuddist and Muslim communities.

Findings are informed by interviews with local residents, local leaders, civil society groups, Government officials and private sector actors in Kyauk Phyu, Sittwe, Yangon and Nay Pyi Taw from April to December 2016. Government documents also inform such findings.

Site profile

Kyauk Phyu Township has a predominantly rural population mainly dependent on subsistence agriculture and fisheries for their livelihoods. Around half of farmers do not hold formal title but affirm land rights under customary tenure. Research for this report found that local residents generally have little if any information about plans for the SEZ.

There have been significant international investments in Kyauk Phyu over recent years. The township is the source of an oil and gas dual pipeline traversing four states and regions to China's western Yunan Province. Linked to this, a crude oil unloading terminal is located on Madei Island, adjacent to Kyauk Phyu. In 2013 a group of community organizers were charged and convicted of unlawful assembly for expressing dissent against land acquisition related to these investments. Disputes over compensation for displacement of land and livelihoods are ongoing and access to remedy has been limited. These existing projects are widely derided by local residents, with many saying that investments have not translated into benefits for the wider community.

These experiences of international investment are reflected in sceptical community perceptions toward new investments, as well as in a general lack of trust in local authorities to fairly oversee any future resettlement.

Key human rights findings of the Kyauk Phyu SEZ study:

- Around 20,000 people potentially face involuntary resettlement due to the SEZ.
- SEZ-related displacements in 2014 constituted forced evictions, violating the right to an adequate standard of living.
- The current land acquisition process, which will impact on human rights, is unlawful because key procedures of the 1894 Land Acquisition Act, such as for public notification, have not been followed.
- Government officials reportedly stated that possession of formal land tenure will be a prerequisite for receiving compensation, however residents of the designated SEZ area have been unable to register land, and international standards require that displaced persons are supported to restore their livelihoods regardless of if they hold formal tenure.
- Persons affected by the SEZ do not enjoy procedural rights established in international law, such as the right to information, or the right to access effective remedies and reparations.
- Minimum wage employment in the SEZ would be insufficient to restore livelihoods of displaced persons.

A minority Muslim population, predominantly of Kaman ethnicity, were based mostly in Kyauk Phyu Town before being displaced during violent conflict in Rakhine State in 2012. As with the Rohingya Muslim minority in other parts of Rakhine State, Kaman Muslims in Kyauk Phyu experience severe restrictions on movement, to which Bhuddists are not subject, that constitute multiple violations of human rights. Ongoing tension between Muslim and Bhuddist communities may contribute to future instability yet to date this does not appear to have been considered in plans for the SEZ or in broader economic planning for Kyauk Phyu.

Project overview

Plans for an SEZ and two deep seaports in Kyauk Phyu appear to have emerged around 2009, over time developing into plans for a megaproject. In December 2015 the then-outgoing USDP Government awarded tenders to the Chinese-led consortium CITIC, to develop the SEZ and the seaports. In November 2016, the NLD-led Government affirmed its commitment to developing this SEZ. As of February 2017, investment agreements had not been publically announced, and significant construction activities had not yet started.

There is limited publically available information about these projects. A promotional video by the project developer, China's CITIC Group, suggests the SEZ would create an investment and economic hub akin to Singapore. The seaports would process cargo to and from Europe, Africa and West-Asia. Associated road and potentially rail links to China could create alternative trade routes, linking China's western provinces with shipping routes through the Bay of Bengal.

The development of an SEZ in Kyauk Phyu should be understood in the context of foreign relations between the governments of China and Myanmar and the geopolitical significance of the deep seaports and transport links, which would reduce China's reliance on the congested Malacca Strait.

The value and viability of an SEZ in Kyauk Phyu is highly contested by stakeholders interviewed for this report as well as among many economists and analysts knowledgeable about the region. On the basis of existing evidence and research on the Kyauk Phyu SEZ, there are significant questions over its economic feasibility and its potential to contribute to economic development in Rakhine State.

Many have also expressed scepticism about the longer-term viability of an oil and gas industry in Kyauk Phyu, however not all economists share this view. Overall there appears to have been a lack of economic assessments and planning to inform Government decision-making about the SEZ.

According to internal Government documents the projects are scheduled to be completed by 2038 and consist of 'textile parks', 'construction parks,' 'residential parks' and the seaports. These projects combined would cover 1,736 hectares. Textile parks would likely centre on garment manufacturing. For the construction parks, Government and CITIC officials have identified logistics, machinery assembly, food processing and petrochemical processing as possible activities. No tender was awarded to develop the residential parks. Energy infrastructure would also be required.

The designated SEZ area covers 35 villages across nine village administrative tracts with a population of around 20,000 people. While information about resettlement plans is not publically available, land acquisition documentation acquired during research indicates that 20,000 people potentially face involuntary resettlement to make way for the SEZ and related projects. CITIC claims these projects will create 103,000 jobs, a figure roughly equivalent to the total working age population in the township as enumerated in the 2014 census.

Site-level preparations

Of Myanmar's three planned SEZs, the Kyauk Phyu SEZ is the least advanced in terms of its development. The only construction activities to date occurred in 2014-15, for two water reservoirs built to service a future zone. These subprojects displaced around 26 families.

In 2016 the GAD coordinated preparations to acquire 1,832 acres of land for the SEZ, most of which is farmland. This included surveying and planning for the compulsory acquisition of 250 acres for Phase 1 of the SEZ construction. There has been no publically available information about these activities.

An Environmental Impact Assessment for the zone has not yet been conducted, and again there is no publically available information about involuntary resettlement plans. Local authorities have identified a potential site for relocation, however that area is understood to be insufficient to provide for all persons facing displacement.

In Myanmar, while the State has the authority to acquire land for public purposes, compulsory acquisition must be carried out in line with national laws and international law obligations. The acquisition of land for the Kyauk Phyu SEZ is so far not compliant with national or international laws.

Forced evictions in 2014 for SEZ subprojects

When families were displaced from farmland in 2014 to construct reservoirs for the SEZ, officials did not follow legal procedures under the Land Acquisition Act, including provisions requiring public notification and guiding compensation. Management Committee members coordinating compensation (most of whom were replaced in October 2016) did not fulfil their promises of replacement land.

In 2014, compensation and relocation seems to have been an afterthought rather than part of a planning process. Overall the process was opaque, with payments divided into different categories, including 'compassionate money,' some of which a private company paid.

Displaced persons say they felt pressured to accept compensation which was insufficient to restore their livelihoods, and that their living standards deteriorated as a result. This deterioration in their standard of living, including decreased access to food and livelihoods, constitutes retrogression in the fulfilment of ESC rights, and is in contravention of international standards. These displacements constitute forced evictions, prohibited by international law, and are not compliant with international standards on involuntary resettlement.

The management of these initial activities has established a poor precedent for the development of the SEZ in Kyauk Phyu.

Land acquisition preparations during 2016

In February 2016, seemingly at the direction of the then-Management Committee, the Ministry of Home Affairs issued a Notification of intent to acquire 1,832 acres of land for the SEZ. However, the Notification was not posted in the area or published in the Union Gazette, as is required by the Land Acquisition Act. Over one year since preparations started, basic information about this acquisition is still not publically available.

Persons interviewed for this report indicate that at a meeting with the then-Management Committee and CITIC in January 2016, local leaders were told that only persons with formal land title would receive compensation for land acquired. Some farmers in the designated SEZ area say they have since faced difficulties registering their land. This suggests the administrative process for issuing Land Use Certificates under the 2012 Farmland Law is not working effectively in Kyauk Phyu. There is a risk that these farmers will not receive adequate compensation, resulting in deteriorating living standards.

In March 2016, surveying activities were conducted in the 250 acres Phase 1 area of the planned SEZ. By November 2016, detailed plans had been developed to acquire land from 77 farming families. People who will be affected by this acquisition say they have not been properly consulted and are yet to be included in any decision-making processes.

Land acquisition is unlawful if the process does not follow procedural requirements established in the Land Acquisition Act. And because the EIA may lead to changes in project plans, land acquisition occurring before its completion may interfere with the international principle of avoiding resettlement.

Alternative livelihood options

Local residents have limited experience in income generation outside agriculture and fisheries, and there are no legal obligations on SEZ employers to hire local residents. There are no legal guarantees that the development of an SEZ will lead to employment opportunities for residents of Kyauk Phyu.

Significant support will be required to assist residents, particularly those who have experienced resettlement, to change from agricultural livelihoods to jobs in industry. So far there has been a lack of planning to protect livelihoods and support alternative jobs. Proper resettlement planning, occurring prior to any displacement, is critical to enabling the State to protect the right to just and favourable conditions of work. This is ever more important for marginalized and disadvantaged social groups in Kyauk Phyu including women, children and Muslim religious minorities.

Impacts on the rights of Muslims

Muslim residents of Kyauk Phyu have lived in camps since 2012, two of which are located in the township, others in neighbouring townships. Their movement remains severely restricted. Mostly forbidden from leaving the camps, these women, men and children rely on assistance from aid agencies and Muslim associations based in Yangon.

The Muslim community, which has been faced with a deteriorating human rights situation in Rakhine State, has so far not been included or considered in planning processes for the SEZ. To a lesser degree, Buddhist residents displaced during the 2012 conflict also have heightened vulnerabilities that need to be taken into account. The failure to address this situation contributes to human rights violations and undermines the potential for sustainable development in Kyauk Phyu and Rakhine State more broadly.

Impacts on the rights of Women

Women in Kyauk Phyu have a lower socioeconomic status than men because of gender discrimination. They are not represented in key positions of authority in local administration, religious institutions or on the SEZ Management Committee. This makes women less likely to receive relevant and timely information about the SEZ, and to participate in decision-making processes affecting them.

Economic and demographic transformations associated with big infrastructure projects can have significant impacts, for better or worse, on women. Experiences in Myanmar and in Asia indicate that women are more likely than men to be employed in textiles, which may a key entry point for local employment in the SEZ. However recent studies show that conditions in Myanmar's garment factories are often exploitative. If jobs materialize, these may be insufficient to restore the livelihoods of persons displaced by the SEZ.

Conclusions

In Myanmar, there has been a lack of accountability for human rights violations committed during the development and implementation of SEZs. A key impact has been interference, by the State and companies, with the enjoyment of the right to an adequate standard of living and other economic, social and cultural rights.

The SEZ laws do not adequately protect the rights of persons living or working in SEZ areas. Amendments to the SEZ Law and SEZ Rules are required to bring the legal framework for SEZs in line with the State's international human rights law obligations.

Changes to laws alone are insufficient to protect rights: laws must be fully implemented by the relevant authorities. Broader reforms, including updating land laws in line with the National Land Use Policy and international standards, enhancing the independence of the judiciary, and including in investment agreements an affirmation of the State's right to regulate, are also critical to protect human rights in Myanmar.

To protect against further human rights violations in SEZs, the Government of Myanmar must place a moratorium on further land acquisition and construction activities in SEZs, and deter from entering binding investment agreements in SEZs, until an improved legal framework is in place that can enable the protection of human rights in SEZs.

Recommendations

To the Legislature:

1. Protect human rights by amending the SEZ laws, through meaningful public consultation in accordance with international standards, to: a) ensure genuine public participation in planning and decision-making processes; b) establish specific duties and lines of accountability of the Management Committees to protect human rights; and c) specify differentiated responsibilities for involuntary resettlement in SEZs, in alignment with the 2015 EIA Procedure.
2. Align land laws with international human rights law obligations and with the National Land Use Policy, which recognize customary land tenure and women's rights to own and use land.
3. Protect the human rights of Muslims in Rakhine State in accordance with the rule of law, including by conferring rights in line with the State's international law obligations.

To the SEZ Central Body:

4. Order a moratorium on the development of SEZs, and on entering related investment agreements, until the SEZ laws have been amended to ensure conformity with international human rights law and standards.
5. Appoint as Management Committee members women, representatives from communities affected by SEZs and legal experts in the protection of human rights and the environment.

To the Ministry of Commerce:

6. Commission a Strategic Environmental Assessment, in line with Chapter 10 of the EIA Procedure. This would involve consultation to inform decision-making on the Kyauk Phyu SEZ and related projects, by identifying cumulative environmental and social impacts of all the developments in Kyauk Phyu, while considering conflict dynamics and economic development in Rakhine State.

To the Kyauk Phyu Management Committee and General Administration Department:

7. Suspend land acquisition until after the completion of a resettlement plan that is in line with international standards, as required in the EIA Procedure.
8. Establish a mechanism to enable genuine public participation in decision-making.

To developers and investors in SEZs:

9. Take heightened due diligence measures to ensure investments are not complicit in human rights violations, particularly related to unlawful land acquisitions that violate human rights.

Principal elements of the legal framework for SEZs[1]

National Law	
Constitutional Law	2008 Constitution
Investment Law	2014 SEZ Law 2015 SEZ Rules
Land Law	1894 Land Acquisition Act 2012 Farmland Law 2012 Vacant, Virgin and Fallow Land Law
Environmental Law	2012 Environmental Conservation Law 2014 Environmental Conservation Rules 2015 Environmental Impact Assessment Procedure
Labour Law	2011 Labour Organisation Law 2012 Settlement of Labour Disputes Law 2013 Employment and Skills Development Law 2013 Minimum Wage Law
International Law and Standards	
Human rights treaties ratified by Myanmar	Convention on the Elimination of all forms of Discrimination Against Women Convention on the Rights of the Child Convention on the Rights of Persons with Disabilities
Human rights treaties signed by Myanmar	International Covenant on Economic, Social and Cultural Rights
Applicable international standards	Asian Development Bank Safeguard Policy Statement International Finance Corporation Performance Standard 5 on Land Acquisition and Involuntary Resettlement World Bank Environmental and Social Standard 5 on Land Acquisition, Restrictions on Land Use and Involuntary Resettlement

1 This table presents important laws. Exclusion of a law from this list does not suggest it doesn't apply.

1. INTRODUCTION

1.1 Introduction

This report provides an overview of Myanmar's legal framework governing Special Economic Zones (SEZs), and assesses whether it is in conformity with the State duty to protect human rights including by provide access to an effective remedy. Drawing on extensive legal research and interviews, this report identifies and assesses concerning aspects of the legal framework. A case study on development of a SEZ in Kyauk Phyu, based on research in Rakhine State, highlights how these legal problems play out in practice. While the responsibilities of companies are considered, the report primarily considers the functions, duties and actions of government agents in relation to the State's international human rights law obligations.

The nascent state of Myanmar's SEZs, and the change in Government in 2016, mean there are opportunities to amend the legal framework and its implementation to address problems with the development of SEZs to date.

The recent development of SEZs in Myanmar has been accompanied by documented human rights violations and abuses.[2] These instances involve violations of internationally recognised rights to food, health and adequate housing, as well as the procedural rights to participate in development and the right to access to an effective remedy. There has also been a lack of accountability for human rights violations committed in the context of the development and implementation of SEZs. A key impact has been interference with people's enjoyment of the right to an adequate standard of living.

A general problem is the lack of clarity in many aspects of the SEZ Law, which creates legal uncertainty about the functions and duties of Government bodies and investors. Many actors spoken to during research for this report were confused about aspects the law and openly said there was a lack of clarify about functions, duties and procedures that impact on human rights and the environment. This complicates the task of establishing accountability and providing redress where human rights abuses may occur. The judiciary lacks independence from the executive and the Myanmar military (known as the Tatmadaw) and does not have the necessary human and material resources to fully carry out its functions. These deficits in essential rule of law elements in turn contribute to the deficit in effective accountability and redress .

To protect against human rights violations and abuses, the Government needs to reform the SEZ Law before authorizing further works in the three designated zones – only one of which is currently operational – and before establishing any further SEZs. While governance and implementation challenges will remain, law reform is a critical and essential measure required to fulfil the State's international law obligations.

This report sets out recommendations to the Government of Myanmar for legal reform and other measures required to protect human rights in the development of SEZs.

1.2 Special Economic Zones in Myanmar

An SEZ is a delineated area with a special legal regime to govern investment and business activities. SEZs vary significantly in size, location and characteristics.[3] In Asia, there are SEZs in China, India, Malaysia and the Philippines, where they have been justified as an important and necessary part of development strategies.[4] Recently, Thailand has also adopted SEZs.[5] Proponents tend to view SEZs as a means of facilitating rapid economic development by creating incentives for both foreign and domestic

2 Daniel Aguirre and Vani Sathisan, "Kyaukphyu: History to repeat itself in Burma's newest Special Economic Zone?," Asian Correspondent, 20 April 2015.
3 Oxfam, "Responsible Investment in Kyauk Phyu: Lessons From Experiences of SEZ Developments," 2017.
4 Connie Carter and Andrew Harding (eds), *Special Economic Zones in Asian Market Economies,* Routledge, 2011.
5 Kongpob Areerat, "Locals Pay the Price as Junta Pushes for Songkhla SEZ," 31 October 2016, Prachatai.

investment.[6] Others note that the economic success of SEZs has been mixed.[7] Used to create a space apart from degraded public infrastructure,[8] SEZs typically involve major infrastructure investments, and so generally carry significant potential for human rights and environmental impacts.

Myanmar has three planned SEZs at the time of publishing this report.[9] The sole site currently in operation is in Thilawa nearby Yangon, where 12 factories opened in late 2016.[10] The other zones, which are not yet operative, are nearby the south-eastern town of Dawei in Tanintharyi Region, and in Kyauk Phyu in the western province of Rakhine State. Plans for SEZ-related infrastructure include the construction of deep seaports in both Dawei and Kyauk Phyu. Preparatory works have occurred at these two non-operative sites, including land acquisition and infrastructure sub-projects such as roads and dams. Investment agreements with developers and financiers remain under negotiation and major construction activities are yet to commence in those two sites.

The impetus for establishing SEZs in Myanmar seems to have come from Senior General U Than Shwe, Head of State from 1992 to 2011.[11] In its final months, the military Government overseen by the State Peace and Development Council decreed two laws to establish SEZs.[12] These were later repealed and replaced by the 2014 SEZ Law,[13] promulgated by President U Thein Sein, who led the military-dominated Government ruled by the Union Solidarity and Development Party from 2011 to 2016. SEZs in Myanmar are established under this SEZ Law.

The present National League for Democracy (NLD)-led Government, elected in November 2015 and in office since April 2016, has stated its commitment to SEZs.[14] In late 2016 the governance bodies for SEZs, including the inter-ministerial Central Body, were reconstituted.[15] The Ministry of Commerce is the focal ministry for SEZs.[16] It is understood that the Ministry has sought external advice on improving the institutional structure for SEZ governance and on feasibility studies for two additional SEZs on the eastern borders.[17] In late 2016 there were unconfirmed reports of plans for a fourth SEZ in Yangon Region.[18]

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6 See: Amit K Khandelwal and Matthieu Teachout, "IGC Policy Note: Special Economic Zones for Myanmar," International Growth Centre, February 2016, pp. 23.

7 See: Sean Turnell, "Legislative Foundations of Myanmar's Economic Reforms," in Melissa Crouch and Tim Lindsey (eds), "Law, Society and Transition in Myanmar," 2014, Hart Publishing Ltd, pp. 194-197. Oxfam, "Responsible Investment in Kyauk Phyu: lessons from experiences of SEZ developments," January 2017.

8 Soe Lin Aung, "The Thick and Thin of the Zone," July 2016, LIMN Magazine.

9 See: Ministry of Industry, "Industrial Policy" February 2016, Art. 48. Gazette of the Republic of the Union of Myanmar (24 June 2016). Plans for a fourth SEZ near Yangon were reported in late 2016 but at the time of writing had not been confirmed by the Union Government. The fourth potential SEZ is not examined in this report. This report looks at the three confirmed SEZs (at February 2017), in Dawei and Kyauk Phyu and Thilawa. Ye Mon and Myat Nyein Aye, "Yangon Region to get second SEZ," 14 December 2016, The Myanmar Times.

10 Tin Yadanar Htun and Zay Yar Lin, "Thilawa Zone B to Start in November," 9 August 2016, The Myanmar Times.

11 It is understood that Senior General Than Shwe was inspired by a visit to a SEZ in China. See: Shwe Gas Movement, "Drawing the Line: the Case Against China's Shwe Gas Project, for Better Extractive Industries in Burma", September 2013, pp. 10. For more on the history of SEZs in Myanmar, see: Charlie Thame, "SEZs and Value Extraction from the Mekong: a case study of the control and exploitation of land and labour in Cambodia and Myanmar's special economic zones' Bangkok: Focus on the Global South [Internal Draft]," December 2016, pp. 30.

12 2011 Dawei SEZ Law, 2011 Myanmar SEZ Law.

13 2014 SEZ Law, Art. 91. The SEZ Law was reportedly developed with Japanese support. See: Dr. Naruemon Thabchumpon, Dr. Carl Middleton and Mr. Zaw Aung, "Development, Democracy, and Human Security in Myanmar: A Case Study of the Dawei Speical Economic Zone", July 2012, pp. 13. An attempt by the ICJ to discuss the 2014 SEZ Law with a Japanese law firm, understood to have supported its drafting, was unsuccessful.

14 Global New Light of Myanmar, "State Counsellor meets with Central Body for Myanmar Special Economic Zone," 16 November 2016.

15 President's Office, "Establishment of SEZ Central Body and Central Working Body," 12 August 2016, Notification 59/2016. Myanmar SEZ Central Body, "Establishment of the Kyauk Phyu SEZ Management Committee," 12 October 2016, Notification 1/2016.

16 In 2016 the focal ministry for SEZs transferred from the Ministry of National Planning and Economic Development to the Ministry of Commerce.

17 ICJ communications, sources, Yangon, October 2016. It is understood that feasibility studies are being considered for the eastern border towns of Muse and Myawaddy. Note feasibility studies were conducted in 2006 for SEZs in Hpaan and Mawlamyine (Union Gazette, vol. 67, no. 27, 24 June 2016).

18 Ye Mon and Myat Nyein Aye, "Yangon to get second SEZ," 14 December 2016, The Myanmar Times.

1.3 Myanmar's legal and governance systems

Myanmar's legal system is derived from the British common law system, largely as implemented in colonial India. In practice, standard components of the common law system, such as written judgments and reliance on precedent, have been rarely been given effect since the 1962 military coup.[19] Since 1962, the judiciary and legal profession were intentionally and systematically degraded by successive military regimes.[20]

The executive and military continue to wield undue influence over the judiciary, often interfering in politically sensitive and criminal cases. [21] Lawyers lack independence and continue to suffer from decades of restrictions, harassment and monitoring by state security officials.[22] The Attorney General's Office has been unwilling or unable to address major problems like corruption and human rights violations by State officials, while the ill-founded prosecution of human rights defenders and political opponents continues.[23] Public confidence in the legal system is very low. [24] In many parts of the country, legal and governance systems are administered by armed groups, drawn from the country's many distinct ethnic groups, many of which have their own governance structures. [25]

The 2008 Constitution provides for a separation of powers and the creation of a structure of government with different levels: Union; State or Region; District; Township; and Ward or Village Tract.[26] For most people in Myanmar, interaction with the State tends to be through the Ward/Village Tract or Township offices managed by the General Administration Department (GAD).

The GAD is established in subnational governance, forming much of the civil service for state and regional governments while also providing administrative functions for districts and townships.[27] The GAD is one of four departments run by the Ministry of Home Affairs.[28] The Minister of Home Affairs, along with the Minister of Border Affairs and the Minister of Defence, are constitutionally appointed by Myanmar's military, the *Tatmadaw*. In supervisory and command terms, these ministries are answerable to the Commander in Chief of the *Tatmadaw*.

Since political reforms undertaken from 2011, significant legislative activity has taken place including the enactment of new land laws, environmental laws, labour laws and the SEZ Law.[29] The NLD-led Government was elected in November 2015, and in April 2016 became the first democratically elected Government to assume authority in five decades.[30] The NLD's election manifesto includes commitments to peace, the rule of law and the protection and improvements of rural livelihoods.[31] Cohabitation and cooperation with the *Tatmadaw*, which maintains control of important ministries, is a key challenge for the NLD.[32]

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19 ICJ, "Right to Counsel: the Independence of Lawyers in Myanmar," 2013, pp. 4. See discussion of the common law in Myanmar, in: ICJ, "Handbook on Habeas Corpus in Myanmar," 2016, pp. 23.
20 ICJ, "Myanmar: attacks on justice," 2000. Makhdoom Ali Khan, "The Burmese Way: to Where? Report of a Mission to Burma," ICJ, 1991.
21 ICJ, "Right to Counsel: the Independence of Lawyers in Myanmar," 2013.
22 ICJ, "Right to Counsel: the Independence of Lawyers in Myanmar," 2013.
23 See: ICJ, "Handbook on Habeas Corpus in Myanmar," 2016. Human Rights Watch, "They Can Arrest You at Any Time: the Criminalization of Peaceful Expression in Burma," 2016, Human Rights Watch. Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, UN Doc: A/HRC/25/64, para. 4.
24 Lisa Denney, William Bennett and Khin Thet San, "Making Big Cases Small, Making Small Cases Disappear," My Justice, 2016.
25 Many of these Ethnic Armed Organisations have been in engaged in armed conflict with the Government of Myanmar, on and off, for decades. Many EAOs have administrative structures running parallel to their military wing, and these structures are generally preferred by communities as sites for accessing services and seeking access to remedy. See: Brian Cartan and Kim Jollife, "Ethnic Armed Actors and Justice Provision in Myanmar," The Asia Foundation, October 2016.
26 A village tract may consist of anywhere from one to around ten villages.
27 See: Kyi Pyar Chit Saw and Matthew Arnold, "Administering the State in Myanmar: An Overview of the General Administration Department," October 2014, Myanmar Development Resource Centre and The Asia Foundation, Discussion Paper No. 6.
28 See also: Phyo Thiha Cho, "All levels of Government Administration are under authority of the Military Chief," 1 February 2016, Myanmar Now.
29 For a discussion of the role of parliament during the USDP-Government, see: Thomas Kean, "Myanmar's Parliament: From Scorn to Significance," in Cheeseman, Farrelly & Wilson (eds), *Debating Democratization in Myanmar,* Institute of Southeast Asian Studies, Singapore, 2014.
30 See: ICJ, "Implementable Action Plans to the New Parliament and Government," May 2016.
31 National League for Democracy, "2015 Election Manifesto," 2015.
32 International Crisis Group, "Myanmar's New Government: Finding Its Feet?," 29 July 2016, pp. 7.

1.4 Methodology

Over the period April to December 2016, 71 people were interviewed in Nay Pyi Taw, Thilawa, Sittwe and Yangon; and 55 people were interviewed in Kyauk Phyu [total of 49 women and 77 men]. This includes interviews with: residents in Kyauk Phyu, including women and displaced Muslims; lawyers; civil society actors; religious leaders; members of parliament; civil servants and senior Government officials at village tract, township, district, state and Union levels; senior SEZ officials including the Minister of Commerce, the former Kyauk Phyu SEZ Management Committee and the incumbent Kyauk Phyu SEZ Management Committee; current and potential investors in SEZs in Myanmar; Non-Government Organisations, think tanks and researchers. An additional cumulative total of 86 participants attended workshops held by the ICJ in Kyauk Phyu during this time; discussions in these workshops also inform this report.

Legal and background research is largely based on national and international legal materials, reports, books and news in both Burmese and English languages. A number of internal Government documents were acquired to inform this research and these inform key findings, particularly in relation to the case study of the Kyauk Phyu SEZ.

2. INTERNATIONAL LAW AND STANDARDS

Myanmar, like all States, has a duty to respect, to protect, and to fulfil human rights.[33] Myanmar is party to several international human rights treaties: the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the sale of children , child prostitution and child pornography and the Convention on the Rights of Persons with Disabilities. Myanmar has also signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Optional Protocol to the Convention on the rights of the Child on the involvement of children in armed conflict, both in 2015.

Despite Myanmar's relatively low rate of human rights treaty adherence, many of the treaty rights form part of general and customary international law, and are therefore applicable in Myanmar.[34] International law also recognizes the rights of people affected by development projects to access timely and transparent information, have opportunities to be involved in meaningful consultations, and to participate in decision-making related to project developments and the resulting changes for the affected population.

In the development of SEZs, several international standards apply that are derived from international human rights law. Safeguard policies of the Asian Development Bank, the International Finance Corporation and the World Bank also provide commonly accepted standards. Myanmar's national laws require compliance with these safeguard policies in the development of SEZs. [35]

Along with national laws, the State's international human rights law obligations, as well as safeguard policies recognized in national law, form part of the legal framework for SEZs in Myanmar.

2.1 State's Duties to Respect, to Protect, and to Fulfil Human Rights

2.1.1 Human rights treaties

Myanmar's international human rights obligations flow from the UN Charter, human rights treaties, general and customary international law. Declaratory instruments by UN intergovernmental bodies and expert sources as well as authoritative commentary by treaties and jurisprudence by courts serve to clarify and provide specificity to these legal obligations.

The rights set out in the Universal Declaration of Human Rights and the principal human rights treaties, especially the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, are universal and enjoyed by all persons irrespective of nationality. The human rights treaties impose on States Parties specific obligations aimed to guarantee and ensure protection of those rights.

33 See, for example: the Committee on Economic, Social and Cultural Rights (CESCR), Report on the Twentieth and Twenty-first Sessions, U.N. ESCOR, Comm. on ESCR, 20–21st Sess., 236, 276, U.N. Doc. E/2000/22, E/C.12/1999/11 (2000); General Comment No. 12: The Right to Adequate Food, U.N. ESCOR, Comm. on ECSR, 20th Sess., 14–20, U.N. Doc. E/C.12/1999/5 (1999); General Comment No. 13: The Right to Education, U.N. ESCOR, Comm. on ECSR, 21st Sess., 46–48 U.N. Doc. E/C .12/199/10 (1999); Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles) adopted by Maastricht University and the International Commission of Jurists on 28 September 2011, principle 3.

34 Myanmar is not yet a party to the following principal human rights treaties: the International Covenant on Civil and Political Rights (ICCPR); the First Optional Protocol to the ICCPR (on a communication procedure); the Second Optional Protocol to the ICCPR aiming for the abolition of the death penalty; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment; The Optional Protocol to the Convention Against Torture; the International Convention for the Protection of All Persons from Enforced Disappearance; the International Convention on the Rights of all Migrant Workers and Members of their Families; the Optional Protocol to the CEDAW (on a communication procedure), the Optional Protocol to the CRPD (on a communication Procedure); the third Optional Protocol to the CRC (on a Communication Procedure) and Additional Protocols to other human rights conventions.

35 2015 Environmental Impact Assessment Procedure, Art. 7.

Table: Human Rights Treaties and Labour Conventions signed or ratified or acceded to by Myanmar

Treaty	Adoption	Entry into force	Ratification or Accession
Convention on the Prevention and Punishment of the Crime of Genocide	9 December 1948	12 January 1951	14 March 1956
International Covenant on Economic, Social and Cultural Rights (ICESCR)	16 December 1966	3 January 1976	Signed but not yet Ratified: 16 July 2015
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	18 December 1979	3 September 1981	22 July 1997
Convention on the Rights of the Child (CRC)	20 November 1989	2 September 1990	15 July 1991
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	25 May 2000	12 February 2002	28 September 2015
Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	25 May 2000	18 January 2002	16 January 2012
Convention on the Rights of Persons with Disabilities (CRPD)	12 December 2006	3 May 2008	7 December 2011
International Labour Organization (ILO) Convention on Forced Labour (n°29)	28 June 1930	1 May 1932	4 March 1955
International Labour Organization (ILO) Convention on Freedom of Association and Protection of the Right to Organize (n°87)	9 July 1948	4 July 1950	4 March 1955
ILO Convention on Worst Forms of Child Labour (n°182)	17 June 1999	19 November 2000	18 December 2013

2.1.2 Duties to protect, respect and fulfil

The *duty* to respect requires States or its agents, when discharging public powers, to refrain from interfering with the enjoyment of a right by rights-holders; the State must abstain from conduct giving rise to violation.[36] States must, for almost all rights, respect the rights of all persons both within their territories and, within a somewhat narrow scope, extraterritorially.[37] A bedrock principle of human rights law is that rights are not dependent on citizenship, and human rights treaties and other instruments

36 See, for example: SERAC and CESR v. Nigeria, African Commission on Human and Peoples' Rights, Communication No. 155/96, 13-27 October 2001, para. 61 and 62.
37 2011 Maastricht Principles, principle 19.

intentionally do not limit rights protection to citizens.[38] Under the UN Charter, States are obliged to establish institutional arrangements necessary to respect human rights, including through international cooperation.[39] This includes the provision of an effective system to administer justice and provide access to effective remedies and reparation with respect to any violation by the State or its agents.[40]

The *duty* to protect obliges States to prevent third parties from impairing the enjoyment of rights of all persons. The duty to protect requires States to take necessary measures to prevent, stop and obtain redress or punishment for interference in the enjoyment of rights by third parties including individuals, business enterprises and other non-State actors.[41] States are obliged to regulate in order to prohibit any interference with persons' enjoyment of rights.[42] Provision of an effective system to administer justice is also critical to enforce such regulations and enable access to effective remedies and reparation in cases of rights violations or abuses.[43] In respect of the duty to protect, measures may include: reform or repeal of laws inconsistent with rights obligations;[44] regulation, inspection and monitoring of private party conduct;[45] enforcing administrative and judicial sanctions for violations or abuses by third parties;[46] ensuring those affected by abuses have access to effective remedy;[47] and taking into account international legal obligations related to human rights when entering into agreements with other States, international organizations or companies.[48]

The *duty to fulfil* obliges States to take positive actions to facilitate the enjoyment of human rights. The State must take deliberate, tangible and targeted steps toward progressively achieving the full realization of rights.[49] Although the full realization of ESC rights may be realized progressively over time, States have an immediate obligation to fulfil minimum essential levels of each right and may not take regressive measures towards such realization. Actions towards this end can include legislative, administrative,

38 For instance, each of the ICCPR rights apply to all persons, with the limited exception on voting and the right to take place in public affairs, in Article 25 of the ICCPR. The human rights committee's general comment 15 on the position of aliens under the Covenant gives full detail, but starts with the statement "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens."

39 Article 55, 56 of the UN Charter "[A]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55," which includes "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," as well as "higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems, and international cultural and educational cooperation." Charter of the UN signed on 26 June 1945 in San Francisco, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force 24 October 1945).

40 ICJ "Adjudicating Economic, Social and Cultural Rights at National Level, A Practitioners Guide," 2014, pp. 58.

41 See: Principle 1 of the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annexed to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31 (2011), adopted by the Human Rights Council in its resolution A/HRC/RES/17/4 (2011): "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to pre- vent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication." On State obligations related to abuses by business enterprises affecting children, see Committee on the Rights of the Child, General Comment No.16, UN Doc. CRC/C/GC/16 (2013).

42 2011 Maastricht Principles, principle 24.

43 ICJ, "Adjudicating Economic, Social and Cultural Rights at National Level, A Practitioners Guide," 2014, pp. 58. Also see, case: SERAC and CESR v. Nigeria, African Commission on Human and Peoples' Rights, Communication No. 155/96, 13-27 October 2001, para. 54. Cases of international courts and treaty bodies dealing with breaches of the obligation to respect also include Islamic Community in Bosnia and Herzegovina, Human Rights Chamber for Bosnia and Herzegovina, CH/96/29, 11 June 1999; Quaker Council for European Affairs v. Greece, European Committee of Social Rights, Complaint No. 8/2000, 27 April 2001.

44 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines), Art. 15(b).

45 ICJ "Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability," 2008, pp. 45.

46 ICJ, "Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability," 2008. See also: Maastricht Guidelines, Art. 15(d).

47 Guiding Principles on Business and Human Rights: Implementing the framework "Protect, Respect and Remedy" UN Doc. United Nations A / HRC / 17/31 (2011), Principle 25 and comment on that principle. Note from the ICJ (2008) Courts & Legal Enforcement paper, that: the Council of the United Nations human rights subscribed to these principles in its resolution 17/4, Doc. United Nations A / HRC / RES / 17/4 (2011).

48 Maastricht Guidelines, Art. 15(j).

49 CESCR General Comment 3, para. 2. The principle of progressive realization is based upon the recognition that, due to resource and capacity constraints, not . Office of the High Commissioner for Human Rights (OHCHR), *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2006), para. 49. See also: CESCR, General Comment 3, para. 9. Importantly, this principle is only applicable to ESC rights, and even then it is not applicable to core minimum levels of each right, nor is duty to respect ESC rights subject to progressive realization. .

budgetary, judicial and other measures.[50] Acknowledging that limitations on resources can place constraints upon States,[51] the Committee on Economic, Social and Cultural Rights (ESCR Committee) has emphasized the importance of international cooperation to achieve these rights.[52] However, a lack of international assistance should not be interpreted as justification for the State to cease or delay the actions necessary for progress toward the full realization of human rights.[53]

States can violate the duty to fulfil by failing to take adequate steps, including by the omission of protections of the failure to undertake prompt, independent and effective investigations into conduct to hold perpetrators to account. Legislation that is inconsistent with rights, or a lack of legislation protecting rights, does not justify a failure to fulfil human rights. Obligations to fulfil can provide protections against substandard provision of State services, insufficient allocation of State resources, and the failure to implement statutory obligations, among others.[54] The duty to fulfil applies to all human rights, and is especially critical for the realization of economic, social and cultural rights.[55]

2.2 Economic, Social and Cultural Rights

Myanmar has international law obligations to respect, to protect and to fulfill Economic, Social and Cultural Rights. Compliance with these obligations must be upheld when the State develops laws and economic projects. The right to an adequate standard of living and the prohibition on forced eviction are of particular importance when developing and implementing projects involving land acquisition and/or involuntary resettlement.

The International Covenant on Economic, Social and Cultural Rights codifies the protection of livelihood rights such as the right to work and to just and favourable conditions of work, the right to health and rights to food, clothing and the right to adequate housing, which carries with it[56] a prohibition on forced eviction as a component of the right to adequate housing.[57] Myanmar signed the ICESCR in July 2015.[58] Although yet to ratify the treaty, Myanmar is obliged to refrain from conduct that defeats its object and purpose, meaning, among other things, that it should at least respect the Covenant in general terms.[59]

50 ICJ, "A Guide to International Business and Human Rights Standards for Myanmar," 2016.
51 CESCR General Comment 3, para. 1.
52 In accordance with Art. 55 and 56 of the UN Charter. The Committee on the Rights of the Child has also stated that when States ratify the Convention on the Rights of the Child, they take obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation. Committee on the Rights of the Child (CRC), General Comment No. 5, CRC/GC/2003/5 (2003), 5. Principle 28 of the Maastricht Principles also says "All States must take action, separately, and jointly through international cooperation, to fulfil human rights within their territories and extraterritorially."
53 ICJ, "Droits sociaux et régimes spéciaux d'exportation : Le cas du textile et de l'agriculture au Maroc," 2014, pp. 11.
54 Cases of international courts and treaty bodies dealing with breaches of the obligation to fulfil include: *R.K.B. v. Turkey*, Committee on the Elimination of Discrimination against Women, Communication No.28/2010, 24 February 2012; and *International Association Autism-Europe v. France, European* Committee of Social Rights, Complaint No. 1/2002, 7 November 2003. Decisions of domestic courts dealing with breaches of the obligation to fulfill include inter alia The *Government of the Republic of South Africa and others v. Irene Grootboom and others*, Constitutional Court of South Africa, 2001 (1) SA 46 (CC), 4 October 2000; *Oberti v. Board of Education of the Borough of Clementon School District,* US Court of Appeals Third Circuit, 99 F.2d 1204 (3d Cir. 1993), 28 May 1993; *Yated and others v. the Ministry of Education*, Supreme Court of Israel, HCJ 2599/00, 14 August 2002; *People's Union for Civil Liberties v. Union of India and others,* Supreme Court of India, 2 May 2003; *Asociación Ben- ghalensis y otros c. Ministerio de Salud y Acción Social – Estado Nacional s/amparo ley 16.688,* Argentine Supreme Court, 1 June 2000; *Soobramoney v. Minister of Health, KawZulu-Natal,* South African Constitutional Court , 1998 (1) SA 765 (CC), 27 November 1997.
55 See: CESCR, in General Comment No. 12: The Right to Adequate Food, para. 15: "The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly."
56 ICESCR, Articles: 6(1); 12(1);
57 CESCR General Comment 7, Article 1 concludes that 'forced evictions are prima facie incompatible with the requirements of the Covenant'.
58 UN Secretary General Treaty Depository. Reference: C.N.415.2015.TREATIES-IV.3 (Depositary Notification) 16 July 2015.
59 See Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), to which Myanmar is a party. Article 18 states the obligation upon State Parties "to refrain from acts which would defeat the object and purpose of a treaty" before its entry into force.

New laws, legislative amendments, bylaws, administrative regulations, and practical measures must be consistent with ICESCR provisions. Moreover, most of the primary rights in the ICESCR are also reflected in the UDHR and under general international law.[60] Economic, social and cultural rights (ESC rights) are provided for, and obligations are spelled out in particular in respect of, children under the CRC, to which Myanmar is a party.

The ICESCR generally prohibits any measures that are retrogressive, involving a step back in the level of enjoyment of ESC rights.[61] The Committee on Economic, Social and Cultural Rights (CESCR), the supervisory body for the ICESCR, has indicated that *retrogressive measures* involve certain State laws, policies or practices that undermine the protections afforded to ESC rights and are a breach of State obligations under the ICESCR.[62] As a rule, adoption of a deliberately retrogressive measure, whether through direct action of the State or resulting from a failure of the State to regulate or otherwise protect against the misfeasance of non-State entities, which adversely affects any of the ESC rights would likely be in breach of obligations imposed by the ICESCR.[63] Upon ratification, Myanmar will be obliged to enact and reform national laws as necessary in order fully to conform to the ICESCR. Myanmar already has obligations regarding ESC rights, including under other treaties. [64]

The Convention on the Elimination of All forms of Discrimination Against Women sets out extensive ESC rights obligations.[65] The CEDAW imposes State obligations specifically for women, obliging State Parties to 'condemn discrimination against women in all its forms'.[66] The principle of non-discrimination includes ensuring that women are not discriminated against in the enjoyment of ESC rights.[67] Violations of this obligation may include policies and procedures that act in a discriminatory manner or have the effect of discrimination against women. States have reiterated the right of women to participate in any development process as both agents and beneficiaries.[68] The CEDAW creates special obligations to women in rural areas to ensure they may participate in and benefit from development.[69] It expressly requires States parties to ensure, among others, the following rights: participation in the planning and implementation of development projects; access to adequate health care; participation in all community activities; and to enjoy the right to adequate living conditions.[70]

Extensive ESC rights obligations are set out in the Convention on the Rights of the Child,[71] to which Myanmar is a State party, especially Articles 23-33. General Comment 16 of the CESCR reaffirms State obligations toward children in regards to the impact of

60 Reflecting the interdependence and indivisibility of human rights. In the Vienna Declaration, States affirmed that: All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

61 CESCR, General Comment No. 3, para. 2.

62 CESCR, General Comment No. 3, para. 2.

63 See the Maastricht Guidelines, in ICJ Compilation of Essential Documents, accessible at: http://www.icj.org/economic-social-and-cultural-rights-a-compilation-of- essential-documents/

64 Article 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ... (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications." Article 27 of the Convention on the Rights of the Child provides that "1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. ... 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."

65 Article 3 of the ICESCR, reaffirms the equal right of women and men to the enjoyment of all human rights. See also: ICESCR, General Comment 16, 'the equal right of men and women to the enjoyment of all economic, social and cultural rights', para. 1.

66 *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). Art. 2.

67 See: Article 3 of the ICESCR, reaffirming the equal right of women and men to the enjoyment of all human rights. See also: ICESCR, General Comment 16, 'the equal right of men and women to the enjoyment of all economic, social and cultural rights', para. 1.

68 UN General Assembly, Vienna Declaration and Programme of Action (Vienna Declaration), 12 July 1993, para. 36. A/CONF.157/23

69 CEDAW, art. 14(2).

70 CEDAW, A14(2a), 14(2b), 14(2f), 14(2h). On procedural rights, see also: Basic Principles and Guidelines on Development-Based Evictions para. 39.

71 *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

business activities.[72] So that business activities do not adversely impact on children's rights, the General Comment provides guidance on the legal and institutional frameworks to be put in place to respect, protect and fulfil children's rights. [73] Myanmar is also a State party to the Convention on the Rights of Persons with Disabilities.[74]

Also of relevance is that Myanmar has ratified three of the eight ILO Fundamental Conventions: the Forced Labour Convention 1930 (No. 29), the Freedom of Association and Protection of the Right to Organize Convention 1948 (No. 87) and the Worst Forms of Child Labour Convention 1999 (No. 182). Drawn up by governments, employers and workers, these international legal instruments set out basic principles and rights at work.

2.3 Principles and Guidelines on Population Displacement due to Economic Development

Like all States, the Government of Myanmar may expropriate land for a public purpose within its eminent domain. This can include the lawful eviction of persons living on that land. For an eviction to be lawful, it must be carried out in accordance with national laws and the State's international law obligations including the duty to respect human rights. UN human rights treaties and International Financial Institution (IFI) safeguard policies provide principles and guidance for States to ensure that population displacement occurring due to economic development does not interfere with the enjoyment of human rights and livelihoods. In addition to its international law obligations, Myanmar's national laws require compliance with IFI safeguard policies related to involuntary resettlement.[75]

The UN Basic Principles and Guidelines on Development-Based Evictions and Displacement (the Guidelines) were developed in response to the particular problem of adverse human rights effects, including violations and abuses, occurring in the implementation of large investment projects.[76] The Guidelines set out standards to be followed by States and other parties responsible for displacement, reaffirming the following requirements: fully exploring alternatives to displacement; ensuring an appropriate planning process with sufficient opportunities for meaningful participation and informed participation; ensuring displaced persons do not experience a deterioration in living standards, including by ensuring appropriate compensation and alternative livelihood options; and prohibiting all forced evictions.[77]

Derived from rights guaranteed in the ICESCR (as set out in General Comment 7 of the ESCR Committee), in particular the right to adequate housing, the prohibition on forced evictions obliges States to refrain from forced evictions and to enforce the law against its agents or third parties who are carrying out or who have carried out forced evictions.[78] The ESCR Committee defines forced evictions as:

> "The permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".[79]

72 At the request of the UN Committee on the Rights of the Child, the ICJ and UNICEF have developed a guide providing practical examples and best practices for the protection and realisation of children's rights in the context of business activities including large development projects. ICJ and UNICEF. "Obligations and Actions on Children's Rights and Business: A practical guide for States on how to implement the United Nations Committee on the Rights of the Child's General Comment no. 16" (2015). Available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/Report-UNICEFChildrenBusiness-2015-ENG.pdf

73 CESCR General Comment 16.

74 Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

75 2015 EIA Procedure, Art. 7.

76 Drafted by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. See: Basic Principles and Guidelines on Development- based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf

77 CESCR General Comment 7 addresses forced evictions.

78 CESCR General Comment 7, para. 9.

79 CESCR General Comment 7, para. 9.

An eviction may be carried out only in exceptional circumstances, where there are appropriate legal protections and access to remedy for affected persons and in conformity with international human rights commitments.[80] The State must ensure access to timely and relevant information, a consultation and negotiation period, and the provision of adequate alternative land, housing and compensation.[81] An eviction not meeting these criteria is not a lawful 'eviction', but a 'forced eviction', incompatible with international law and always unlawful.

International financial institutions have developed frequently cited standards on involuntary resettlement, in the recognition, based on experience with major development projects, that involuntary resettlement may result in severe, long-term hardship and impoverishment for affected persons.[82] Involuntary resettlement can involve displacement from property, land, assets and housing. The term refers to a process of displacement that is involuntary, and always applies when land is acquired through the exercise of State powers. Many States look to these standards for guidance. Some, including Myanmar, require in law that projects involving involuntary resettlement conform to these standards.[83] These policies place the responsibility for resettlement arrangements upon States.[84]

Safeguard policies of the Asian Development Bank (ADB), the International Finance Corporation (IFC) and the World Bank Group (WBG), the latter of which amended its policy in August 2016, provide commonly accepted standards.[85] Each safeguard policy shares specified policy objectives: first, to avoid involuntary resettlement where possible; and second, to minimize, where involuntary resettlement does occur, adverse impacts including by exploring alternatives.[86] All three policies state that the livelihoods of persons affected by displacement should improve, or at a minimum, be restored to pre-project levels.[87] As part of this policy principle, persons who experience relocation must be provided with secure tenure for replacement land, regardless of if they previously had secure land tenure or not.[88]

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80 Basic Principles and Guidelines on Development- based Evictions and Displacement, principle 40.

81 See: Centre on Housing Rights and Evictions, "A Guide to Land, Property and Housing Rights in Burma", 2009, pp. 32 http://www.globalprotectioncluster.org/_assets/files/field_protection_clusters/Myanmar/files/HLP%20AoR/Myanmar_Guide_HLP_Rights_2009_EN.pdf (Accessed 11 October 2016).

82 ADB Safeguard Requirements 2: Involuntary Resettlement, para. A(1): "ADB experience indicates that involuntary resettlement under development projects, if unmitigated, could give rise to severe economic, social, and environmental risks: production systems are dismantled; people face impoverishment when their productive assets or income sources are lost; people are relocated to environments where their productive skills may be less applicable, and the competition for resources greater; community institutions and social networks are weakened; kin groups are dispersed; and cultural identity, traditional authority, and the potential for mutual help are diminished or lost." See also: IFC Performance Standard 5, para 2; World Bank Operational Policy 4.12 (Involuntary Resettlement), para 2.

83 2015 EIA Procedure, Art. 7.

84 World Bank, "Involuntary Resettlement Sourcebook: Planning and Implementation in Development Projects," 2004, pp. 9, 144. Note that IFC policies place this responsibility on 'clients', who are generally the private-sector recipient of financial support.

85 The World Bank has reviewed its safeguard policies in 2016, to produce an Environmental and Social Framework, which includes Environmental and Social Standard 5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement. The new safeguard policies will be operationalized in 2018, however changes largely related to operational and procedural measures, with the key principles of involuntary resettlement remaining largely unchanged. See: http://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework (Accessed 11 October 2016). The changes have attracted criticism, including concern that people without secure land tenure will not be sufficiently protected from the adverse effects of compulsory land acquisitions. Among others, Oxfam and Inclusive Development have jointly called for the Voluntary Guidelines on the Responsible Governance of Tenure of Land (VGGTs) to be incorporated into the new Bank policy. They point out that the Bank has found that security of tenure is critical for poverty reduction, and that the Bank's President committed to the VGGTs. The key compliant is that the new standard reduces the requirements for compliance with the rule by borrowers and Bank-funded projects. See: World Bank's Updated Safeguards a Missed Opportunity to Raise the Bar for Development Policy. http://www.bankinformationcenter.org/world-banks-updated-safeguards-a-missed-opportunity-to-raise-the-bar-for-development-policy/

86 IFC Performance Standard, para 2: ""Unless properly managed, involuntary resettlement may result in long-term hardship and impoverishment for the Affected Communities and persons, as well as environmental damage and adverse socio-economic impacts in areas to which they have been displaced. For these reasons, involuntary resettlement should be avoided. However, where involuntary resettlement is unavoidable, it should be minimized and appropriate measures to mitigate adverse impacts on displaced persons and host communities should be carefully planned and implemented" See also: ADB Performance Standard, para. A(1). World Bank Operational Policy 4.12, December 2001 (revised April 2013) art. 2(a).

87 World Bank 2(c): "Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher." See also: ADB A(1); IFC para. 2.

88 For example, see: ADB, "Safeguard Policy Statement," June 2009, pp. 17, 44.

The prohibition on forced evictions is universal, applicable in any involuntary resettlement process. However, it should be noted that the IFC's performance standard five is inconsistent with the UN Basic Principles and Guidelines since it implies that forced evictions may be carried out 'in accordance with the law'.[89] Contrary to the IFC's formulation, forced evictions are always unlawful and cannot be treated as legally permissible even if they are provided for in national law.

In some instances other standards are applied to the displacement of persons, most commonly by a development financier supporting a specific project, and usually based on principles found in the above standards. For example, the Japan International Cooperation Agency (JICA) has its own Guidelines for Environmental and Social Consideration. These are intended to serve as a safeguard policy for JICA-funded projects such as the SEZ development at Thilawa, in Myanmar.[90] In 2013, the China issued its Guidelines for Environmental Protection in Foreign Investment and Cooperation.[91] The China Guidelines, which are targeted at Chinese businesses operating abroad, do not include human rights provisions and are only recommendatory, not legally binding, for Chinese investors abroad. Neither of these frameworks displace or supersede the territorial State's need to comply with its international obligations.

While the policies mentioned are largely based on established international human rights standards, it should be noted that the development banks do not expressly apply or refer to human rights in their policy pronouncements. Nor they do not always create or give rise to legal duties. Also, some provisions may be inconsistent with international law, as discussed above in relation to the prohibition on forced evictions, which means that these policies must only be applied to the extent that they are in conformity with international law.[92]

2.4 Rights of People Displaced by Economic Development Projects

Under international law and standards, States may fulfil their economic and social rights obligations in part through enablement and facilitation of sustainable economic development. States must also respect and protect human rights in the development and implementation of economic projects.

A variety of human rights apply in the context of a large development projects. These are examined here in three groups: procedural rights; the right to an adequate standard of living; and the right to effective remedies and reparation. It should be recalled, however, that these aspects are legally interconnected and indivisible in creating State obligations.

Procedural rights are particularly critical during the planning and implementation of development projects, and serve to avoid human rights abuses or violations. The right to an adequate standard of living protects rights to livelihoods, including the right to decent work. Generally these are the rights that tend to be violated or abused in the implementation of development project and the conduct of business activities. Each of these rights must also be accompanied by the availability of effective remedies and reparation.

89 The IFC's Performance Standard 5, para 24, says that 'forced evictions will not be carried out except in accordance with law and the requirements of this performance standard'. This is inconsistent with international standards. A forced eviction is defined as such for not being in accordance with law.

90 In June 2014, residents of Thilawa submitted a complaint to JICA, on the basis that the JICA-funded project was non-compliant with the JICA guidelines for environmental and social considerations. This was the first time such an objection has been submitted to JICA. See: The Examiner for the JICA guidelines for environmental and social considerations, "Investigation Report: Thilawa SEZ Project in the Republic of the Union of Myanmar," November 2014. Annex 1: 'The Request', pp. 41.

91 Ministry of Commerce of the People's Republic of China and Ministry of Environmental Protection of the People's Republic of China, Notification of the Ministry of Commerce and the Ministry of Environmental Protection on Issuing the Guidelines for Environmental Protection in Foreign Investment and Cooperation. Date of Issuance: February 18, 2013. Issued by: Shang He Han [2013] no. 74.

92 "The World Bank is a Human Rights-Free Zone" – UN expert on extreme poverty expresses deep concern" http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16517&LangID=E

2.4.1 Procedural safeguards

A significant body of international law establishes the rights of people affected by development projects to access timely and transparent information, have opportunities to be involved meaningful consultations, and to participate in decision-making related to project developments and the resulting changes for the population. By conforming with these procedural obligations, States can avoid or mitigate adverse project impacts, community grievances and human rights violations. This may enable issues to be addressed so as to avoid subsequent litigation before the courts, which are in practice often ill-positioned to prevent, and inadequately equipped to deal with, procedural deficiencies.[93] At the same time it must be recalled that courts must have competency to review procedural questions, such as through writs or equivalent procedures, and those challenging procedures should have effective access to a judicial authority.

Access to timely and relevant information, and opportunities to engage in meaningful consultations, are required to enable people to be involved in decision-making processes as informed participants where such decisions affect communities and their surrounds.[94] Effective participation in decision-making means that those who are likely to be impacted upon by a decision have a right to be involved and seek to influence that decision. Affected communities and individuals must be included in the analysis of impacts and the development decision-making process.[95] This is consistent with the principles recognized by States that all persons are entitled to participate in the decisions of their government,[96] and participation is key to good governance and, thereby, to sustainable development. [97]

For decisions that affect communities and their environment, the established international best practice is to have a process of meaningful consultation in which: the public is provided with access to relevant information in a timely manner (e.g. proposed plans, alternatives, impact assessments, proposed eviction and resettlement plans); and the public has an opportunity to present comments, objections and propose alternatives.[98] It is critical that information is released in a timely manner during the planning process, with reasonable time for public review, and that public hearings are convened that offer opportunities to challenge decisions and/or present alternate proposals.[99] The failure to meet these procedural obligations not only disregards the obligations themselves, but can also result in, among other things, a degraded environment which in turn interferes with people's enjoyment of rights and so can constitute a human rights violation.[100]

UN treaty bodies including the ESCR Committee, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination have recommended that States ensure consultation with affected communities prior to conducting development

93 See: ICJ, Courts and legal enforcement of ESCR, pp 93.

94 See, for example: Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters [Aarhus Convention], 2161 UNTS 447; 38 ILM 517 (1999), (while Myanmar is not a party, the Aarhus Convention sets out international best practices for procedural obligations and public participation in environmental decision-making and calls for transparency and participation in decision-making).

95 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992), principle 10 (each individual shall have access to information concerning the environment, including information on activities affecting their communities, and the opportunity to participate in decision-making processes); see also Maastricht Principles, Principle 7.

96 See: The Universal Declaration of Human Rights, (UDHR), art. 21 (right to participate in government); CEDAW, art. 7 (right to participate in forumulation of government policy); CRC, art. 13 (right to information); see also UDHR, arts. 19, 20 (rights to information, association, assembly, and freedom of expression, which includes right to receive and impart information); International Covenant on Civil and Political Rights, art. 19 (right to freedom of expression includes right to receive and impart information); ICESCR, art.13 (component of right to education is the right to participate effectively in a free society).

97 1993 Vienna Declaration and Report of the United Nations High Commissioner for Human Rights on the role of the public service as an essential component of good governance in the promotion and protection of human rights, UN Doc A/HRC/25/27 (2013); The World Bank, Governance: The World Bank's Experience (Washington DC, 1994), p.vii; Robert Zoellick, 'Fragile States: Securing Development', speech to Institute for Strategic Studies, 12 September 2008.

98 See, for example: Aarhus Convention.

99 Basic Principles and Guidelines on Development-based Evictions and Displacement, principle 37.

100 John H Knox, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' UN Doc. A/HRC/22/43 (2012), para. 42.

projects or other land acquisitions or concessions.[101] Opportunities for dialogue and consultation must be extended to the full spectrum of persons affected, including women and vulnerable and marginalised groups, through the adoption of special measures when necessary.[102]

The principle of free, prior and informed consent (FPIC) requires States to consult and cooperate with indigenous peoples before undertaking measures that may affect them.[103] FPIC requires: timely provision of information about the nature, scope, size, duration, reversibility, and pace of a proposed project; a preliminary assessment of impacts and risks, including to the environment and economic, social and cultural rights; and consent in advance of the authorization or commencement of any activities.[104] Whilst FPIC flows from the UN Declaration on the Rights of Indigenous Peoples, there is a trend for international organizations to advise that the FPIC of affected communities should be obtained before any major industrial or development projects.[105] The requirement for FPIC has been recognized as also applying to local communities affected by projects.[106]

The safeguard policies of the ADB, the IFC and the WBG also affirm the rights to information, consultation and participation in projects – in addition to other rights.[107]

2.4.2 Right to an adequate standard of living

The right to an adequate standard of living, which creates State obligations under the ICESCR and applicable norms of customary international law,[108] has a number of components, including food, clothing, housing and water. These include is the right to adequate food, which includes the right to earn a decent living commensurate with the ability to enjoy the right.[109] The right to water has also been universally recognized as forming a component of the right to and adequate standard of living. [110] Another component, linked to the ability to generate a sufficient livelihood, is the right to adequate housing. Two essential elements of this right are security of tenure and protection against forced eviction. [111]

101 CESCR, Concluding observations on Cambodia (E/C.12/KHM/CO/1, 2009), Chad (E/C.12/TCD/CO/3, 2009) and Madagascar (E/C.12/MDG/CO/2, 2009); CERD Concluding observations on Argentina (CERD/C/ARG/CO/19-20, 2010), Chile (CERD/C/CHL/CO/15-18, 2009) and Congo (CERD/C/COG/CO/9, 2009); HRC Concluding observations on United Republic of Tanzania (CCPR/C/TZA/CO/4, 2009). See generally UN OHCHR "Land and Human Rights: Standards and Applications," June 2015.

102 Basic Principles and Guidelines on Development-based Evictions and Displacement, principle 39.

103 UN Declaration on the Rights of Indigenous Peoples, art. 19.

104 OHCHR, 'Free, Prior and Informed Consent of Indigenous Peoples', 2013, http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf (Accessed 11 October 2016).

105 See: Myanmar Centre for Responsible Business, "Myanmar Oil & Gas Sector Wide Impact Assessment," pp. 132, 137 (highlighting the trend by OECD, IFIs, and others in Myanmar to require FPIC for projects). See also: MCRB "Indigenous People's Rights and Business in Myanmar" February 2016. The Organisation for Economic Cooperation and Development, in its Investment Policy Review of Myanmar, recommends the use of FPIC a core element of any responsible investment strategy related to land. OECD, "OECD Investment Policy Reviews: Myanmar 2014," 2014, pp. 68.

106 See: Cathal Doyle and Jill Carino, "Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector," May 2013, pp 11, 13.

107 World Bank Operational Policy 4.12, December 2001 (revised April 2013) 2b: "Displaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs." ADB, Safeguard Policy Statement (June 2009), Involuntary Resettlement, op. cit., para 28. This defines meaningful consultation as a process that: "Begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle; Provides timely disclosure of relevant and adequate information that is understandable and readily accessible to affected people; Is undertaken in an atmosphere free of intimidation or coercion; Is gender inclusive and responsive, and tailored to the needs of disadvantaged and vulnerable groups; and Enables the incorporation of all relevant views of affected people and other stakeholders into decision making, such as project design, mitigation measures, the sharing of development benefits and opportunities, and implementation issues."

108 ICESCR, art. 11. See also: UDHR, art. 25; CRC, art. 27; CEDAW, art. 14.

109 CESCR General Comment 12, para. 26

110 UN General Assembly, Resolution on the human right to water and sanitation, 28 July 2010, A/RES/64/292. CESCR General Comment 15 on the right to water.

111 Elisabeth Wickeri & Anil Kalhan (2009), Land Rights Issues in International Human Rights Law, Institute for Human Rights and Business (IHRB), pp. 5.

For enjoyment of the right to food, food must be available, both economically and physically accessible, and adequate for dietary needs.[112] The ESCR Committee has clarified that States are obliged to: respect the right to food by refraining from measures that result in preventing access to food; protect the right by ensuring that third parties do not prevent access; and to fulfil the right by proactively undertaking measures to ensure people's livelihoods including their food security.[113] A State would be in violation of its obligations if, as a result of the sale or leasing of land to investors, persons were deprived of access to productive resources that are required for their livelihoods.[114] This would also constitute interference with persons' right to work.

The right to adequate housing must be guaranteed regardless of a person's income or access to resources.[115] Various determinants are considered when assessing the adequacy of housing: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.[116] The Special Rapporteur on adequate housing has noted that the enjoyment of this right is particularly contingent on access to land.[117] Security of tenure, regardless of its type, is critical to provide legal protection against forced evictions and arbitrary displacement, both of which are unlawful.[118]

The ESCR Committee has noted that States should confer security of tenure to all persons currently lacking legal protections, irrespective of whether persons do or do not hold land title under domestic law.[119] The Voluntary Guidelines on Land Governance, developed by the UN Food and Agricultural Organization, call upon States to safeguard tenure rights against infringements and to protect persons against any arbitrary loss of tenure rights.[120] Doing so requires recognizing various forms of land rights, in addition to ownership, so that land tenure does not discriminate against persons who may lack formal title but who may rely on land for their source of livelihood.[121] This is especially critical to meet the State's international legal obligations in respect of gender discrimination. Women in many communities typically do not possess ownership under domestic law due to discriminatory policies and practices.

Providing security of tenure is a measure States should take to protect against forced evictions. States must also ensure that adequate safeguards are in place so that evictions occur only in exceptional circumstances, authorized and regulated by law, carried out in accordance with international standards, within reason and proportion, undertaken only to promote the general welfare of persons experiencing displacement, and that full and fair compensation and rehabilitation is ensured. ESCR safeguards should be established in legislation, to include measures that: provide the greatest possible security of tenure to occupiers of houses and land; conform to international standards; strictly control the

112 OHCHR Right to Food Factsheet, pp 2-3. States have an obligation to respect and not prevent access to existing food; to protect individuals from being deprived of access to food by enterprises and individuals; to engage in activities that strengthen access to resources and means that ensure livelihoods and food security; and to fulfil this right directly when individuals are unable to access food (UN ECOSOC, 'CESCR General Comment No. 12 - The Right to Adequate Food', UN Doc. E/C.12/1999/5 (1999), para. 15; see also Food and Agriculture Organization of the United Nations (FAO), 'Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security', 2005, Guideline 2 (States should adopt economic policy goals based on food security needs of their population and promote stable supply of food). States are also prohibited from taking deliberate measures that will mean retrogression in the level of fulfilment of the right to food (UN Office for the High Commissioner for Human Rights, 'Special Rapporteur on the Right to Food' http://www.ohchr.org/EN/issues/food/Pages/FoodIndex.aspx).

113 CESCR General Comment 12, para. 15.

114 Mr. Olivier De Schutter Special Rapporteur on the right to food, "Large-Scale Acquisitions and Leases: a set of core principles and measures to address the human rights challenge" (Large-Scale Acquisitions and Leases: Core Principles), 11 June 2009, para. 15.

115 CESCR General Comment 4, para. 7.

116 CESCR General Comment 4, para. 8.

117 The Special Rapporteur on Adequate Housing has noted that "[l]and is often a necessary and sufficient condition on which the right to adequate housing is absolutely contingent for many individuals and even entire communities."Commission on Human Rights, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, 41, U.N. Doc. E/CN.4/2005/48 (March 3, 2005).

118 Committee on Economic Social and Cultural Rights (CESCR), General Comment No. 4, The right to adequate housing (Art. 11(1)), UN Doc. E/1992/23, para. 8(a).

119 Committee on Economic Social and Cultural Rights (CESCR), General Comment No. 4, The right to adequate housing (Art. 11(1)), UN Doc. E/1992/23, para. 8(a).

120 FAO, Voluntary Guidelines on Land Governance. General Principle 3.1(2)

121 Large-Scale Acquisitions and Leases: Core Principles, para. 23.

circumstances in which evictions may be carried out; and provide for commensurate sanctions against those who carry out forced evictions.

2.4.3 Right to effective remedies and reparation

A general principle of international law is that every right must be accompanied by the availability of effective remedies and reparation in the event of any violation or abuse of rights.[122] Remedies must be prompt and effective, and they must be simple and accessible for all, regardless of a person's status or any disadvantages faced by her or him. They must address human rights violations and abuses either by judicial mechanisms provided by the States, or by or non-judicial mechanisms provided States and or business enterprises, and must in any event always allow for recourse to judicial measures.[123]

The right to effective remedies and reparation entails the right to due process resulting in an enforceable decision that is not subject to interference from authorities against whom a complaint has been brought.[124] This includes the right to access an independent authority that can determine with impartiality if a rights violation is occurring or has occurred, has the power to order a thorough and impartial investigation, and has the power to offer a remedy in the form of cessation and reparation.[125] In accordance with the UDHR and international human rights treaties, States are obliged to provide effective remedies to victims of human rights abuses including when third party actors, such as a business enterprise, are responsible for rights violations or abuses.[126]

The UN Basic Principles on Remedy and Reparation reiterate the importance of judicial mechanisms in ensuring access to remedy, and reaffirm the obligations of States to take appropriate steps to ensure the judiciary can effectively address human rights violations and abuses arising in the conduct of business activities by State or non-State actors.[127] To provide meaningful justice for persons experiencing rights violations, remedy must be prompt, simple and accessible.[128] Where people are disadvantaged, due to discrimination or otherwise, they should be empowered to access justice through guarantees of legal advice and representation.[129] States must take measures to remove laws, policies, legal processes and other practices that impede access to justice.[130]

Non-judicial mechanisms – remedial procedures undertaken outside of the judicial process – may also provide effective access to remedy and should be established as a means of complementing the availability of judicial mechanisms to provide for redress. Administrative procedures, national human rights commissions and ombudspersons

122 See: Universal Declaration of Human Rights (Art. 8); International Covenant on Civil and Political Rights (Article 2 (3)); Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Articles 13 and 14); International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); Convention on the Rights of the Child (Article 39); American Convention on Human Rights (Articles 25 and 63 (1)); African Charter on Human and Peoples' Rights (Article 7(1)(a)); Arab Charter on Human Rights (Articles 12 and 23); the European Convention on Human Rights (Articles 5 (5), 13 and 41); and the Vienna Declaration and Program of Action (Article 27). The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

123 See: ICJ, 'The right to a remedy and to reparation for gross human rights violations – Practitioners Guide no. 2' 2016

124 See: ICJ, "A Guide to International Business and Human Rights Standards for Myanmar." See also: UN HRC, General Comment No 31 (cit. above), para 15; European Court of Human Rights: Case Keen an v the United Kingdom, Judgment of 3 April 2001, Reports 2001-III, para 122; Inter-American Court of Human Rights: Advisor y Opinion OC-9/ 87, Judicial Guarantees in States of Emergency, 6 October 1987, Series A No 9, para 24.

125 International Commission of Jurists (ICJ), "The Right to a Remedy and Reparations for Gross Human Rights Violations: A Practitioners Guide" (2006), pp. 46-47 http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/right-to-remedy-and-reparations-practitioners-guide-2006-eng.pdf.

126 See: OHCHR, Basic Principles on Remedy and Reparation.

127 See: OHCHR, Basic Principles on Remedy and Reparation. Principle 26.

128 UN Human Rights Council: General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant on Civil and Political Rights, 26 May 2004, CCPR/C/21/Rev.1/Add.13, par a 15; Inter-American Court of Human Rights: Advisory Opinion OC- 9/87, Judicial Guarantees in States of Emergency, 6 October 1987, Series A No 9, para 24; African Commission of Human Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle C, African Union Doc. DOC/OS (XXX) 247; Case SERAC and CESR v Nigeria (cit. above), para. 61, in which the Commission considered that the St ate had to ensure 'legal remedies'.

129 ICJ, Declaration on Access to Justice and Right to Remedy, adopted on 12 December 2012 in Geneva, para 3 and 4. http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Congress-Declaration-adoptedFINAL.pdf

130 ICJ, Declaration on Access to Justice and Right to Remedy, adopted on 12 December 2012 in Geneva, para. 2.

can play and important complementary role in contexts where the judiciary may lack the resources and or independence to effectively deliver redress. Such mechanisms are only effective, however, when they are compliant with due process standards and hold authority to prescribe an appropriate remedy for implementation.[131] Non-judicial mechanisms should always complement rather than displace the State judiciary, and States are obliged to take steps to reform and enhance the judicial capacity to provide for effective remedies and reparation.

The UN Guiding Principles on Business and Human Rights make clear that, where persons may be adversely affected by business activities, business enterprises too have a responsibility to provide or facilitate access to remedy. Set apart from State-based mechanisms, a business may establish non-State-based procedures to facilitate or provide access to remedies and reparation.[132] For example, an 'Operational Grievance Mechanism' (OGM) is a non-judicial procedure that a business may employ at site or project level as a means to resolve disputes early on and to provide access to remedy where persons have been adversely affected by business activities. The Guiding Principles state that businesses should provide for or cooperate in legitimate remediation processes in response to instances in which they have caused or contributed to adverse impacts.[133] An increasing number of businesses are establishing or participating in OGMs among other alternative procedures in order to sufficiently satisfy duties as a responsible investor. An OGM may also provide space for issues that are arising to be addressed directly before they become grievances and/or amount to human rights violations or abuses. Again, non-judicial initiatives of businesses are designed to complement rather than displace access to judicial mechanisms providing for remedies and reparation.

2.5 Guiding Principles on Business and Human Rights

2.5.1 State obligation to protect

International law now reflects the consensus that States must protect the rights of people who may be adversely affected by business and economic activities. An international framework related to business and human rights has evolved over the last two decades. In 2011 the Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights (the Guiding Principles).[134] The Guiding Principles are based on three pillars: the State duty to protect human rights; the corporate responsibility to respect human rights; and the shared duty to provide access to an effective remedy, including through both judicial and non-judicial mechanisms.[135]

These pillars clarify the international law obligations of States to protect human rights against violations by business enterprises, both those owned or controlled by third parties and those owned or controlled by the State.[136] States must protect rights by regulating the conduct of business through legislation as well as by providing access to an effective remedy by taking appropriate steps to investigate, and redress business-related rights violations and abuses when they occur and to prosecute such conduct when it gives rise to criminal liability. [137]

The responsibility of businesses to respect human rights flows necessarily from the State obligation to protect, by taking effective measures to ensure that businesses respect human rights is part of that protective function.

131 ICJ, Need and Options for a New International Instrument in the Field of Business and Human Rights (June 2014).
132 UN Guiding Principles, principles 29 – 31.
133 UN Guiding Principles, principle 22.
134 The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.
135 Note that judicial remedies are not "grievance mechanisms" - and there must be State based remedies - a company based grievance mechanism alone is not adequate.
136 See: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (Guiding Principles), UN Doc. A/HRC/17/31, 21 March 2011. Principles 1, 2, 4.
137 Guiding Principles, commentary on principle 25, pp. 27.

2.5.2 Business responsibility to respect

Third party actors, including corporate developers and investors, have the responsibility to respect human rights by incorporating human rights standards into their development projects, operations, and decision-making processes. The Guiding Principles sets out the responsibilities of businesses to: avoid causing or contributing to violations of human rights through their activities; address violations when they occur; and mitigate impacts linked to their operations even if they are not directly contributing to those impacts.[138] Businesses should conduct human rights due diligence to identify, prevent, and mitigate adverse human rights impacts.[139] Businesses should also establish and or participate in operational grievance mechanisms.[140] Where the judiciary is not a reliable remedy for people who may be adversely affected by business activities this is particularly important to allow issues to be addressed early and remedied directly.

The corporate-based standards for responsible businesses are grounded in voluntary principles, codes of conduct and Corporate Social Responsibility initiatives.[141] It is important to recall that these efforts are not enough to satisfy legal obligations. Some of these standards fall short of being consistent with international law; most lack legally binding commitments or enforcement mechanisms. Businesses carrying out activities are legally bound to comply with protections in domestic law, which are often sourced from the environmental law framework, as well as being required to act in conformity to the State's international law obligations. Where a business has caused or contributed to a rights impairment or abuse, it should provide remedies and participate in remediation.[142]

When rights violation or abuse occurs – and with consideration to the degree of causation, knowledge and proximity of the business – conduct that *enables, exacerbates or facilitates* specific abuses is sufficient to find corporate complicity in human rights violations under international law.[143]

Many States, including Myanmar,[144] require businesses to engage in the facilitation of involuntary resettlement in the context of large development projects. In such instances the domestic laws and official guidance may be insufficient due to the vague legal provisions and and/or the opaqueness of governance in practice. Given the heightened potential for violations in the context of involuntary resettlement, it is especially important for businesses engaged in such activities to ensure conformity to the responsibility to protect human rights.

The International Finance Corporation's Performance Standard 5 states that when the Government facilitates involuntary resettlement, resettlement measures must be assessed against the Standard and supplemented if they are deficient.[145] The Guiding Principles direct businesses so they do not become complicit in abuses or violations by enabling, exacerbating or facilitating abuses.

138 UN Guiding Principles, principles 13.
139 UN Guiding Principles, principles 11, 17, 18.
140 UN Guiding Principles, principle 29
141 A body of standards for the responsible conduct of business has emerged, first through the UN Global Compact and then the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development.
142 UN Guiding Principles, principles 22 and 29
143 Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes (2008), Corporate Complicity and Legal Accountability, Volume 1, p. 9.
144 See: 2014 SEZ Law, art. 80.
145 IFC Performance Standard 5, para 30—32.

3. MYANMAR'S LEGAL FRAMEWORK FOR SEZs

3.1 The Special Economic Zone laws

3.1.1 Overview

The Special Economic Zone Law, enacted by the Union Parliament in January 2014, establishes the legal framework for developing and governing SEZs in Myanmar. This 2014 Law repeals two earlier laws related to SEZs from 2011,[146] and creates a legal regime for investments that is independent of arrangements under the 2016 Investment Law.[147] In August 2015, the focal Ministry issued the 2015 SEZ Rules as implementing regulations.[148]

The SEZ Law and SEZ Rules are designed to attract investment in the zones by providing beneficial arrangements to investors, including extendable 50-year land leases as well as tax and customs benefits. The SEZ Law establishes special governance bodies to facilitate the development, operations and investments in the zones. In each SEZ a One Stop Service Centre (OSSC) is established, comprising representatives from multiple government departments, to streamline permit processes for investors.

The legal framework for SEZs is heavily intertwined with and must be read in connection with other national laws. Multiple provisions in the SEZ Law reference other parts of Myanmar's legal framework, such as land laws, environmental laws and labour laws. Special investment procedures and rights are elaborated in the SEZ Rules. However the SEZ laws do not clarify duties, functions and procedures related to the involuntary resettlement of people residing in the SEZ areas. Human rights protections are not mentioned in the SEZ laws.

3.1.2 Governance bodies

The 2014 SEZ Law establishes the three-tier governance structure for the administration of SEZs: the Central Body; the Central Working Body; and Management Committees.

The *Central Body* is the highest governing body for SEZs, formed by the Union Government. Members are Union Ministers, with a 'suitable person' as Chairperson.[149] In 2016 one of the two Union Vice-Presidents became Chairperson, replacing the former President of the Union.[150] Members of this inter-ministerial body are responsible for issuing national policies and regulations for SEZs, consistent with applicable laws, and submitting projects to the Union Government for final approval.[151] The Central Body takes advice from the Central Working Body. In 2016, members of the reconstituted Management Committees were selected based on advice from the Central Working Body.[152]

146 Senior General Than Shwe promulgated the SEZ Law and Dawei SEZ Law in January 2011, during the final days of the State Peace and Development Council. The 2014 SEZ Law harmonizes the two 2011 laws, changing a number of provisions, but generally retaining the governance structure.

147 This is also applied under the 2012 Foreign Investment Law and 2013 Citizens Investment Law. ICJ interview, DICA Director General/MIC Secretary, Yangon, October 2016.

148 The ministry has authority to issue rules as per the 2014 SEZ Law, Art. 95(a). The 2015 Rules were issued by the then-Ministry of National Planning and Economic Development (now Planning and Finance). Under the NLD-led Government, the Ministry of Commerce became focal ministry for SEZs.

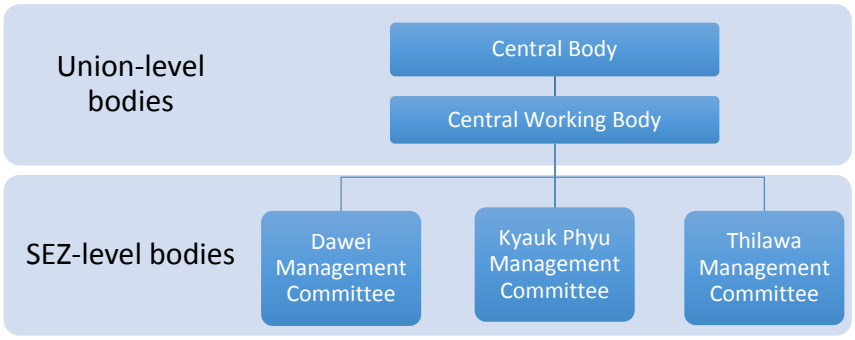
149 2014 SEZ Law, Art. 5(a). Chapter 3 of the SEZ Law states its functions, duties and composition.

150 Union Vice President U Henry Van Thio took over from former President of the Union U Thein Sein.

151 2014 SEZ Law, Arts. 6(a), 11(f).

152 Myanmar SEZ Central Body, Notification 1/2016 (Kyauk Phyu Management Committee), Notification 2/2016 (Thilawa Management Committee), Notification 3/2016 (Dawei Management Committee). 12 October 2016. (Union Gazette, vol. 69, no. 46, 4 November 2016).

Chart: Governance structure for Myanmar's SEZs



The *Central Working Body* sits a tier below the Central Body, formed by the Central Body with the approval of the Union Government.[153] Its members include ministers and representatives from various ministries – mainly senior civil servants. They scrutinize but do not approve development plans, provide policy advice to the Central Body and relevant government departments, and act as intermediary between the Central Body and Management Committees. Unlike the other bodies, the Central Working Body cannot issue regulations.

Each SEZ has a Management Committee tasked with direct oversight of the development, implementation and governance of its respective SEZ. The SEZ Law requires that its members include persons from relevant government entities, a representative from the relevant region or state government, and 'external persons'.[154] A Chairperson is selected from among these members.[155]

Management Committees have an extensive mandate to prepare development plans, propose projects and facilitate investment approvals. Consistent with applicable laws, they may issue regulations to, among other things: define business zones and permitted business activities; provide rules for operations; and determine the ratio of citizens to be employed.[156] Management Committees are tasked with management of the OSSCs established in each SEZ. They also prepare development plans and may coordinate resettlement for people displaced by projects in SEZs.

Any Management Committee may form a supporting body. The SEZ Law states that this body may include representatives of relevant government departments and government organisations as well as investors, developers, 'other suitable persons' and 'persons from organisations'.[157] The SEZ Law does not provide further criteria for selecting its members.

153 2014 SEZ Law, Art. 6(d).
154 2014 SEZ Law, Art. 9(a)(b)(c).
155 2014 SEZ Law, Art. 10. The Chairperson reports to the Union President, through the Central Body.
156 2014 SEZ Law, Arts. 11(f), 11(o).
157 2014 SEZ Law, Art. 11(q).

The Thilawa SEZ Supporting Body

In February 2015, the Thilawa SEZ Management Committee established an incorporated company, the Thilawa SEZ Management Committee Company Limited, as a supporting body to implement some of its functions.[158] The Management Committee Chairperson chairs this company. Some company employees also sit on the Management Committee.[159] It could not be established whether the company benefits from profits and who may have financial interests.[160] A company representative said the company was established to decentralize decision-making.[161] The arrangements remain murky, and further transparency and disclosure of information is required to determine its legal and practical implications.

3.1.3 Establishing SEZs

The Central Body formally establishes each SEZ on a case-by-case basis with approval of the Pyidaungsu Hluttaw.[162] The SEZ Law has criteria for site selection,[163] yet the Parliament may approve an alternative location if deemed 'beneficial for the State and its people'.[164]

The Management Committee demarcates the SEZ site into free zone(s) and promotion zone(s), and, depending on market demands, the Committee may also establish an 'other zone'.[165] A free zone is designed for export-oriented business activities and attracts the most generous benefits for investors, while a promotion zone is intended to target the domestic market as well as to provide products and services to the free zone.[166] Superior infrastructure and streamlined approvals processes can be attractive for investors servicing the domestic market, even if they do not require or intend to access customs benefits.[167] The SEZ Law guarantees against nationalisation of businesses during the agreed period.[168]

Any non-prohibited investment activity may be carried out in the SEZ, following the issuance of a permit and fulfilment of its conditions.[169] Benefits and guarantees for investors, such as tax breaks and long land leases, vary depending on the type of business activity and the zone in which it is conducted.[170] Heightened Government commitments to infrastructure development in SEZs provide an additional incentive for potential SEZ investors.[171]

158 Thilawa Management Committee, 'Notice to Investors regarding the Status of Thilawa Special Economic Zone Management Committee' Notice No. 2/2016 (27 May 2016). This Notification establishes the body in reference to Article 11(q) of the SEZ Law and Article 224 of the SEZ Rules.
159 ICJ email communication, business insider, December 2016.
160 See annex: ICJ letter to the Thilawa SEZ Management Committee, November 2016.
161 ICJ email communication, Thilawa Management Committee member, December 2016.
162 2014 SEZ Law, Art. 12. The Pyidaungsu Hluttaw is the joint sitting of the Pyithu and Amyotha hluttaws (lower and upper houses of parliament).
163 2014 SEZ Law, Art. 12: "(a) having international gateways such as port, airport, or can transport easily to international border or domestic markets; (b) being the area designated for regional development by the Union Government; (c) having the infrastructural pre-requisites or having the prospect for the implementation; (d) availability of the water resource and electric power; (e) having sufficient land area to establish the industries and the investment business; (f) availability of the skilled workers, semi-skilled workers and trainable workers; (g) able to arrange the training courses for the recruitment of required skilled workers; (h) being the strategic area or land in the condition of transportation or linkage to the market in the country."
164 2014 SEZ Law, Art. 13.
165 2014 SEZ Law, Art. 16(a)(b). The SEZ laws do not further defined the term 'other zone.' For further, see: Thilawa Committee, Instruction 2/2015 (27 May 2015).
166 2014 SEZ Law, Ch. 7.
167 ICJ interview, Company Manager of SEZ investor, Thilawa, August 2016.
168 2014 SEZ Law, Art. 86.
169 See: 2014 SEZ Law, Art. 29(a)(b)(c)(d)(e). 2015 SEZ Rules, Arts. 52, 53. The SEZ Rules list prohibited business activities, including but not limited to: importation, production and packaging of chemicals prohibited by World Health Organisation stipulations; production and packaging of substances harmful to the ozone layer; processing of industrial waste from abroad.
170 2014 SEZ Law, Ch. 7.
171 ICJ interview, Company Manager of SEZ investor, Thilawa, August 2016.

The SEZ Law distinguishes between developers and investors.[172] A developer is an entity involved in the construction and operation of infrastructure for the SEZ. There may be one or more developers, depending upon if the SEZ is established as a bilateral inter-governmental venture, through a multilateral arrangement or as a government-private venture. The first legal procedure for the developer is submission of a detailed project plan to the Management Committee. This is first scrutinized by the Central Working Body then reviewed by the Central Body. Approved plans are referred to the Union Government for final approval.[173] For investors, they must submit a permit application to the Management Committee, which determines if the permit will be issued, issued with remarks, or denied.[174]

The Management Committee may issue a SEZ Developer Permit, with approval from the Central Body. For an SEZ Investor Permit, the Management Committee may issue this directly. Both permits include general conditions that the Developer or Investor must adhere to. These include, for example, requirements to abide by environmental laws. Investors are directed to obtain a permit from the Environmental Conservation Department prior to commencing construction activities.[175] A breach of any condition is grounds for revocation of the SEZ permit.

3.1.4 One Stop Service Centres

The SEZ Law provides for the establishment of a OSSC in each SEZ, to operate at the same location as the Management Committee and coming under its direct management.[176] The purpose of the OSSC is to streamline investment approvals and permitting by providing to investors 'all services in one place'.[177] The SEZ Rules stipulate nine government departments from various ministries to be represented in the OSSC, while allowing for the addition of other departments.[178] The Management Committee's roles are to manage, administer and supervise the OSSC.[179] The SEZ laws do not confer any approval or assessment powers from other ministries to the Management Committee.

However, the SEZ Rules provide instructions to ministries on how to implement the law. Article 22 of the SEZ Rules instructs representatives from the ministries who are on the OSSC to fully exercise approval and assessment powers in SEZs, by making determinations and granting relevant permits without seeking prior approval from their respective ministries.[180]

To give effect to this order, the provision also instructs Ministries to delegate decision-making power to their representatives on the OSSC.[181]

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172 2014 SEZ Law, Art. 3.
173 2015 SEZ Rules, Ch. 5.
174 2015 SEZ Rules, Art. 48.
175 2015 SEZ Rules, Arts. 25, 50, Form B: Permit for Developer of the SEZ. Form F: Permit of Investment Business.
176 2014 SEZ Law, Art. 11.
177 2014 SEZ Rules, Art. 20.
178 2015 SEZ Rules, Art. 20: (a) Customs; (b) Administration for Consumers and Commerce; (c) Directorate of Investment and Company Administration; (d) Internal Revenue; (e) Immigration; (f) a department of the Ministry of Industry; (g) a department of the Ministry of Construction; (h) a department of the Food and Drugs Administration; (i) a department of the Ministry of Energy; (j) other departments as required. Note the Environmental Conservation Department is not on this list.
179 2014 SEZ Law, Art. 11(l)(m). 2015 SEZ Rules, Art. 21.
180 2015 SEZ Rules, Art. 22: "The representatives from the relevant Ministries who are appointed at One Stop Service Center (OSSC) shall issue the required license permits and permission to Developers and Investors without getting any approvals and recommendations from the relevant Ministries. Those representatives shall be fully authorized by the respective Ministries for making decisions and signing to issue the relevant license and permit."
181 A similar, earlier instruction was included in a letter, not publically available, sent from the Union President's Office to various ministries in January 2015, prior to issuance of the SEZ Rules in August 2015. Myanmar President's Office, "Subject: Official Permission for decision making and providing signature to assigned representatives at the One Stop Service Centre, Special Economic Zone Management Committees", 21 January 2015, Letter ref: 49(1)/7/7President Office. This letter is discussed in: Matthew Baird and Martin Cosier, "Briefing Note: Environmental Impact Assessments and Special Economic Zones in Myanmar," 2016.

3.1.5 Resolution of disputes

The legal framework for SEZs does not establish a special procedure for mediating disputes. The SEZ Law and SEZ Rules call upon disputing parties to resolve disputes amicably,[182] and in accordance with any relevant prior agreements.[183] Where these options are unavailable or have been exhausted, the matter is to be dealt with in accordance with applicable laws.[184] In the case of a dispute, the parties are required to notify the Management Committee.[185] If the developer or investor intends to call someone from the Management Committee or its office as a witness, they are required by the SEZ Rules to request the Management Committee's permission to do so.[186]

Provisions of the SEZ laws related to disputes mainly apply to disputes that involve investors, developers and or the Management Committee.[187] These laws also provide limited instructions regarding labour disputes (see below). Disputes that involve residents of the SEZ area are not contemplated in the SEZ laws.

3.1.6 Analysis

Lack of clarity regarding responsibilities for human rights and environmental impacts

The SEZ laws are closely intertwined with other national laws. However, it remains to be seen whether and how land, environmental and labour laws will be properly and adequately implemented in the zones. A general lack of clarity in the SEZ laws contributes to legal uncertainty regarding the functions, duties and accountabilities of government and business actors in SEZs. This uncertainty creates a confused and disordered situation where there is lack of specificity as to which authority is responsible for which procedure and at what point in the design and execution of operations and actions. A consequence is that legal procedures are not followed.

Take for instance provisions in the SEZ Law guiding land acquisition and the involuntary resettlement of people living in the designated SEZ area. Three actors have duties in this process. The Ministry of Home Affairs is responsible for the acquisition and transfer of land in SEZs. Companies are required to cover resettlement costs and to ensure that people's living standards do not deteriorate as a result of displacement.[188] The Management Committee has an undefined overall coordination role. Beyond these provisions, the SEZ laws contain no legal procedures for this critical resettlement process. There is no clear and detailed differentiation as between the roles of the three authorities. Also there are no directives as to how these actors will coordinate and the scope of subject matter to be coordinated. This lack of procedural guidance contributes to a situation whereby duty-bearers are unsure of their duties, rights holders are unsure of their rights. There is an overall lack of accountability in principle or in procedural terms, nor is there access to an effective remedy for unlawful acts.[189]

Another example of this messy legal framework lies in the application of environmental laws. The 2014 SEZ Law affirms the applicability of environmental laws and an implication of this will be the undertaking of EIAs in SEZs in accordance with the 2015 EIA Procedure. However the Procedure does not contemplate the particular governance arrangements of SEZs, and the SEZ laws do not provide clarity on the roles of different actors related to an EIA. So differentiated responsibilities and accountabilities related to EIAs remain unclear in SEZs.

182 2014 SEZ Law Art. 53. 2015 SEZ Rules Art. 78. Note the ambiguity regarding how a court may assess a disputing parties' efforts to resolve the dispute 'amicably.'
183 2014 SEZ Law Art. 54(a); 2015 SEZ Rules Art 79(a).
184 2014 SEZ Law Art. 54(b); 2015 SEZ Rules Art. 79(b). Applicable laws may include the 2016 Arbitration Law, passed in January 2016 (Pyidaungsu Hluttaw Law No. 5/2016).
185 2015 SEZ Rules Art. 80.
186 2015 SEZ Rules, Art. 82. Note that this provision cannot override powers of the court.
187 2014 SEZ Law Art. 53. SEZ Rules Art. 78.
188 2014 SEZ Law, Art 80(a)(b).
189 Sean Bain, "SEZ managers must be versed in rights," 31 August 2016, Democratic Voice of Burma.

Unclear sequencing and procedures

The SEZ Law and its Rules do not include procedural protections for persons affected by SEZ projects. Information sharing requirements that are included refer only to communications involving investors and government bodies.[190] There are no transparency requirements for government communiqués that guide SEZ development and implementation, and may affect persons in the project area, such as the notifications and directives issued by SEZ bodies.[191] A single communiqué related to procedural rights was made public in August 2015.[192]

The SEZ laws lack basic guidance on the sequencing of these important procedures. The result tends to be an ineffective and unlawful implementation of legal procedures. In Dawei, EIAs have been conducted post-construction. In Thilawa, resettlement plans were developed during and after displacement had occurred. In Kyauk Phyu, authorities understand that EIA and land acquisition processes are to occur concurrently.[193] Therefore the SEZ laws should be amended to clarify the differentiated roles of government actors and businesses in the involuntary resettlement and EIA processes, in conformity with the relevant laws. These clarifications must include guidance on the sequencing of these procedures.

Role of Management Committees

The legal roles of Management Committees have been subject to misinterpretation by a range of actors, including Committee members, and so clarity is required in the SEZ laws. In the 2014 SEZ Law the Management Committee's prescribed functions and duties involve supervising and managing the development and implementation of the SEZ in coordination with responsible government departments and bodies.[194] As part of these roles, Management Committees host, manage, administer and supervise the One Stop Service Centres.[195] Management Committees hold no approval and assessment powers related to the implementation of other applicable laws.[196]

In practice, Management Committees have tended to interpret their mandate as broader than what is provided for in the express terms of the SEZ laws. For example, Management Committees have played a central role in carrying out land acquisition and environmental impact assessments – despite these functions being prescribed to other authorities. This type of statutory overreach reflects deficiencies with the legal framework for SEZs, which is often vague, and creates uncertainty about the functions and duties of different actors. An effect of this situation is that because these roles are not recognized in law, there is no formal accountability in instances where committee members fail to protect human rights and the environment. The lack of clarity on differentiated roles also impedes the lawful application of legal procedures by all actors.

Supporting bodies.

The NLD Government has committed to establishing an advisory group to each of the SEZ Committees, which would reportedly include experts on social and environmental matters. It would be in the legal scope of each Committee to formally recognize its

190 For example, the 2014 SEZ Law requires situation reports to be provided by investors to Committees (34b) and by the Central Body to the Union Government (Article 6n).
191 For example, in 2015 a Presidential Directive was issued to stipulate the decision-making powers of departmental representatives at the OSSC. The Directive was not publically available despite having potentially significant implications for SEZ management.
192 Thilawa SEZ Management Committee, "Notice to Ensure the Responsible Investment in the Thilawa SEZ," 7 August 2015, Notification 4/2015.
193 ICJ interview, senior Government official, Kyauk Phyu, August 2016.
194 2014 SEZ Law, Art. 11. For instance, see: Art. 11(d).
195 2014 SEZ Law, Art. 11(l)(m). 2015 SEZ Rules, Art. 21. DOES SEZ LAW 11(m) SAY "MANAGE"??
196 While Management Committees may issue stipulations these must be consistent with higher laws. See also: Matthew Baird and Martin Cosier, "Briefing Note: Environmental Impact Assessments and Special Economic Zones in Myanmar" 2016, pp. 3.

advisory group as a supporting body. At the Thilawa SEZ, the Committee formed a supporting group to implement some of its functions, and registered it as a limited liability company (see discussion below). The SEZ Law states that Supporting Body members may include 'other suitable persons' and 'persons from organisations.'[197] This opens scope for the inclusion of local residents, members of Parliament, SEZ workers and civil society organizations.

One Stop Service Centres – possible derogation from national standards

The One Stop Service Centres operate under an unclear legal arrangement. The central problem is the degree of authority held by civil servants representing their respective Government Ministry on the OSSC. Measures taken by the USDP Government to devolve permitting decisions from relevant ministries to authorities at SEZ level appear unlawful.

Article 22 of the 2015 SEZ Rules instructs representatives from the ministries who are on the OSSC to fully exercise approval and assessment powers in SEZs, by making determinations and granting relevant permits without seeking prior approval from their respective Ministry.[198] To give effect to this order, the provision also instructs Ministries to delegate decision-making power to their representatives on the OSSC.[199]

An effect of this provision would be the devolution of important statutory powers, for example the issuance of an Environmental Compliance Certificate, from a Union Minister to a civil servant on the OSSC. There would also be a risk of interference in decision making by the Management Committee, which hosts and manages the OSSC. This type of arrangement constitutes a deviation from legislated national standards, and would weaken human rights and environmental protections in SEZs.

Under Myanmar's 2008 Constitution, implementing rules issued by statutory bodies must be in conformity with the respective legislation.[200] The SEZ Law reaffirms the applicability of various national laws without reservation, and does not contemplate interference with authorities or procedures of other Ministries. Article 22 of the SEZ Rules is in conflict with the SEZ Law and thus appears to be unlawful. The SEZ Rules should be amended to reaffirm the ultimate statutory authority of Ministers who are represented on the OSSC. For clarity the SEZ Rules should also reaffirm the statutory authority of ministries and bodies responsible for implementing laws that interact with the SEZ legal framework.

3.2 Land laws in SEZs

3.2.1 Overview

The SEZ laws must be read in connection with other national laws related to land. The SEZ Law confers responsibility for the acquisition and transfer of land for SEZs to the Ministry of Home Affairs, 'in accordance with existing laws'.[201] The 1894 Land Acquisition Act remains the primary law for acquiring land,[202] however other land laws are also used to determine compensation rights and arbitrate disputes, primarily being the 2012 Farmland Law and the 2012 Vacant, Virgin and Fallow Land Law. Each of these

197 2014 SEZ Law, 11(q)

198 2015 SEZ Rules, Art. 22: "The representatives from the relevant Ministries who are appointed at One Stop Service Center (OSSC) shall issue the required license permits and permission to Developers and Investors without getting any approvals and recommendations from the relevant Ministries. Those representatives shall be fully authorized by the respective Ministries for making decisions and signing to issue the relevant license and permit."

199 A similar instruction was included in a letter, not publically available, sent from the Union President's Office to various ministries in January 2015, prior to issuance of the SEZ Rules in August 2015. Myanmar President's Office, "Subject: Official Permission for decision making and providing signature to assigned representatives at the One Stop Service Centre, Special Economic Zone Management Committees", 21 January 2015, Letter ref: 49(1)/7/7President Office. This letter is discussed and found to be without legal effect, in: Matthew Baird and Martin Cosier, "Briefing Note: Environmental Impact Assessments and Special Economic Zones in Myanmar" 2016.

200 2008 Constitution, Art. 97(b).

201 2014 SEZ Law, Art. 82.

202 The NLD Government has commissioned a review of the Land Acquisition Act, with a view to amend or repeal, although the process has been secretive and sources close to this process have not publically clarified more details.

laws have different procedures for the State to reclaim land, and for compensation entitlements. The 2015 National Land Use Policy is considered by many civil society actors as being a basis for future land reform.

3.2.2 Land in the SEZ laws

Article 82 of the SEZ Law confers to the Ministry of Home Affairs the responsibility to acquire and transfer land that has been allocated for an SEZ by the Central Body.[203] A land acquisition procedure may lawfully commence only after a direction from the Central Body – which itself requires approval from the Union Government and the Pyidaungsu Hluttaw.[204]

The SEZ laws do not include provisions regarding the transfer of land from the Ministry of Home Affairs to the Management Committee. While the Management Committee is responsible for making leasing arrangements with the Developer, the SEZ laws do not include procedures to give this effect.[205] Upon entering a lease agreement with the Management Committee,[206] the Developer may then sublease land to other investors, provided that the Management Committee permits the business activity.[207]

Access to an extendable 50-year land lease is a key inducement for foreign investors in SEZs.[208] The 1897 Transfer of Immoveable Property Act otherwise prohibits foreign companies from entering leases longer than one year,[209] except for those who apply for a permit from SEZ bodies or, outside SEZs, from the Myanmar Investment Commission.[210]

The SEZ Developer must comply with general conditions listed in the Developer Permit issued by the respective Management Committee. The requirement to respect environmental regulations, included in general conditions of the permit, obliges the Developer to comply with the EIA Procedure. The Developer therefore cannot commence construction activities until after the issuance of an Environmental Compliance Certificate by MONREC. This means that a Developer cannot use land prior to fulfilling requirements under the EIA Procedure.

The specific roles, responsibilities and arrangements for transferring and leasing land to a Developer are not spelled out in the SEZ laws. The EIA Procedure requires that projects comply with international standards on involuntary resettlement, however it how this obligation is apportioned among the Developer, the State and any other investors.[211] Article 80 of the SEZ Law establishes base obligations for businesses regarding resettlement. The developer or investor must: a) cover resettlement costs; and b) ensure that displaced person's living standards do not deteriorate. With the Management Committee, the company should 'coordinate... as necessary.' [212] The nature of this coordination is undefined.

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203 2014 SEZ Law, Art. 82: "The Ministry of Home Affairs shall carry out the take over or transfer of the lands in the region intended as Special Economic Zone by the Central Body in accordance with the existing laws." The ICJ found that, whilst not expressed in the law, the practice in each of Myanmar's three designated SEZs has been for the Chairperson of the Management Committee to direct the GAD District Officer undertake land acquisition activities according to the Committee's instructions.

204 2014 SEZ Law, Art. 12, 13.

205 Article 74 of the 2014 SEZ Law authorizes the Management Committee to lease land to the developer (see also: Article 39). The 2015 SEZ Rules contemplate the Management Committee giving permissions to the Developer to rent, use and sub-lease land in the SEZ (Arts. 40-45). The SEZ laws do not contemplate the specific procedures or arrangements for leasing land to the Developer.

206 2014 SEZ Law, Art. 79.

207 2014 SEZ Law, Art. 39(a), 42.

208 2014 SEZ Law, Art. 79. Investors may apply for a 25-year extension after the initial lease has lapsed.

209 2016 Myanmar Investment Law, Art. 50.

210 1987 Transfer of Immoveable Property Act, Article 5(a) and 5(b).

211 2015 EIA Procedure, Art. 7.

212 2014 SEZ Law, Article 80: The developer or investor "(a) Shall bear the expenses of relocating and paying compensation in accordance with the agreements if houses, buildings, farms and gardens, orchards and fields, plantation on land permitted for land lease or land use are required to be relocated; and (b) shall, to relocate the persons so as not to lower their original standard of living, to fulfill the fundamental needs and for facilitating such works, coordinate and carry out with the relevant Management Committee as may be necessary."

Note that the SEZ Law defines infrastructure as any 'fundamental requirements connected with' the zone, including water supply, electricity supply and transport infrastructure.[213] The SEZ laws therefore may apply outside the land area designated for the SEZ so long as the infrastructure development is fundamentally connected with the SEZ. Obligations established in the SEZ laws and EIA Procedure could thus also apply outside the zone itself.

Land governance under the NLD-led Government

A large number of Government institutions are involved in land governance in Myanmar, linked to the range of land laws in force and efforts to address land-related grievances, by the previous USDP Government and the current NLD-led Government. There is no multi-ministerial committee or body specifically mandated with oversight of land issues.

The Ministry of Agriculture, Livestock and Irrigation (MOALI) plays a key role through its Department of Agriculture and Department of Agricultural Land Management and Statistics. The Ministry of Home Affairs (MOHA) has a significant role through its General Administration Department (GAD). In designated forest areas, the Ministry of Natural Resources, Environment and Conservation (MONREC) oversees land management. There are another six concerned Union ministries. The Union parliament hosts four upper house committees and four lower house committees that include a focus on land issues. Two additional committees include Union ministers and senior civil servants.[214] One is the Central Committee for Re-inspection of Farmland and Other Land Acquisition, established by the Union President in 2016 to resolve historical land disputes.[215] The Central Committee for Management of Vacant, Fallow and Virgin Lands is the other, established by the law of the same name, and also empowered to establish a 'task force' in each state and region.

For farmers, the Farmland Management bodies are among the most important institutions. The 2012 Farmland Law directs the creation of these bodies at all five administrative levels: village tract and ward; township; district; state and region; and Union. The Legal Affairs and Special Cases Commission also appears to influence land policy,[216] along with party-committees, parliamentary committees and think tanks and at state and region levels. [217]

3.2.3 2008 Constitution

Article 37 of the Constitution establishes 'The Union' – defined in Article 2 as 'The State' – as the ultimate owner of all land and resources. This is generally understood to mean that the Government has a legal entitlement to all land and resources in Myanmar.[218] Some analyses have cited Article 4, which states that the Union's authority is derived from its citizens, to contend that lands belong to the citizenry rather than the Government of the State.[219] Other relevant constitutional provisions related to

213 2014 SEZ Law, Art. 3(d).
214 See: Land Core Group & USAID, 'Land Stakeholder Analysis: Governance Structures and Actors in Myanmar,' December 2016.
215 This consists of four additional levels of sub-committees at regional, district, township and village tract/ward levels.
216 Myanmar Times, "Parliamentary commission advises overhaul of national land use policy," 1 December 2016.
217 The above summary is informed by: Land Core Group & USAID, 'Land Stakeholder Analysis: Governance Structures and Actors in Myanmar,' December 2016.
218 For example, see: Republic of the Union of Myanmar, "Myanmar Agricultural Development Support Project: Environmental and Social Management Framework Final Report" 2015. Ministry of Agriculture and Irrigation, pp. 20. 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 & Policy Frameworks Relating to Land Management in Myanmar", November 2012, pp. 16.
219 Myanmar China Pipeline Watch Committee, "In Search of Justice along the Myanmar-China Oil and Gas Pipeline" 2016, pp 37-38.

land include the establishment of a market economy with private property rights, the State duty to enact laws protecting peasants' rights, and an affirmation of the courts' jurisdiction to review administrative decisions.[220]

3.2.4 1894 Land Acquisition Act

As Myanmar's primary law used for land acquisition, the colonial-era 1894 Land Acquisition Act empowers the State to carry out public purpose land acquisitions.[221] Accompanying Rules and Directives provide procedural guidance that is relatively clear compared with other land laws in Myanmar. Procedures and arrangements related to land acquisition by the State, including the calculation of compensation, are determined under this Act and its bylaws.[222]

Under the Act, land acquisition may be carried out if the President of the Union declares it to be for a public purpose, following the completion and consideration of a preliminary investigation procedure.[223] Procedures in the Act are overseen by the 'collector',[224] a function served by the District Officer of the GAD,[225] who is represented on each SEZ Management Committee.[226] The Act prescribes two stages of the acquisition procedure when objections can be made: first to the collector, then in the courts.

The *preliminary investigation* is the first procedural requirement, of which the first step is public notification that an area is likely to be required for a public purpose land acquisition.[227] The notification, required to legalise the act of surveying activities,[228] must be published in the Union Gazette and the collector is responsible to ensure it is posted in areas of convenience to potential *interested persons*.[229] An interested person is someone with an easement on the land or who would be otherwise affected financially, and has an interest in claiming compensation in the event of acquisition.[230] For example, a farmer or labourer working on the land is considered an interested person.[231] The Act contains no requirements for an interested person to be in possession of formal land tenure.

Under the Act an interested person may object to the acquisition. Generally, objections in practice have tended to challenge the public purpose grounds of the acquisition. There are several grounds to object, including: if it is not a *bona fide* (good faith) public purpose acquisition; or if works for which the land is acquired are unlikely to be useful for the public; among others.[232] Nominally, the collector hears and assesses an objection, then provides a recommendation to the President of the Union for a decision on the matter.[233] The Act states that this decision is final (however, see boxed text below).

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220 See 2008 Constitution of Myanmar, Articles 35, 37, 356 and 372; Article 23; Articles 11 and 19. Also see commentary: Land Core Group, "Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law Improving the Legal & Policy Frameworks Relating to Land Management in Myanmar," November 2012, pp. 16.

221 1894 Land Acquisition Act, Art. 40(1b). Article 41 of the Act outlines two scenarios where a company may apply to acquire land: to provide housing and related amenities to its employees construction activities are for a public purpose; or if a construction are for a public purpose.

222 See also: Land Core Group, "Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law Improving the Legal & Policy Frameworks Relating to Land Management in Myanmar," November 2012, pp. 20.

223 There appears to be no other criteria defining public purpose for land acquisition in Myanmar law.

224 1894 Land Acquisition Act, Art. 3(c). A criteria for appointing the collector is included in the 1894 Land Acquisition Directions, Art. 28. Note that the District Officer is the highest GAD post in a district.

225 'Collector' is defined in the 1945 Lower Burma Land Revenue Manual. In Appendix 1, Article 2(2), the collector is defined as the chief in charge of land-revenue in a district (now GAD District Officer).

226 Gazette of the Republic of the Union of Myanmar, 12 October 2016, Part 1, pp. 2164-67.

227 1894 Land Acquisition Act, Art. 4(a).

228 1894 Land Acquisition Directions, Art. 10. Note that Article 7 of the Directions contemplates the risk of a suit against the Government if departmental officers exceed their legal powers by entering or taking possession of land without following procedures such as the Act's notification requirements.

229 1894 Land Acquisition Act, Art. 4(1), Art 6. The collector is responsible to 'cause public notice.'

230 1894 Land Acquisition Act, Art. 3(b), 5(3).

231 U Maung Maung Nyunt, presentation at Land Core Group Meeting on 2 November 2016 in Yangon.

232 1894 Land Acquisition Act, Art. 5(1)(2)(3). 1932 Land Acquisition Rules, Art. 3.

233 1894 Land Acquisition Act, Art. 5(a2).

Following the preliminary investigation, if there are no outstanding objections, a declaration of intended acquisition including detailed information about the acquisition and its public purpose basis must be is published in the Union Gazette.[234] The collector is responsible to provide public notice in affected areas and invite claims for compensation for interested persons who may have entitlements.[235] Detailed procedures, rules and directions guide the calculation of compensation.[236] Compensation must consider the dispossession of land, crops, trees, buildings and other livelihoods.[237] Payments for land should be based on its market value plus 15 per cent.[238] Replacement land may be granted in lieu of financial compensation.[239] Standing crops must be allowed time to mature for harvest; if not, the owner is entitled to receive payment based on the market value it would have incurred.[240] For interested persons with 'limited interest' in the land, the Collector may make alternative arrangements instead of awarding financial compensation.[241]

When an interested person is determined to have compensation entitlements, awards are to be dispensed prior to the Government taking possession of the land.[242] Documentation of payments must utilise the forms and registers contained in the 1947 Land Acquisition Manual, with copies issued to all parties.[243] If a person does not appear on the nominated date of payment, they do not forfeit entitlements – alternative arrangements are available.[244]

If an interested person has not accepted or received an award, for whatever reason, the Act prescribes a procedure for them to submit an objection to the Court.[245] Provided the applicant meets conditions prescribed in the Act, a proceeding will take place in a Court. The Act details advice and instruction for the Judge to take into consideration the judgement.[246]

234 1894 Land Acquisition Act, Art. 6(1)(2)(3).
235 1894 Land Acquisition Act, Art. 9(1) and Ch. 3, 4 and 5.
236 For example, see: 1894 Land Acquisition Directions, Art. 19.
237 1894 Land Acquisition Act, Art. 17(3), Art. 19(a).
238 1894 Land Acquisition Act, Art. 23(1)(2).
239 1894 Land Acquisition Act, Art. 31(3).
240 1894 Land Acquisition Directions, Art. 41, 45.
241 1894 Land Acquisition Directions, Art. 31(3).
242 1894 Land Acquisition Act, Art. 16. Detailed procedures contained in the 1894 Land Acquisition Directions reaffirm this. Note the President of the Union may overrule this in urgent cases. Art. 17(1).
243 1947 Burma Land Acquisition Manual, Part 4: Forms and Registers. These documents are discussed further in Direction 53 of the 1894 Land Acquisition Directions.
244 1894 Land Acquisition Directions, Art. 55.
245 1894 Land Acquisition Act, Art. 18(1). Part 3 of the Act outlines the process for judicial review.
246 1894 Land Acquisition Act, Part 3: Reference to the Court and Procedure Thereon.

The right to challenge administrative decisions

It is a general principle of law that courts have competency to review procedural questions, and that people challenging procedures should have effective access to a judicial authority.

Individuals in Myanmar have constitutional rights to seek judicial review of administrative decisions by executive powers including by ministers, civil servants and statutory bodies.[247] Constitutional writs are a mechanism for the judicial review of decisions by administrative bodies and lower courts in their exercise of executive power.[248] In Myanmar, the Supreme Court may issue a prerogative writ (an order) either by its own initiative or in response to the application of an individual.[249] Five separate prerogative writs may be issued by a Court:

- Certiorari: to cancel an unlawful decision by an executive power.
- Prohibition: to prohibit and prevent an illegal act by an executive power.
- Mandamus: to direct an official to perform their duties or correct an illegal action.
- Habeas corpus: to review the legality of an individual's detention.
- Quo warranto: to prevent a person from carrying out unauthorized acts.[250]

Constitutional writs can be a powerful tool as a check on executive power, especially in countries with weak or no administrative law. Legislative content may not interfere with these writs. So despite provisions in the 1894 Land Acquisition Act and 2012 Farmland Law which the finality of certain administrative decisions,[251] avenues remain open for individuals to appeal decisions of land-related bodies. This principle applies to the acts of all executive powers including investment bodies.[252] However there are significant barriers to utilizing writs in practice. [253]

A court acting *suo moto* may provide another pathway to reviewing and potentially altering an administrative decision. Suo moto is where a court acts of its own initiative rather than being reactive to the given case. Early jurisprudence in Myanmar includes cases where judges have sought to take suo moto.[254] Some current judges say they have a right to act suo moto however it is unclear if they have applied this principle in practice.[255]

247 Constitution of Myanmar, Art. 18, 296, 378. See: Melissa Crouch, "Access to Justice and Administrative Law in Myanmar,' USAID Promoting the Rule of Law Project, October 2014, pp. 2-14.
248 For further on this, see: ICJ, "Handbook on Habeas Corpus in Myanmar," May 2016, pp. 16-18.
249 2008 Constitution, Art. 18(c), 378(a).
250 See: Melissa Crouch, "The Importance of Constitutional Writs for the Protection of Rights in Myanmar," Constitutional Writs Workshop in Yangon, 8-9 August 2015.
251 1894 Land Acquisition Act, Art. 5(a2). 2012 Farmland Law, Art. 25(c).
252 2015 SEZ Rules, Art. 49. 2016 Investment Law, Art. 98.
253 For applicants, these challenges include costs associated with the preparation and processing of documentation and with travel to the Supreme Court in Nay Pyi Taw. See: 2011 Procedural Rules and Regulations for the Application of Writs. See also: Melissa Crouch, "The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar" in Law, Society and Transition in Myanmar, Hart Publishing, 2014, pp. 155. For the judiciary, it lacks independence from the executive. See: ICJ, "Handbook on Habeas Corpus in Myanmar," May 2016, pp. 19-22.
254 A preliminary study of available jurisprudence did not establish if these acts had been upheld. For an example of its intended application, see: Pwa Thein v. Tin Shwe, Burma Law Reports (1956) pp. 228.
255 Judges have anecdotally told the ICJ that they may act with suo moto, yet the ICJ is unaware of any examples of this being applied, and there is generally a dearth of jurisprudence since the 1962 coup.

3.2.5 2012 Farmland Law

The 2012 Farmland Law entitles persons in Myanmar to apply for a Land Use Permit that can grant rights to use, lease and sell land for agricultural purposes.[256] *Form 7* is the colloquial term for this permit, in reference to the annex of the 2012 Farmland Rules used to legally document the tenure arrangement.[257] Strict stipulations connected to the Land Use Permits make for weak security of tenure even where people hold a permit.[258]

A complex application procedure reflects the complicated five-tier system of land governance bodies established by the Law.[259] The applicant must first apply to their Ward or Village Tract Farmland Management Committee, by completing a format that must be provided free of charge by the respective administrative office. Completed applications are to be reviewed by the Township Department of Farmland Management and Land Statistics, over which the GAD exerts significant influence.[260] This department is required to prepare a dossier that is submitted to the Township Farmland Management Committee. Under the Farmland Law, ultimate determination on issuance of the Form 7 sits with the District Farmland Management Committee.[261]

Land Use Permits come with strict conditions, such as specific designations on the types of crops that may be grown and the frequency of harvests. A breach of a condition, often vague and poorly defined, can attract severe penalties including revocation of the permit.[262] Procedures to object to determinations of the Farmland Management bodies are multi-layered and complex. [263] These conditions and procedures are widely considered to offer limited security of tenure without access to effective remedies and reparation.[264]

The Farmland Law and Farmland Rules contemplate public purpose land acquisitions.[265] Acquisition for a non-agricultural purpose requires the Central Farmland Management Body to reclassify the land.[266] In these cases, the 2012 Farmland Rules require that permit holders be compensated, at rates varying from 200 to 300 per cent of the market value depending on the type of land or property.[267] However compensation rights may be forfeited if the Body determines that the permit-holder is in breach of permit conditions. Neither the Farmland Law nor Farmland Rules contemplate resettlement arrangements.

In the case of disputes, the upper farmland bodies may review the decisions of lower bodies. The state or region body is the highest arbiter and can make a 'final' decision on the matter.[268] Despite this provision, and the lack of an independent mechanism for reviewing administrative decisions or arbitrating disputes in the Farmland Law, a case may nonetheless be filed with the courts (see text box, above: the right to challenge administrative decisions).

256 2012 Farmland Law, Art. 14 (on the prohibition of leasing to foreigners without permission). Article 4 states that "A person who has the permission of right to use farmland shall have to apply for getting the Land Use Certificate to the Township Land Records Department Office passing it through the relevant Ward or Village Tract Farmland Management Body."
257 2012 Farmland Rules, Art. 23(a). See also the annex: Form 7 (Land Use Permit).
258 Displacement Solutions, "Land Acquisition Law and Practice in Myanmar: overview, gap analysis with IFC PS1 & PSf and scope of due diligence recommendations," 2015, pp. 10.
259 See: 2012 Farmland Law, Art. 15, 16. These provisions establish a five-level farmland management bureaucracy: Central (Union); Region or State; district; township; and ward or village tract levels.
260 Land Core Group & USAID, 'Land Stakeholder Analysis: Governance Structures and Actors in Myanmar,' December 2016, pp. 9.
261 This procedure is outlined in the 2012 Farmland Rules, Ch. 3.
262 For example, conditions upon the right to work farmland include 'farmland is prohibited to grow other crop from regular crop without permission' (Article 12h), and that 'farmland shall not be fallow without a sound reason' (Article 12i). In case of breach of any of these conditions, the Farmland Management Body may decide one or more of four responses, one of which is eviction from the farmland (Article 19c). The farmer is in effect stripped of the autonomy to decide what crops to plant.
263 2012 Farmland Rules, Ch. 2.
264 See, for example: Displacement Solutions, "Land Acquisition Law and Practice in Myanmar: overview, gap analysis with IFC PS1 & PSf and scope of due diligence recommendations," 2015, pp 10.
265 2012 Farmland Rules, Art. 64. The English translation of the Law phrases this as "(farmland requisitioned under the Farmland Law for the interest of the State or the public..."
266 2012 Farmland Law, Art. 30, 31, 32. Farmland may be confiscated 'in the interests of the nation.'
267 2012 Farmland Rules, Art. 67. Confiscated paddy, crops, trees and plants must be compensated at three times the market value; any buildings associated with farmland at two times the market value; and land compensation should be set at fair market value. See also: ERI, "A Briefer on the Thilawa Special Economic Zone: Analysis of the Affected Communities' Rights and Remedies Under Myanmar Law and JICA's Guidelines", 2014.
268 2012 Farmland Law, Ch. 8.

3.2.6 2012 Vacant, Virgin and Fallow Lands Management Law

The 2012 Vacant, Fallow and Virgin Lands Management Law is designed to allocate State land to individuals, investors and others. To manage these arrangements, the Law establishes a land governance architecture that is separate to the Farmland Law.[269] The Law establishes a Central Committee that may grant permission to use the land for a variety of purposes, such as agriculture, livestock farming and mining.[270] It can issue leases of up to 30 years,[271] which cannot be subsequently sold or sub-leased without the Committee's approval.[272] Applicants, including local and joint venture investors, may request a permit for land that the State considers as being not in use.[273]

For land that is determined as being vacant, fallow or virgin but in respect of which there has been no use, compensation is not contemplated for persons who claim rights to that land because, by definition, such land is determined to be without ownership.[274] By definition this land is considered to be without an owner so there is no mechanism for compensation.

The Law contemplates compensation for State repossession of land from the granted land user only in certain instances, such as where historical artefacts are found or where infrastructure projects are deemed to be required in the interests of the State.[275] Allocated land that is not used within four years of the issuance of a permit may be reclaimed by the State without compensation. The Central Committee is empowered to arbitrate and rule on disputes arising.[276] Criminal penalties are stipulated for encroachment and for failure to comply with an eviction order.[277]

3.2.7 2016 National Land Use Policy

In January 2016 the USDP Government released the National Land Use Policy (NLUP).[278] The NLUP recognizes many of the common land-related grievances existing in Myanmar and affirms the need for participatory, transparent and accountable processes for land governance. The Policy commits the Government to reform land laws in line with international human rights standards and in consultation with civil society. It also pledges to develop procedures to assess the social and environmental impacts of State land acquisition before it occurs, whilst calling for public consultation and participatory decision-making involving local stakeholders.[279]

Chapter 10 of the Policy states that a new national land law will be developed to harmonise existing legislation and remedy its problems, based on a series of principles and procedures for a consultative drafting process. However this commitment was made by the previous Government, and the NLD-led Government's view and plans for the NLUP remain unclear.[280]

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269 2012 Vacant, Fallow and Virgin Lands Law, Art. 3(a)(b). The Law establishes a Union-level Central Committee and enables the formation of state- and region-level 'Task Forces'.
270 2012 Vacant, Fallow and Virgin Lands Law, Art. 4.
271 2012 Vacant, Fallow and Virgin Lands Law, Art. 10, 11(c).
272 2012 Vacant, Fallow and Virgin Lands Law, Art. 16.
273 2012 Vacant, Fallow and Virgin Lands Law, Art. 5.
274 2012 Vacant, Fallow and Virgin Lands Law, Art. 2(e)(f).
275 2012 Vacant, Fallow and Virgin Lands Rules, Art. 55, 56.
276 2012 Vacant, Fallow and Virgin Lands Law, Art. 25.
277 2012 Vacant, Fallow and Virgin Lands Law, Art. 26-29.
278 National Land Use Policy, January 2016, especially: Art. 9(b), and Part IV. Note that civil society groups had been overwhelmingly disappointed with the original draft, released in October 2014, and with the initial Government-led consultation process. Ultimately the consultation schedule was revised and the process for garnering inputs from civil society and communities resulted in a significant transformation of the policy.
279 National Land Use Policy, January 2016, Art. 9(b), Part IV. Released by the National Land Resources Management Central Committee.
280 Sources close to the NLD and land reform processes told the ICJ that senior NLD officials are considering developing a different instrument, independent of efforts by the previous Government. See also: The Economist, "Land policy a test case for new parliament's power," 23 December 2016.

As a policy only, the NLUP is currently not legally binding and does not provide for legal accountability. Nor does it create mechanisms for resolving land-related disputes and grievances. Its principles must be enshrined in law if it is to aid the resolution of land-related legal issues.[281]

3.2.8 Analysis

Myanmar's legal framework for land governance consists of a patchwork of more than fifty overlapping and often conflicting laws spanning across three centuries.[282] The land laws currently in force typically classify land into categories that are out-dated, and or overly complicated and generally do not accurately reflect the ways that land is used in practice.[283] Confusing this picture is the variety of institutions – nine ministries and over ten committees – engaged in managing land and land-related disputes, generally administrative bodies that are separate to, but not outside the jurisdiction of, the courts.

The SEZ laws provide detailed procedures for the Government to lease land to developers and investors. But these laws do not establish a procedure for land to be requested by and transferred to the SEZ Management Committee.[284] Nor do they include procedures relating to the resettlement of residents living in SEZ areas. So there is a lack of legal clarity about the duties, functions and accountabilities of Government and businesses in these processes.

The SEZ laws do not clarify which laws shall apply to the process of land acquisition and related legal procedures such as resettlement and compensation. In practice, the Land Acquisition Act is the key instrument cited in the land acquisition and resettlement process.

The Land Acquisition Act provides a series of procedural safeguards that, if followed by the State in practice, and in conformity to the protective provisions of other laws, may offer procedural rights otherwise unavailable. However, the Act is not consistent with international standards, particularly in its definition of public purpose, which is considered in the Act to be what the Union President deems to be in the public purpose. Furthermore, unlike in international standards, the Act does not arrange for the provision of replacement land with security of tenure, for persons displaced for a public purpose acquisition. Finally, the legal procedures of the Act are often not followed by the competent authorities, as illustrated in the case study of the Kyauk Phyu SEZ, below.

281 Daniel Aguirre, "A sound basis for land reform," February 2016, Frontier Magazine.
282 The 1879 Land and Revenue Act is the earliest key land law in force; 2012 laws are the most recent. A 2009 compendium listed 54 laws in force related to housing, land and property. Two land laws have since been passed, with three repealed, so the current figure may stand at 53 laws. See: Displacement Solutions, "Housing, Land and Property Rights in Burma: the Current Legal Framework," 2009.
283 See: Food Security Working Group's Land Core Group, "Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law", November 2012, pp. 7-10.
284 Note that in practice, the GAD District Officer sits as a member of the SEZ Management Committee.

3.3 Environmental laws in SEZs

3.3.1 Overview

The SEZ laws reaffirm the applicability of environmental laws in SEZs. As with other parts of the legal framework for SEZs, provisions of the SEZ laws related to the environment must be read in connection with other laws. The 2012 Environmental Conservation Law is the key environmental law in Myanmar. It builds upon the 1994 National Environment Policy, which places protection and conservation of the environment as primary development objectives.[285] The 2008 Constitution reaffirms this commitment, empowering the Union Parliament to enact legislation to these ends.[286]

Chapter 7 of the Environmental Conservation Law stipulates the duties and functions of the Environment Ministry: previously the Ministry of Environmental Conservation and Forestry, now the Natural Resources and Environmental Conservation (MONREC).[287] The 2012 Environmental Conservation Rules, issued by the Ministry under its authority in the Environmental Conservation Law, establishes, among other measures, the basis for a system of Environmental Impact Assessments, set out in the 2015 EIA Procedure.[288]

3.3.2 Environment in the SEZ laws

The SEZ laws reaffirm the obligations of the government, developers and investors to comply with environmental laws in SEZs.[289] The SEZ laws contain 14 references to the applicability of environmental laws in SEZs.[290] The Management Committee has duties for 'supervising and ensuring compliance with' environmental laws.[291] The SEZ laws do not contemplate conferring powers of determination or permit approvals to the Management Committee.

The SEZ Rules include stipulations reaffirming that compliance with environmental laws are conditions of investment permits. The table below shows where these stipulations are documented in official application and permit forms issued by Management Committees. A form for quarterly reporting to the Management Committee, included in the SEZ Rules, requires updated financial reporting by investors but does not generate data to monitor compliance with environmental conditions of developer and investor permits.

285 2012 Environmental Conservation Law, Art. 3(a). 1994 National Environment Policy. In December 2016, MONREC released a draft update to the Policy which 'reaffirms and builds upon' the 1994 Policy.
286 The 2008 Constitution of the Union of Myanmar states that: in Article 45, 'The state shall protect and conserve natural environment;' in Article 390, 'It shall be the duty of every citizen of Myanmar to protect the natural environment;' in Section 96, 'The Pyidaungsu Hluttaw shall have the right to enact laws for the entire or any part of the Union related to matters prescribed in Schedule 1 of the Union Legislative List." Note that Schedule 1, Art. 6(g) lists: 'environmental protection and conservation.'
287 This change followed a ministerial reshuffle after the NLD-led Government took office in April 2016.
288 2012 Environmental Conservation Law, Art. 7(m). 2014 Environmental Conservation Rules, Art. 54, 55.
289 2012 Environmental Conservation Law, Art. 11(b), 35, 85. These environmental laws include the 2012 Law, 2014 Rules and the 2015 EIA Procedure.
290 2014 SEZ Law contains three provisions affirming the applicability of environmental laws in SEZs whilst the 2015 SEZ Rules mention environmental requirements 11 times.
291 2014 SEZ Law, Art. 11(p).

Document	Relevant Legal Conditions
Developer Application (to establish SEZ)	No references to environmental law.
Developer Permit	General conditions include the need to obey environmental requirements and abide by local laws including environmental conservation. The permit may be suspended in case of violation of any conditions.[292]
Investor Application (to establish business)	Application must include an 'environmental conservation and protection plan and reduction of social impact.'[293]
Investor Permit	Terms and conditions include requirements to obey instructions of the Environmental Conservation Department. Non-compliance shall result in cancellation of the permit. The environmental permit must be issued from the OSSC prior to construction.[294]

3.3.3 2012 Environmental Conservation Law

The Environmental Conservation Law is a framework law conferring regulatory, monitoring and enforcement authority for environmental matters to the Ministry of Natural Resources and Environmental Conservation (MONREC).[295] The Law expressly reaffirms that businesses operating in SEZs must comply with directives issued by the Ministry.[296] It sets out the duties of Government authorities, including regulating and monitoring business compliance with environmental standards and procedures. The Law also provides for the establishment of regulations such as pollution standards,[297] and for levying penalties for pollution and environmental impacts.[298] These are elaborated further in the Environmental Conservation Rules.[299]

Chapter 3 establishes the Environmental Conservation Committee. Chaired by the Minister, its duties include promotion of environmental conservation, policy development and monitoring of environmental damages arising from other Government departments.[300] Chapter 4 creates an Environmental Conservation Department (ECD), with duties and powers including developing and promulgating rules, quality standards, penalties and procedures required for implementation of the Law.[301] With both Union and State/Region-level offices,[302] the ECD creates statutory liabilities for companies,[303] specified in bylaws, and is the implements the system for EIAs. In line with the SEZ laws, ECD representatives sit in the SEZ OSSCs to liaise with investors and Management Committees.

MONREC has significant discretionary powers – including a broad power to exempt any Government department, organization or business from obligations created by the Environmental Conservation Law and its bylaws – if this is concluded to be in the 'interests of the Union and its people'.[304]

292 2015 SEZ Rules, Art. 25, Annex Form B [Art. 3(c)(d)(g)].
293 2015 SEZ Rules, Art. 47, Annex Form-E [Art. 2(r)].
294 2015 SEZ Rules, Art. 74, Annex Form-G [Terms and Conditions, Art. ii, xi; Notification of situations and restrictions, Art. 2].
295 Formerly the Ministry of Environmental Conservation and Forestry, prior to April 2016.
296 2012 Environmental Conservation Law, Art. 16.
297 2012 Environmental Conservation Law, Ch. 6: Environmental Quality Standards.
298 2012 Environmental Conservation Law, Art. 7(o). 2015 EIA Procedure, Annex 3.
299 2014 Environmental Conservation Rules.
300 2012 Environmental Conservation Law, Arts. 4—6.
301 2012 Environmental Conservation Law, Ch. 12. For more on the duties and functions of ECD, see: 2014 Environmental Conservation Rules, Art. 23-26, 32-34, 39-40, 42c, 44-49, 51, 60, 66, 68.
302 2015 SEZ Rules, Art. 73.
303 2012 Environmental Conservation Law, Ch. 13: Offences and penalties.
304 2012 Environmental Conservation Law, Art. 36.

Environmental Impact Assessments

An EIA is a legal procedure to assess projects for potential impacts, identify mitigation measures, develop alternatives as may be required and ultimately to determine if a project is approved. In Myanmar law the definition of environmental impact includes any effects on individuals and communities. These may be environmental, occupational, social, cultural, socio-economic, health or safety related impacts including involuntary resettlement. These impacts can be direct, indirect, cumulative, adverse or positive.[305]

A third party consultant commissioned by the Project Proponent generally conducts an EIA. It requires investments from all parties and can serve as an opportunity to address potential negative impacts and grievances early on. The participation of persons affected by the project is critical to inform assessments of social as well as environmental impacts. Myanmar's EIA Procedure includes mandatory legal procedures requiring information disclosure and public participation throughout the process. Although a lack of detailed guidance presents a challenge for ensuring that appropriate, quality and timely measures for public participation are implemented in practice. The Government of Myanmar is currently involved in developing national and regional guidelines for public participation in EIAs.

Myanmar laws contain no other legal procedures that require a pre-project assessment and determination of the potential social and human rights impacts of development projects. Therefore, if an IEE or EIA is not legally required in accordance with the procedure, national laws do not require an impact assessment prior to commencing a project. While the EIA Procedure is not primarily designed to protect human rights, it nonetheless may serve as an important tool in national law for assessing and addressing the potential impacts of investment on human rights.[306]

3.3.4 2015 Environmental Impact Assessment Procedure

The Ministry of Environment (now MONREC) issued the EIA Procedure in December 2015, in exercise of its powers in the Environmental Conservation Law.[307] Annex 1 of the Procedure lists types of projects requiring approval from the MONREC's ECD before activities are permitted to commence.[308] For project types not included in Annex 1, there may still be a mandatory 'prior permission' requirement for approval from MONREC in line with the Environmental Conservation Law.[309]

305 2015 EIA Procedure, Article 2(g) defines 'adverse impact' as: '(A)ny adverse environmental, social, socio-economic, health, cultural, occupational safety or health, and community health and safety effect suffered or borne by any entity, natural person, ecosystem, or natural resource…'. 2015 EIA Procedure, Article 2(h) includes in 'environmental impacts': (O)ccupational, social, cultural, socio-economical, public and community health, and safety issues. Moreover, social impacts include Involuntary Resettlement and relating to Indigenous People.

306 For a discussion of problematic issues in impact assessments, including the tendency to be approached as a regulatory hurdle rather than as a planning tool, see: Bruce Harvey and Sara Bice, "Social impact assessment, social development programmes and social licence to operate: tensions and contradictions in intent and practice in the extractive sector," Impact Assessment and Project Appraisal, Vol. 32, No. 4, Pp. 382.

307 2012 Environmental Conservation Law, Art. 42(b).

308 Ch. 10 of the 2012 Environmental Conservation Law empowers the Ministry to stipulate the economic activities requiring an EIA (Article 21) and to grant or refuse prior permission based for those activities in conformity with the stipulations (Article 23). Further guidance to this end is included in Ch. 12 of the Environmental Conservation Rules. Annex 1 of the EIA Procedure – Categorization of Economic Activities for Assessment Purposes – categorises which economic activities require an assessment and affirms MONREC's authority to interpret these. MONREC has exclusive power to determine and interpret these categories (Environmental Conservation Rules, Article 52) and interpret (EIA Procedure, Annex 1(d)).

309 2012 Environmental Conservation Rules, Ch. 10.

Depending on the type and size of a project, MONREC may require the Project Proponent[310] to commission an Initial Environmental Examination (IEE) or an EIA – both of which must include an Environmental Management Plan (EMP).[311] The Project Proponent may be from the public or private sector. If MONREC determines that an EIA is required,[312] the Project Proponent is obliged to engage a third party to conduct the assessment.[313] The Project Proponent is obliged to participate in this process, including in consultations – this duty should not be relinquished to the third party.

All EIA- and IEE-type projects require an Environmental Conservation Certificate (ECC). MONREC holds exclusive authority to approve, conditionally approve or reject an EIA Report and the accompanying EMP.[314] Issuance of an ECC by MONREC is a prerequisite to the granting of final project permissions by other ministries, including in SEZs.[315] If an EIA Report is not accepted, an ECC will not be issued, meaning that a project cannot proceed, unless subsequent measures are taken that satisfy the MONREC's to grant an ECC.[316]

EIA Procedure Article 7: involuntary resettlement standards

Article 7 of the EIA Procedure requires that projects involving involuntary resettlement or which may potentially have adverse impacts on indigenous peoples must adhere to international standards including those accepted by the World Bank Group and Asian Development Bank.[317] It is an important article because, given the lack of directions provided in the 2014 SEZ Law and 2015 SEZ Rules, Article 7 establishes a legal procedure for any resettlement process that includes obligations and procedures.

The 5 key phases of EIA

The EIA consists of four main phases: *screening* by MONREC, to determine if an EIA or an IEE is required; development by a third person/organisation of the scoping report and Terms of Reference for the investigation; *investigation and drafting* by a third person/organization of the EIA Report and Environmental Management Plan; then review of the report and *determination* on issuance of an ECC by MONREC.

The screening phase involves the submission of a project proposal by the Project Proponent to MONREC. The ECD then determines what type of assessment, if any, is required based upon the considerations and categorisations set out in Chapter 3 of the Procedure: Screening. The project shall be designated as being an EIA-type project, an IEE-type project or a project not requiring an environmental assessment. EIA- and IEE-type projects than proceed to the scoping phase.

310 2015 EIA Procedure, Art. 2(z): 'Project Proponent means any natural person, legal entity, or organization, from the public or private sector, intending to undertake, or having commenced to undertake, as relevant, a Project or any aspect of a Project (including study, survey, design, development, pre-construction, construction, operation, decommissioning, closure, and post-closure) within the territorial borders of the Republic of the Union of Myanmar, and during the period of such undertaking which has an ownership interest (legal or equitable) in the Project, or which intends (or could reasonably be expected to intend) to derive financial or other benefits from the Project of the sort which an owner would ordinarily derive.'

311 Articles 2(p) and 2(q) of the 2015 EIA Procedure state that IEE and EIA reports must include an EMP. The discretionary power of the Ministry to determine if an EMP is required, in Article 24 of the Procedure, should be read in the context of the Ch. within which it is included ('Screening'), thus giving the Ministry discretion to require a non-IEE or non-EIA type project to require an EMP. Article 24 does not rescind the requirement for an EMP as part of IEE and EIA.

312 2015 EIA Procedure, Ch. 3: 'Screening' (Articles 23-30).

313 EIA Procedure, Articles 32 and 45. Article 17-22 of the Procedure state requirements related to the third party conducting the assessment.

314 2015 EIA Procedure, Art. 15.

315 2015 EIA Procedure, Art. 83.

316 2015 EIA Procedure, Article 42 states that the Ministry makes the final decision on approval of an IEE Report. Article 70 of the EIA Procedure authorises the Ministry to approve or reject the EIA Report.

317 If Myanmar develops its own specific procedures on involuntary resettlement, they will apply instead but must still conform to best practice and applicable international law and standards. It is understood that there are no plans to develop a separate procedure.

The scoping phase provides an early opportunity for the Project Proponent to identify issues and either modify or discontinue the project at an early stage. To inform its determination, MONREC forms an EIA Report Review Body, which may consist of external experts as well as qualified representatives of Government departments and organizations.[318] However it is understood that the issuance of an ECC is yet to occur during the 12 months following the issuance of the EIA Procedure, December 2015 to December 2016.

The Scoping Report must detail efforts to disclose information and consult,[319] while the Investigation Report (EIA Report) must include a chapter detailing consultation activities and results.[320] The EIA Report must include consideration of the views and concerns of affected persons and detail the consultations with them.[321] Following its submission, the ECD of MONREC is obliged to arrange public consultations at local, state/region and national levels "where the Project Proponent shall present the EIA Report".[322] The EIA Report Review Body, formed by MONREC, is empowered to recommend further consultations for the Project Proponent to undertake and report.[323]

Throughout the procedure, the Project Proponent is obliged to inform and consult with affected persons and establishes opportunities for their participation in decision-making. Note that the definition of Project Proponent in the EIA Procedure is not explicit, and could be used to refer to the Developer and/or the Government of Myanmar. While it is generally understood that this refers to the Developer, it could also include the Government, for example in the case of the Thilawa SEZ where the Government is a partner in its development and construction.

The Project Proponent is directed to conduct consultations which include "local communities, potential project affected persons, local authorities, community based organisations, and civil society" during the scoping and investigation phases of an EIA.[324] These obligations are time-bound and must be performed if the ECD of MONREC is to issue an Environmental Compliance Certificate. A series of provisions directs the Project Proponent to disclose information to the public and civil society in a variety of ways at different stages of the process.[325] The Ministry is empowered to ensure that information provided is sufficient,[326] and to request supplementary information as required.[327] The Ministry is also obliged to publically disclose the EIA Report and its determinations.[328]

318 2014 Environmental Conservation Rules, Art. 58-59. Note that the term 'organizations' is not specifically defined in the Rules and may include Government and private organizations.
319 2015 EIA Procedure, Art. 51(b).
320 2015 EIA Procedure, Article 63 indicates that Ch. 9 of the EIA Report is to be structured as follows: 9.0 Public Consultation and Disclosure: 9.1 Methodology and Approach ; 9.2 Summary of consultations and activities undertaken ; 9.3 Results of Consultations ; 9.4 Further ongoing Consultations; 9.5 Disclosure .
321 2015 EIA Procedure, Article 60 states that the EIA Report: 'shall consider the views, concerns, and perceptions of stakeholders, communities and individuals that could be affected by the Project or who otherwise have an interest in the Project. The EIA shall include the results of consultations with the public, affected populations and other stakeholders on the environmental and social issues. The concerns raised during such consultations shall be considered in assessing impacts, designing mitigation measures, and in the development of management and monitoring plans.'
322 2015 EIA Procedure, Art. 67(d).
323 2015 EIA Procedure, Art. 16(d).
324 2015 EIA Procedure, Art. 50(b), Art. 61(b).
325 2015 EIA Procedure, 50a (scoping); 61b (investigation); 65 (submission of report). For example, Article 50 of the EIA Procedure states that: "Not later than fifteen (15) days after submission of the EIA Report to the Department, the Project Proponent shall disclose the EIA Report to civil society, PAPs, local communities and other concerned stakeholders: (i) by means of national media (i.e. newspapers); (ii) the website(s) of the Project or Project Proponent; (iii) at public meeting places (e.g. libraries, community halls); and (iv) at the offices of the Project Proponent."
326 2015 EIA Procedure, Art. 16(v).
327 2015 EIA Procedure, Art. 40.
328 2015 EIA Procedure, Art. 70(c) (decision to approve or reject), Art. 75 (reversal or modification of decision) .

EIAs in SEZs

Within SEZs there are no exemptions or waivers – the EIA Procedure applies in full.[329] Both the Environmental Conservation Law and Environmental Conservation Law Rules oblige investors to comply with MONREC's directives in SEZs and reaffirm the Ministry's regulatory and determination powers in SEZs.[330] This includes the exclusive authority of MONREC to determine if a project requires an EIA or an IEE as well as to issue the ECC.[331] While representatives of the ECD sit in the OSSCs, determination powers stay with the ministry.[332]

In SEZs, there are two occasions when MONREC must determine if an EIA or IEE is required.

MONREC must first screen the project plans for the entire SEZ project to determine if an EIA or IEE is required. Note that an EIA is required for 'special investment projects' that are approved by the Union Parliament, Union Cabinet or President.[333] An EIA is also significant in size and has the potential for large impacts, so would also be considered a 'complex project,' thus necessitating an EIA.[334] Therefore MONREC would find that an EIA is required.

If MONREC issues an ECC for the SEZ, each subsequent project component must be screened to determine if it requires an EIA or IEE. Project components may include infrastructure facilities, residential buildings and investments such as factories. These are generally potentially high impact projects so MONREC is likely to determine, during the screening phase, that an EIA or IEE is required.

In accordance with Article 83 of the EIA Procedure, an ECC must first be issued by MONREC before the SEZ Management Committee can grant or issue a permit.

329 See: Matthew Baird and Martin Cosier, "Briefing Note: Environmental Impact Assessments and Special Economic Zones in Myanmar" 2016.

330 2012 Environmental Conservation Law, Article 16: 'A person or organization operating business in the industrial estate or business in the special economic zone or category of business stipulated by the Ministry: (a) is responsible to carry out by contributing the stipulated cash or kind in the relevant combined scheme for the environmental conservation including the management and treatment of waste; (b) shall contribute the stipulated users charges or management fees for the environmental conservation according to the relevant industrial estate, special economic zone and business organization; (c) shall comply with the directives issued for environmental conservation according to the relevant industrial estate, special economic zone or business.' 2014 Environmental Conservation Rules, Article 43: 'The Ministry: (a) May prescribe the terms and conditions relating to effluent treatment in industrial estate, special economic zones and other necessary places and buildings, and emissions of machines, vehicles and mechanisms.'

331 2015 EIA Procedure, Art. 32 and Art. 45. Affirming MONREC's authority to determine if an IEE or EIA is required. Ch. 3 of the Procedure, 'Screening,' details this process.

332 Whilst the ECD does not appear on the prescribed list of nine departments to be represented on the OSSC in accordance with Article 20 of the SEZ Rules, it has nonetheless been included on the OSSC in each of the three SEZs.

333 2015 EIA Procedure, Annex 1: 'Categorization of Economic Activities for Assessment Purposes.

334 'Complex Project refers to a Project that has substantial impacts on the environment, which may include impacts beyond the borders of the jurisdiction under consideration, or a cumulative impact on other projects, or in which complex technology is applied.' 2015 EIA Procedure, Art. 2(e).

EIA in practice, 2012—2015

Since the enactment of the Environmental Conservation Law in 2012, EIAs have been required for projects with potential adverse impacts. However, the legal procedure had not being defined until issuance of the EIA Procedure in December 2015.[335] Linked to these requirements, EIAs tended to be either avoided or conducted haphazardly without public disclosure.[336] Two investment bodies introduced interim measures to guide the EIA process during this period.

Prior to issuance of the EIA Procedure, the Myanmar Investment Commission (MIC) issued a series of notifications stipulating the types of investment projects permitted by the MIC that would require an EIA.[337] Following issuance of the EIA Procedure, the MIC repealed these earlier notifications to affirm the global applicability of the EIA Procedure.[338]

Prior to issuance of the EIA Procedure, the Thilawa SEZ Management Committee, with support from the Japanese Investment Cooperation Agency (JICA), designed a bespoke EIA regime for investments in the Thilawa SEZ. The process is based upon the development of Environmental Conservation and Prevention Plans (ECPP).[339] The Management Committee appears to have assumed powers to determine where an ECPP is required and if it is accepted.[340] This is a key point of difference between the ECCP process and the EIA Procedure, the latter of which assigns all determination powers to the ECD. A conflict of interest may arise with the ECPP process, because the Management Committee has a 10 per cent shareholding in the Myanmar Japan Thilawa Development Company, but is also making determinations on regulatory matters such as environmental permitting.[341]

Unlike the MIC, the Thilawa Management Committee has not updated its instructions to investors to bring EIAs in the zone into conformity with the EIA Procedure.[342] The Management Committee continues to instruct investors that approval and permit procedures established by the OSSC shall supersede national laws.[343] In accordance with the EIA Procedure, project proponents of ECPP-type projects may be required to undertake EIAs retrospectively.[344] The environmental permitting process in Thilawa appears to be inconsistent with the EIA Procedure and therefore unlawful.

335 2012 Environmental Conservation Law, Art. 42. 2014 Environmental Conservation Rules, Art. 51-61.

336 For example, see the legal assessment of JICA and Nippon in their preparatory study for the Thilawa SEZ: 'EIA is not required because an EIA law does not exist in Myanmar'. JICA and Nippon (March 2014), Preparatory study on Thilawa Special Economic Zone infrastructure development in the Republic of the Union of Myanmar: Final Report, Section E, pp 14. Also see an EIA study for projects related to the Dawei SEZ, conducted only after project activities had been undertaken and not made publically available. Dawei Development Association, Voices from the Ground: Concerns over the Dawei Special Economic Zone and Related Projects, 2014, pp 27, 43 and 81.

337 The MIC issued two notifications, the latter repealing the former: MIC Notification 1/2013; and MIC Notification 50/2014.

338 Myanmar Investment Commission (29 March 2016), Notification 80/2016: '[I]nvestors shall carry out the Environmental Impact Assessment Procedures issued by the Ministry of EnvironmentalConservation and Forestry.'

339 The Management Committee's advice to investors sets out this process. See: http://www.myanmarthilawa.gov.mm/investment-application (accessed 17 November 2016).

340 While it is understood that JICA is supporting the Management Committee to update its procedures, it is not yet clear if this will be in conformity with the 2015 EIA Procedure. The Management Committee had not responded to correspondence seeking clarification (see annex).

341 This concern has been raised by civil society organisations and INGOs. JICA has reportedly said that there is no conflict of interest because an ECD representative sits on the OSSC. See also: Myanmar Times, 15 September 2014 'Thilawa attracting foreign firms as tenants.'

342 In 2016, the Management Committee and project developers were still following the old regime for EIAs. In May 2016 and June 2016, EIA reports for different components of the SEZ's Zone B were submitted, by Myanmar Japan Thilawa Development Ltd., and by Thilawa Property Development Ltd., respectively. In cover letters to the Management Committee, each company says it understands the ECPP process remains in effect.

343 "Procedures and necessary documents for obtaining approval and / or permit on making registration described in SOP of OSSC of Thilawa SEZ shall supercede those provided for in the national laws and regulations." Thilawa SEZ Management Committee, Website, Accessed 3 December 2016. (http://www.myanmarthilawa.gov.mm/national-laws-and-regulations).

344 Article 8 of the EIA Procedure contemplates investors being required to undertake an EIA for projects that commenced prior to the issuance of the Environmental Conservation Rules.

3.3.5 Analysis

MONREC holds ultimate authority for prescribing, monitoring and enforcing environmental procedures and standards, including EIAs and environmental quality standards.[345] These powers are prescribed in Myanmar's environmental laws, the applicability of which are reaffirmed in the SEZ laws. Neither the SEZ laws nor environmental laws confer powers of determination or approvals in environmental matters to the Management Committee.[346]

Article 22 of the SEZ Rules, instructing ministries represented on the OSSC to devolve determination powers to its representatives, is inconsistent with the SEZ Law and environmental laws, and therefore appears unlawful (as discussed above). MONREC retains its regular procedures and powers in SEZs, including for EIAs. ECD representatives on the OSSC may assist investors with permit processes but not make decisions upon them.

The ECPP process, implemented by the Thilawa SEZ Management Committee as an interim measure for EIAs, has had no legal basis since the issuance of the EIA Procedure in December 2015. All projects must be screened by MONREC, and may only proceed following issuance of an Environmental Compliance Certificate by the Ministry.

3.4 Labour laws in SEZs

3.4.1 Myanmar's labour laws and governance

Several new labour laws, enacted under the previous Government of President General Thein Sein, interact with the SEZ laws. These include the 2011 Labour Organisation Law, the 2012 Settlement of Labour Disputes Law, the 2013 Employment and Skills Development Law and the 2013 Minimum Wage Law. The 2008 Constitution requires the Union to enact laws to protect the rights of workers.[347]

In 2016, the new NLD-led Government merged a number of ministries to establish the Ministry of Labour, Immigration and Population (MLIP). The MLIP retains ultimate powers of determination, monitoring and enforcement for labour matters in SEZs. Its Labour Department generally has ultimate authority for determinations related to labour laws, including in SEZs.[348] A Factories and General Labour Laws Inspection Department also exists to lead on monitoring and enforcement of labour laws. A separate entity, the National Minimum Wage Committee, sets and monitors compliance with minimum wage laws. This Committee is a tripartite group with representatives from business, government and unions.

In SEZs, Management Committees have duties for supervising labour matters and assisting with recruitment and permits in SEZs, in accordance with labour laws.[349] The SEZ Law contemplates the inclusion of Labour Department representatives in the One Stop Service Centre.[350] But the Department is not included in the prescribed list of OSSC member departments in the 2015 SEZ Rules.[351] Nonetheless, the Labour Department is represented in the OSSC at Myanmar's current sole operative SEZ in Thilawa.[352]

345 2012 Environmental Conservation Law, Art. 2(c). 2015 National Environmental Quality (Emission) Guidelines (29 December 2015).
346 2012 Environmental Conservation Law, Art. A6(a)(b)(c). 2014 Environmental Conservation Rules, Art. 43(a). For a detailed legal analysis of this, see: Matthew Baird and Martin Cosier, "Briefing Note: Environmental Impact Assessments and Special Economic Zones in Myanmar" 2016.
347 2008 Constitution, Art. 24.
348 Provisions to this effect are noncompliant with the International Labour Organisation Convention 87, to which Myanmar is a State Party. A guide to labour laws developed by the ILO Liaison Office in Myanmar is expected to be published in 2017.
349 2014 SEZ Law, Art. 70(a)(b).
350 2014 SEZ Law, Art. 77.
351 2015 SEZ Rules, Art. 20(a-i). Additional departments may be included. See: SEZ Rules, Art. 20(j).
352 The ICJ confirmed this via a telephone interview with the Assistant Director of the Labour Section at Thilawa SEZ One Stop Service Centre on 17 October 2016.

3.4.2 The minimum wage

The 2013 Minimum Wage Law establishes the National Minimum Wage Committee (the Wage Committee). The Wage Committee is a statutory body, separate to but including members of the MLIP. In August 2015 the Wage Committee prescribed the national minimum wage for Myanmar.[353] The Thilawa SEZ Management Committee adopted this national standard.[354]

The Minimum Wage Law and 2013 Minimum Wage Rules affirm that the Wage Committee has determination powers to set the minimum wage in SEZs.[355] In a seemingly conflicting provision, the SEZ Law states that the Management Committee 'may determine the minimum wages of employee and staff.' [356] Importantly, this provision in the SEZ Law is qualified by the Management Committee's duty to ensure that the rights and entitlements of employees in SEZs are not diminished relative to employees outside SEZs.[357]

The national minimum wage therefore applies in SEZs, unless the Management Committee proposes a higher wage to the Wage Committee, who would likely have to approve this for the respective SEZ.

353 The National Committee is appointed by the Union President. The national minimum wage of 3,600 kyat per day is stipulated by the National Committee for Minimum Wage, Notification no. 2/2015 (28 August 2015), under the authority of Ministry of Labour, Employment and Social Security, Minimum Wage Rules, Notification No. 64/2013 (12 July 2013), under authority of 2013 Minimum Wage Law, Pyidaungsu Hluttaw Law No. 7/2013 (22 March 2013).
354 ICJ phone communication, Assistant Director in Labour Department of Thilawa SEZ OSSC, 17 October 2016.
355 2013 Minimum Wage Law, Art. 9. 2013 Minimum Wage Rules, Art. 48.
356 2014 SEZ Law, Art. 70(d).
357 2014 SEZ Law, Art. 70(c).

Myanmar's minimum wage – a decent living?

A recent study on the garment sector found that Myanmar has the lowest minimum wage of any other garment producing country apart from Bangladesh.[358] The current rate of 3600 kyat per day was set in August 2015 following over two years of negotiations and reflects a compromise between industry groups and labour unions.[359] Unions had lobbied for a higher rate at the time and factory workers have since called for an increased minimum matched to rising inflation and living costs.[360] Income pressures related to the minimum wage disproportionately affect women, who make up the bulk of garment sector workers.[361]

Many recent studies on labour conditions for Myanmar's garment sector workers have documented widespread problems of exploitation of workers in garment factories and non-compliance with labour laws on the part of factory owners.[362] General problems in industrial areas include harsh labour conditions, safety issues and the targeting of union leaders for dismissal.[363]

A 2017 report into Myanmar's garment factories interviewed workers in a garment factory in the Thilawa SEZ run by a Chinese company.[364] They found around three quarters of interviewed workers [25 of 34] had not signed an employment contract.[365] Garment workers at the Thilawa SEZ reported that anyone taking more than three days of leave was automatically fired.[366] Workers also reported being required by their employer to undertake unpaid overtime work, such as cleaning the factory and listening to management announcements.[367] Workers reported having to skip lunch to fulfil daily production targets.[368] No interviewed worker at the Thilawa SEZ reported any knowledge about trade unions.[369] Other sources also indicate that noncompliance with labor laws is occurring in the Thilawa SEZ. A forthcoming report documents an allegation that workers in a Thai-owned business are being paid at a rate lower than the national minimum wage, apparently on the basis that the workers are interns.[370]

3.4.3 Employment and training of citizens

The 2014 SEZ Law includes provisions reaffirming that developers and investors in SEZs must comply with labour laws in the zones.[371] Additional special requirements are established by the Law, which contemplates two categories of jobs. For low-skilled jobs, employers are restricted to employing Myanmar citizens only.[372] The SEZ laws contain no provisions requiring employers to preference the training and recruitment of persons from the SEZ area, and there are no requirements to employ persons who are not recognized as citizens under the 1982 Citizenship Law.

358 Oxfam, "Made in Myanmar: entrenched poverty or decent jobs for garment workers?" 2015, pp. 7.
359 Nyan Lynn Aung and Pyae Thet Phyo, "Myanmar wage set at K3600," 19 August 2015, The Myanmar Times.
360 Zaw Zaw Htwe, "Protest seeks K5600 minimum wage," 22 November 2016, The Myanmar Times.
361 See: Progressive Voice, "Raising the Bottom: a report on the garment industry in Myanmar," December 2016.
362 Action Labour Rights, "A study of labour conditions in garment factories in Myanmar which are wholly Korean owned or in a joint venture with Korean companies,' March 2016, pp. 18.
363 See: Oxfam, "Made in Myanmar: entrenched poverty or decent jobs for garment workers?" 2015, pp. 3. Business and Human Rights Resource Centre, "Myanmar's Garment Sector – Briefing Note," (forthcoming in 2017).
364 SOMO, "The Myanmar Dillema: can the garment industry deliver decent jobs for workers in Myanmar?," February 2017, Stichting Onderzoek Multinationale Ondernemingen (Centre for Research on Multinational Corporations), Amsterdam, pp. 60.
365 Ibid, pp. 68.
366 Ibid, pp. 71.
367 Ibid, pp. 79.
368 Ibid, pp. 87.
369 Ibid, pp. 90.
370 Charlie Thame, "SEZs and Value Extraction from the Mekong: a case study of the control and exploitation of land and labour in Cambodia and Myanmar's special economic zones' Bangkok: Focus on the Global South [Internal Draft]," December 2016, pp. 32.
371 2014 SEZ Law, Art. 72. 2015 SEZ Rules, Annex: Form-B, Art. 3(d) [general permit conditions].
372 2014 SEZ Law, Art. 74: "The investor shall employ only the citizens in the work where high technology and skill are not required"

For skilled jobs, foreigners may be employed, yet the ratio of citizens employed must increase 25 per cent every two years.[373] Investors are required to provide projections on these ratios in their investment application.[374] The terms 'skilled' and 'low-skilled' are undefined.[375] These restrictions, and the graduated ratio of citizens in skilled jobs, appear intended for job creation and up-skilling of the local labour force. However the Management Committee is empowered to waive these requirements regarding citizen employment ratios.[376]

Employers in SEZs may recruit freely through any arrangements.[377] The SEZ Law contemplates the establishment of a Work and Labour Recruitment Office in each zone, but does not create obligations to recruit from the local area or to give preference to local recruitments.[378] Developers and investors are required to arrange training for citizen workers however there are no established legal targets for the type, frequency or duration of these trainings.[379]

The SEZ Rules enable developers or investors to propose alternative employment rules to the Management Committee.[380] While the Management Committee may issue reactive stipulations it is at the same time constrained by the obligations to conform to labour laws.

3.4.4 Dispute mediation

The Management Committee is the first stop for negotiation and mediation when a labour dispute arises in a SEZ.[381] The SEZ Law states that, in the case of no resolution, the dispute is to be referred to the procedures under the 1929 Trade Disputes Act.[382] Absent any provisions suggesting otherwise, relevant labour laws are also applicable, for example the 2012 Settlement of Labour Disputes Law and the 2013 Minimum Wage Law. [383]

3.4.5 Analysis

Management Committees are responsible to ensure compliance with labour laws in SEZs however this does not displace the determination, compliance monitoring and enforcement authorities of other agencies with statutory powers on labour matters.[384]

Many aspects of Myanmar's labour laws are inconsistent with international law and standards, including the ICESCR and ILO conventions. For instance, workers do not have rights to freely organize.[385] Strikes are only permitted after administrative approval has been granted.[386]

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373 2014 SEZ Law, Art 75: "The investor shall, in employing citizen skilled workers, technicians and staff who are required of high technology and skills, have appointed the citizens at least 25 percent the first two years from the commencing year of operation, at least 50 percent in the second two years, at least 75 percent in the third two years." Investors are required to undertake efforts to meet these targets, but penalties for failing to meet the targets are unclear, see: 2014 SEZ Law, A51. Also note that whilst the 2012 Foreign Investment Law included a similar staggered ratio for citizen employment in skilled jobs, that provision was removed in the 2016 Myanmar Investment Law.
374 2015 SEZ Rules, Art. 47, Annex: Form-E.
375 Three occupation types are contemplated in the SEZ Rules: administration, expert and labour. Ibid.
376 2014 SEZ Law, Art. 78.
377 2014 SEZ Law, Art. 71.
378 2014 SEZ Law, Art. 71.
379 2014 SEZ Law, Art. 73. 2015 SEZ Rules, Art. 216.
380 2015 SEZ Rules, Art. 210.
381 2014 SEZ Law, Art. 76(a).
382 2014 SEZ Law, Art. 76(b). 1929 Trade Disputes Act.
383 Civil servants are not covered in the definition of a 'worker' for the purposes of the 2013 Minimum Wage Law, but there are no provisions precluding employees in SEZs from this definition. This reaffirms the applicability of this Law to workers in SEZs. See: Article 2, (definition of 'worker').
384 Inspections to monitor and enforce labour laws are generally carried out by the Factories and General Labour Laws Inspection Department of the Ministry of Labour, Immigration and Population.
385 See: Business and Human Rights Resource Centre, "Myanmar's Garment Sector – Briefing Note," (forthcoming in 2017).
386 2011 Labour Organisation Law INSERT PINPOINT REF

The SEZ Law states that Management Committees have a duty to ensure that labour rights and entitlements are not diminished or lost for employees in SEZs.[387] It would therefore be unlawful to establish a minimum wage in an SEZ that is lower than the national standard. In any case, recent studies indicate that minimum wage employment in Myanmar, particularly in garment factories, would be insufficient to restore the livelihoods of persons displaced by the development of an SEZ.

The 2014 SEZ Law makes the Management Committee the first instance arbitrator of disputes between employers and employees in the SEZs. However the SEZ laws do not establish procedures to implement this provision. It is therefore unclear if this undermines or is complementary to effective redress mechanisms under existing laws.

While the SEZ laws require employers to arrange trainings for workers these obligations lack definition and there are no provisions in place compelling these activities to be effective in protecting, restoring or strengthening livelihoods.

3.5 Company and Investment laws in SEZs

Company registration is required of all foreign investors in Myanmar, including in SEZs.[388] Local companies are generally also required to register.[389] The registrar is the Directorate of Investment and Company Administration (DICA).[390] Under the previous Government, DICA was housed in the focal ministry for SEZs, and provided some support to SEZ governance. DICA maintains a presence at site level but is no longer directly supporting SEZ governance.

In 2016 a new Myanmar Companies Law was been drafted with the intention to repeal antiquated provisions of the 1914 Companies Act, formalise the role of DICA and bring greater clarity to the regulatory framework.[391] The draft available at time of publishing this report, however, suggests that registration requirements are unlikely to change. To help facilitate registration, the SEZ laws provide for the establishment of a DICA presence at SEZ site level. [392]

In October 2016 the Union Parliament enacted a new Investment Law that repeals and combines the 2012 Foreign Investment Law and 2013 Myanmar Citizens Investment Law. Under the framework operating from 2012-2016, the Myanmar Investment Commission (MIC) had significant powers to regulate investments through approval processes and the issuance of notifications. These regulations include restrictions and prohibitions on the type of business activities and the ministerial approvals required for different sectors of investment. The 2016 Law devolves much of the previous investment approval powers of the MIC to the State and Regional governments. At the time of writing, DICA was embarking on developing Investment Rules and the MIC plans to then release notifications reflecting the new law.[393]

The role of the MIC in SEZs has been a source of confusion because the investment laws and SEZ laws were not specific on this matter, whilst advice and guidance from authorities on this matter appeared to be unclear. Research for this report clearly established that provisions and regulations under investment laws and MIC notifications are not

387 2014 SEZ Law, Art. 70(c). 2015 SEZ Rules, Art. 209(b).

388 2014 SEZ Law, Article 34(a). DICA's advisory literature states that foreign investors must register under the 1914 Myanmar Companies Act. See: http://www.dica.gov.mm/en/printpdf/145 (Accessed 7 September 2016). Joint ventures with the Government register under the 1950 Special Companies Act. See: DICA (June 2016) 'How to register your company in Myanmar' p3 http://www.dica.gov.mm/sites/dica.gov.mm/files/uploads/pdf/how_to_register_eng.pdf

389 DICA advises that the following businesses may generally operate without registration: enterprises run by citizens that are a sole proprietorship or partnership, such as: "single restaurant, small shop, small departmental stores, individual trading, small service providers, law firm." http://www.dica.gov.mm/en/printpdf/145 (Accessed 7 September 2016).

390 DICA was formed in 1993 by the then-Ministry of National Planning and Economic Development.

391 See: U Aung Naing Oo and Winfried Wicklein, 'Transforming Myanmar's corporate landscape' *The Myanmar Times* (16 August 2016).

392 The 2014 SEZ Law states DICA shall have a 'branch office,' Art. 34(a). The 2015 SEZ Rules states that DICA shall have a presence through the OSSC, Art. 20(c).

393 In October 2016, DICA started developing the Investment Rules with support from the International Finance Corporation (ICJ Interview with DICA Director General and MIC Secretary U Aung Naing Oo, in Yangon on 10 October 2016).

and have not been applicable in SEZs.[394] SEZs were autonomous from the recently repealed 2012 Foreign Investment Law and 2013 Myanmar Citizens Investment Law. As developments increased over 2015-2016 at Myanmar's only active SEZ, in Thilawa, the Committee told investors that they weren't required to engage with the MIC.[395] No investment approvals in SEZs came from the MIC during that time.[396] The 2016 Investment Law now mentions SEZs only to state that its exemptions and reliefs do not apply to businesses in SEZs.[397] Restrictions, prohibitions and monitoring procedures established under the investment laws are not applicable in Myanmar's SEZs.

394 ICJ Interview with DICA Director General and MIC Secretary U Aung Naing Oo, in Yangon on 10 October 2016. See: http://www.dica.gov.mm/en/news/discussion-dr-daniel-aguirre-international-legal-advisor-myanmar (Accessed 12 October 2016).

395 ICJ Interview with General Manager of a foreign company investing in Thilawa, on 29 August 2016 in Thilawa.

396 An examination of all MIC approvals from January 2015 to September 2016 found that the MIC had not considered any SEZ investments. Note that three investments approved in the Thilawa area during that time are outside the SEZ area and seemingly not directly related to the SEZ development.

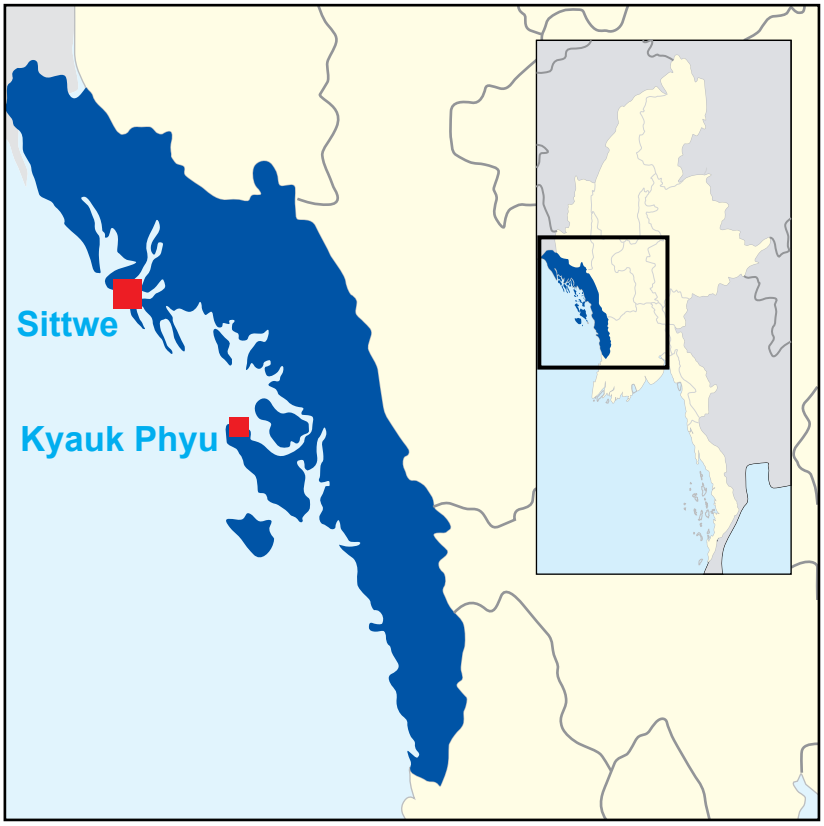
397 2016 Myanmar Investment Law

4. HUMAN RIGHTS CONCERNS WITH THE KYAUK PHYU SEZ

The case study below of the Kyauk Phyu SEZ in Rakhine State, reveals that the design and implementation of Myanmar's legal framework for SEZs does is not compliant with international standards and the State's international law obligations to protect human rights.

Human rights violations have occurred, on a relatively small scale, during initial preparations for the development of the Kyauk Phyu SEZ. Future rights violations can be avoided if the SEZ is developed in line with the State's international human rights law obligations and international standards on involuntary resettlement that are recognized in national law.Subsection one [4.1] gives an overview of the socio-economic profile of Kyauk Phyu as well as a background and key details about the SEZ development. The second subsection [4.2] documents displacements that occurred in 2014 related to the construction of infrastructure subprojects to service the SEZ. This subsection also examines preparations for a substantial land acquisition for the SEZ that took place during the period of research for this report, from April to December 2016. The third subsection [4.3] assesses the human rights impacts of these displacements, and identifies potential future livelihood changes for people living and working in the area. Finally, a legal assessment [4.4] assesses the State's compliance with national and international laws in the development of the SEZ to date, and provides recommendations linked to these findings.

Map of Kyauk Phyu, Rakhine State



Map edited by the ICJ (original by Radio Free Asia)

4.1 Overview of the Kyauk Phyu SEZ project

4.1.1 Profile of Kyauk Phyu

Livelihoods and demography

Located in the northern part of Ramree Island, off the Rakhine State coast, Kyauk Phyu Township consists of 54 village tracts containing 261 villages. Its total population is 165,352.[398] Eighty seven per cent of all residents live in rural areas. Farming and fisheries are the primary means of livelihood for around 70 per cent of residents.[399] Limited economic opportunities have contributed to significant outward migration from Kyauk Phyu. Over 25,000 residents, around 80 per cent men, live abroad pursing employment mainly in Thailand and Malaysia.[400] A significant number of women have reportedly moved to Yangon for employment opportunities, mainly in garments manufacturing.[401] It has been reported that outward migration from Rakhine State, one of Myanmar's poorest provinces, has increased since violent conflict there in 2012.[402] Many families now rely on remittances from abroad to support their livelihoods.

Around half of Kyauk Phyu's rural population are estimated to be without the land tenure rights granted under the 2012 Farmland Law.[403] Many use land that has not been registered but has nonetheless been used by their families for generations, by affirming land rights under customary tenure arrangements. [404] Local Government officials recognize the gap between land use documented in official records and land use that is occurring in practice.[405]

The ethnic and religious composition of the township is mainly Buddhist Rakhine, with various minority groups present along with inward migrants of varying ethnicities from other parts of Myanmar. A degree of animosity toward the central Government reflects historical tensions between ethnic Rakhine and ethnic Bamar.[406] A Muslim population, predominantly ethnic Kaman, was based mainly in the town itself before being driven out during a violent conflict in 2012.[407] These residents have since lived in camps, two of which are located in the township, others in neighbouring townships.[408] Their movement remains severely restricted. Forbidden by authorities from leaving the camps, these women, men and children rely on assistance from aid agencies and Muslim associations based in Yangon.[409] A third camp hosts Buddhist Rakhine residents who do not experience the same restrictions on movement. [410]

398 86,590 females and 78,762 males. Ministry of Immigration and Population, & UNFPA, 'The 2014 Myanmar Population and Housing Census: Rakhine State', April 2014. Note that the official estimate of non-enumerated persons in Rakhine State is 31 per cent of the population (mostly Muslim residents). See: Population and Housing Census of Myanmar 2014, Provisional Results, pp. 14.
399 Oxfam, "Kyauk Phyu: a baseline socio-economic assessment," 2016, pp. 16.
400 Ministry of Immigration and Population, & UNFPA, 'The 2014 Myanmar Population and Housing Census: Rakhine State', April 2014. pp. 47.
401 Oxfam, "Kyauk Phyu: a baseline socio-economic assessment," 2016, pp. 16.
402 Andrew R. C. Marshall, " Poor and besieged, Myanmar's Rakhine join Rohingya exodus," 26 November 2016, Reuters.
403 ICJ interview, senior Monk, Kyauk Phyu, April 2016. ICJ interview, GAD District Officer, Kyauk Phyu, August 2016.
404 Ibid.
405 ICJ interview, GAD District Officer, Kyauk Phyu, August 2016.
406 Bamar people form the majority ethnic group nationwide, and have comprised most civil service and State leadership positions since Myanmar's independence in 1948. Bamar are a minority ethnic group in Rakhine State, with high representation in the civil service, security forces and the Rakhine State Cabinet. Rakhine people form the majority ethnic group in Rakhine State. Note that in Myanmar, the designation 'Burmese' is generally used to describe Bamar people, while outside the country it is often used as a general descriptor for all people from Myanmar.
407 Kaman people, who are predominantly Muslim, are one of the 135 designations of recognized ethnic groups in Myanmar, according to the 1982 Citizenship Law, enacted by the Burma Socialist Programme Party Government led by General Ne Win. Rohingya Muslims are not recognized as citizens. For recent discussion of Kaman in Kyauk Phyu, see: Fiona MacGregor, "Why were Kaman Muslim deaths ignored?" 6 May 2016, The Myanmar Times.
408 Some actors call these 'IDP camps'. Others, such as the INGO Fortify Rights, use the term 'interment camps' because residents are confined. ICJ email communication, Fortify Rights, July 2016.
409 ICJ interview, Kyauk Ta Lone Camp Management Committee, Kyauk Phyu, August 2016. ICJ interview, Kyauk Ta Lone Camp Women's Group, Kyauk Phyu, August 2016. ICJ interview, Kyauk Ta Lone Camp Volunteer Group, Kyauk Phyu, August 2016.
410 The two camps with mostly Muslim residents have a total population of 1,378 (770 women & 608 men). The one camp with mostly Rakhine ethnic residents has a total population of 352 (192 women & 160 men). ICJ email communication, Oxfam, December 2016.

Recent experiences of foreign investment

The township has seen significant investment activities in recent years. Kyauk Phyu is the source of an oil and gas dual pipeline traversing four states and regions. Completed in 2013, the pipeline connects China's western Yunan Province with the Bay of Bengal.[411] As part of this development, the China National Petroleum Corporation (CNPC) operates a crude oil unloading terminal facility on Madei Island, adjacent to Kyauk Phyu. These projects have been widely derided by local residents, from farmers to business people, who have not seen investments translate into benefits for the wider community.[412] For some community leaders, peaceful opposition to these projects and their impacts resulted in prosecution and prison sentences with hard labour, including in late 2013 for unlawful assembly. [413]

Many residents have still not been compensated for losses and damages to farmlands and fisheries associated with the pipeline and related projects.[414] It appears that commitments to comply with international standards on resettlement have not been fulfilled. Disputes over compensation are ongoing and access to remedy is limited.[415] These recent negative experiences are reflected in sceptical community perceptions toward Chinese investments, as well as a general lack of trust in local authorities to fairly oversee any future resettlement.

4.1.2 Overview of the Kyauk Phyu SEZ

Project background

Plans for an SEZ and deep seaports in Kyauk Phyu appear to have emerged around 2009, over time developing into plans for a megaproject.[416] A corporate promotional video suggests the SEZ will create an investment and economic hub akin to Singapore.[417] Two deep seaports with ten berths would process cargo to and from Europe, Africa and West-Asia.[418] Associated land-transport connections to China would create alternative shipping routes for Chinese trade. A new road would link Kyauk Phyu either to the national road network from Magwe or extend all the way to the Chinese border. Trans boundary railways have also been envisaged, but seem to have been placed on hold.[419] Public information about the projects is generally opaque.

An initial feasibility study was conducted in 2011 by the expected project Developer, the Chinese State-Owned Enterprise CITIC Group (China International Trust and Investment Corporation).[420] In 2013 the Government selected a consortium to manage a bidding

411 The China National Petroleum Company (CNPC) signed a MoU with Myanmar's state-owned Myanmar Oil and Gas Enterprise in June 2009. Chi Zhang (2016) The Domestic Dynamics of China's Energy Diplomacy, 2016, Word Scientific Publishing Co. Pty. Ltd., Singapore, pp. 152.

412 Most residents interviewed for this report or who took part in legal literacy workshops held by the ICJ expressed this perspective. ICJ observations, Kyauk Phyu, April-December 2016.

413 They were prosecuted under Article 18 of the Peaceful Assembly and Peaceful Procession Law. For details, see: Thaing Naing Soe, "'Arrest us all': Maday residents protest jail terms," The Myanmar Times, 7 October 2016. For analysis, see: ICJ, "Implementable Action Plans from the ICJ to the new Parliament and Government," May 2016, pp. 32.

414 ICJ interview, CSO member, Kyauk Phyu, May 2016. See also: Eleven Media, "Kyauk Phyu farmers protest against CNPC," 7 November 2016.

415 Su Myat Mon, "With Planned Protest, Shwe Gas Pipeline Resentments Linger," The Irrawaddy, 8 April 2016. See also: Myanmar China Pipeline Watch Committee, "In Search of Social Justice along the Myanmar-China Oil and Gas Pipeline," January 2016.

416 ICJ interview, businessperson, Kyauk Phyu, August 2016. See also: CITIC, "(website statement)," 14 July 2014, http://www.cici.citic.com/iwcm/null/null/ns:LHQ6LGY6LGM6MmM5NDgyOTU0NzMyMDgzYTAxNDczMzVlMTU0MzAwNmIscDosYTosbTo=/show.vsml, retrieved 4 February 2017.

417 CITIC, Video about the Kyauk Phy SEZ, 2016. CITIC shared this video with the ICJ in May 2016.

418 Xinhua, "New Projected SEZ in West Myanmar to Benefit Economic Growth," 1 January 2016. Ministry of Industry, "Industrial Policy," February 2016. Published in the Republic of Myanmar Gazette, 24 June 2016.

419 In 2010, the governments of Myanmar and China signed an MoU to develop a transport corridor. Global New Light of Myanmar, 19 May 2010. See also: Xinhua News, "China Railway signs agreement with Myanmar on rail project," 28 May 2011.

420 CITIC Group, "Myanmar Kyauk Phyu Port Industrial Zone Preliminary Feasibility Study", May 2011. Cited in: Arakan Oil Watch, "Danger Zone: Giant Chinese Industrial Zone Threatens Burma's Arakan Coast," 2012, pp. 3. CITIC and Myanmar Government officials reportedly met in 2009 but it is unclear what was discussed. Simon Lewis, "The Irrawaddy Business Roundup," 2 January 2016, The Irrawaddy.

process for the SEZ, seaports and a residential area.[421] Bids were submitted in 2014. Following a series of delays,[422] CITIC became the 'preferred bidder' in January 2015.[423] In December 2015, the SEZ Management Committee's Bid Evaluation and Awarding Committee proposed CITIC as the winning bidder. On 29 December 2015 the outgoing USDP Government led a parliamentary vote to establish the SEZ, awarding to CITIC tenders for the SEZ project and deep seaports project.[424] The tender for a residential zone was not awarded.

Project area

Research for this report established that the designated SEZ area covers 35 villages across nine village administrative tracts, with a population of around 20,000 people.[425] These villages are located to the south of Kyauk Phyu Town on the island of Ramree (see map).

State media reported on 30 December 2015 that the Union Parliament approved an area of 4,289 acres (1,736 hectares) for development of the SEZ and related projects.[426] Detailed information about the project area and affected population has not been publically disclosed. However, details obtained for this report are compiled in the below chart.

An initial 250 acres area would initially be developed for the SEZ, followed by two larger phases, with development activities expected by officials conclude in 2038. The seaport terminals would reportedly be constructed over four phases spanning a 20-year period.[427]

The SEZ's area of impact would extend beyond the zone itself and is likely to affect a significantly large area and population size as well as potentially bringing an influx of workers from other parts of Myanmar. The construction of infrastructure including energy, water and transport facilities is expected to take place outside the zone. Highways and bridges would connect the SEZ with the seaports.[428]

The overall project including the seaports would have a vast area of impact including Kyauk Phyu Town, its surrounding coastal areas and the hinterlands. Allocation of replacement land for people resettled from the SEZ area would also expand the impact zone.

The below table indicates the breakdown of geographical areas that would be included in the SEZ and seaport projects. Note that there are inconsistencies in these figures across a number of documents and statements by Government and CITIC officials, which reflects the lack of accurate and publically available information about the projects.

421 CPG Consortium, the corporatized entity of the former Singapore Public Works Department, developed a master project plan consisting of an industrial zone, deep seaport and residential area. Nyan Lin Aung, "Singapore firm wins Kyaukpyu consultancy," 17 March 2014, Myanmar Times. CPG Consultants, "Media Release: CPG Consortium Appointed to Develop Master Plan for Myanmar's Kyauk Phyu Special Economic Zone" 7 July 2014.

422 Kyaw Hsu Mon, "Twelve Months on, Kyauk Phyu Tender Still up in the Air," 18 September 2016, The Irrawaddy.

423 CITIC, "Attachment No. 1: Description of KP SEZ Deep Sea Port Project and Industrial Park Project," Document shared with several NGOs in December 2016, pp. 5.

424 Global New Light of Myanmar (30 December 2015), 'SEZ given green light: Pyidaungsu hluttaw approves Kyaukphyu SEZ on 4,289 acres'. CITIC is understood to be made up of: CITIC Group; Thailand Charoen Pokphand Group Company Limited (CP Group); China Harbor Engineering Company Ltd.(CHEC); China Merchants Holdings (International) Co. LTD (CMHI); TEDA Investment Holding (TEDA); and Yunnan Construction Engineering Group (YNJG).

425 Internal GAD Document, "Facts about Kyauk Phyu SEZ," 6 June 2016. ICJ interviews, village administrators, Kyauk Phyu April and September 2016. Population data is from village administrators, based on May 2015 figures which indicate the total population of the nine village tracts to be 19,949 people. ICJ phone communications, village administrators, December 2016.

426 Global New Light of Myanmar, "SEZ given green light," 30 December 2015.

427 Xinhua, "New Projected SEZ in West Myanmar to Benefit Economic Growth," 1 January 2016.

428 CITIC, "Attachment No. 1: Description of KP SEZ Deep Sea Port Project and Industrial Park Project," Document shared with several NGOs in December 2016, pp. 1.

Chart: Total project area [429]

Project	Sub-project	Acreage	Total acres
SEZ parks	TIP 1	784.5	2,446.07 (990 hectares)
	TIP 2	324.68	
	CIP 1	314.84	
	CIP 2	1,022.05	
Seaports	Madei Island	(unknown)	609 (246 ha)
	Ramree Island	(unknown)	
Residential parks	RES 1	(unknown)	1,235 (500 ha)
	RES 2	(unknown)	
	RES 3	(unknown)	
Subtotal			4,290.07 (1,736 ha)
Additional infrastructure	*(unknown)*	*(unknown)*	*(unknown)*

Plans for land acquisition and resettlement

A relatively small amount of land was acquired by the State in 2014 to construct infrastructure facilities which displaced 26 families from farmland. At the time they were promised replacement land but this has not been provided. [430]

In February 2016 the Ministry of Home Affairs started a process to acquire land for the SEZ parks. In March an inter-departmental team undertook a detailed land survey in the Phase 1 SEZ area.[431] It is understood, but has not been confirmed, that the Management Committee gave this direction.[432] By June, plans had been made to demarcate 1,832 acres (741 ha) of land.[433] By the end of 2016, a detailed land survey appears to have been finalized that directly affects 77 farmers.[434] This information has not been made publically available.

There are also plans to acquire land in the Doma Taung area, outside the SEZ, to provide replacement land to some persons who would be resettled from within the SEZ.[435] While much of this land is officially classified as vacant, in practice residents in the area use the land for their livelihoods by affirming customary land tenure (see discussion, below).

Project sectors

Detailed project plans obtained for this report indicate the SEZ would be divided into four areas, comprised of two 'textile industrial parks' and two 'construction industrial parks'. [436]

429 Internal GAD Document, "Facts about Kyauk Phyu SEZ," 6 June 2016, pp. 11, 32. SEZ Central Body Notification 6/2015 (29 December 2015).
430 ICJ interview, GAD District Officer, Kyauk Phyu, August 2016. ICJ interview, former KPSEZ Management Committee members, Yangon, October 2016.
431 See: Sean Bain, "Time for Transparency in Kyauk Phyu," August 2016, Frontier Magazine.
432 The former Management Committee did not respond to a letter seeking clarification. See annex.
433 Internal Government (GAD) Document, "Facts about Kyauk Phyu SEZ," 6 June 2016. These plans include the classification of land into four categories: road land (998.5a); toddy tree land (72a); garden land (645.95a) and village land, town land and land used for other purposes (115.7a). Note that there are slight discrepancies in acreage across various sources. The figure in the referenced document is citied.
434 Internal Government Document, November 2016.
435 ICJ interview, GAD District Officer, Kyauk Phyu, August 2016.
436 Internal Government (GAD) Document, June 2016.

The potential for textiles to create large numbers of low skilled jobs is likely to be a consideration of the Union Government, as per its 2016 economic policy.[437] Garment manufacturing used to be a big employer in Myanmar however there was a decline during the 2000s, linked to the introduction of western sanctions on the country as well as increased manufacturing in China.[438] With changes in the political and economic contexts, analysts expect this sector to be an area of significant future investment in Myanmar.[439] A recent study is inconclusive as to whether garment manufacturing businesses are likely to be attracted to invest in relatively remote Kyauk Phyu, at least in the near term.[440]

Business activities in the 'construction industrial parks' may include logistics services, machinery assembly and food processing.[441] The SEZ area is in close proximity to the planned seaports as well as existing and developing offshore and onshore oil and gas infrastructure, making logistics operations an attractive commercial option for investors.[442] The Kyauk Phyu SEZ may include heavy industry[443] and the establishment of a petrochemical processing plant has also been contemplated.[444] Kyauk Phyu has poor infrastructure so new power-generating facilities would be required to support the four parks.

A corporate video from CITIC also anticipates the inclusion of the following sectors: pharmaceuticals; information research; research and development; automobile; equipment manufacturing; marine supply and services.[445]

No tender was awarded for residential parks but local authorities have included three 'residential' or 'recreation and enterprise' parks in development plans for the area.[446] There is speculation, but no confirmation, that these may include a tourist zone,[447] .

Project status at Union-level

In November 2016 the NLD-led Government's de facto leader, State Counsellor Daw Aung San Suu Kyi, publically stated a commitment to the Kyauk Phyu SEZ.[448] The announcement followed the reconstitution of the Kyauk Phyu SEZ Management Committee the previous month, and ended a period of heightened uncertainty about the project's future.[449] No members appear to have been retained from the previous Management Committee

At the time of publishing this report, in February 2017, the Government of Myanmar was negotiating two framework investment agreements with CITIC.[450] Under the 2014 SEZ Law, as project Developer, CITIC would be granted a 50-year lease to develop the SEZ. A similar leasing arrangement is possible, if not likely, for the seaports, particularly given that CITIC sees these projects as related 'products'. [451]

437 Government of Myanmar, "National Economic Policy," July 2016.
438 Business and Human Rights Resource Centre, "Myanmar's Garment Sector – Briefing Note," (forthcoming in 2017).
439 Oxford Business Group, "Myanmar's garment manufacturing segment sees growing export revenues," 2016.
440 Oxfam, "Responsible Investment in Kyauk Phyu: lessons from experiences of SEZ developments," January 2017, pp. 18.
441 Internal Government (GAD) Document, June 2016, part 31. CITIC, Video about the Kyauk Phy SEZ, 2016.
442 ICJ interview, businessperson, Kyauk Phyu, August 2016.
443 Oxfam, "Responsible Investment in Myanmar: lessons from experiences of SEZ developments," 2017, pp. 25.
444 See: Kyaw Suu Mon, "Another Deadline Missed by Kyaukphyu SEZ Developers," 13 March 2015, The Irrawaddy.
445 CITIC, Video about the Kyauk Phy SEZ, 2016.
446 Internal GAD Document, "Facts about Kyauk Phyu SEZ," 6 June 2016.
447 This was raised and discussed by participants at events and workshops held by the ICJ in Kyauk Phyu in May, September and December 2016.
448 Global New Light of Myanmar, "State Counsellor meets with Central Body for Myanmar Special Economic Zone," 16 November 2016. Members of the SEZ bodies and newly appointed Management Committees were present at the meeting in Nay Pyi Daw on 15 November 2016. Note it is understood the incoming Central Body Chairperson visited Dawei and Thilawa in late 2016 but not Kyauk Phyu.
449 For a list of previous members, see: SEZ Central Working Body Notification 4/2015 (25 December 2015). Published in the Republic of Myanmar Gazette, 25 December 2015. For a list of new members, see: SEZ Central Working Body Notification 1/2016 (12 October 2016). Published in the Republic of Myanmar Gazette, 3 November 2016.
450 It is understood that there would be seven agreements: four for the port and three for the SEZ.
451 ICJ communication, CITIC representatives, May 2016.

The Chinese conglomerate has formed one consortium to develop the SEZ and a second consortium for construction of the seaports.[452] CITIC plans to make the SEZ a multilateral project through inviting investment by companies from other countries including South Korea and Thailand.[453]

Chart: Key Union-level events in development of the SEZ

8 November 2015	National elections see the NLD win parliamentary majority
29 December 2015	Announcement that CITIC consortiums have won tenders USDP-dominated Union Parliament approves the SEZ
1 April 2016	NLD-led Government takes office
12 August 2016	NLD establishes reconstituted Union-level SEZ bodies
12 October 2016	NLD establishes reconstituted KP SEZ Management Committee
16 November 2016	State Counsellor affirms NLD commitment to KP SEZ
16 November 2016	State Counsellor affirms NLD commitment to KP SEZ

Project status at site-level

In December 2015, the then-Chairperson of the Management Committee announced plans to set aside land for development of the SEZ.[454] Local civil society groups issued a 12-point reactive statement calling for any decisions and developments to be suspended during the handover period to a new Government.[455] A group of local businesspeople travelled to Nay Pyi Taw where they unsuccessfully lobbied Members of Parliament to delay a vote on the project's future until the NLD-led Government was formed.[456]

In early January, then-members of the Management Committee held a meeting in Kyauk Phyu to discuss the SEZ. Representatives from CITIC attended this meeting along with locals who were invited through the GAD. [457] This appears to be the only SEZ-related meeting that Government authorities held with Kyauk Phyu residents during 2016.

From April 2016, local authorities and the expected Developer told researchers for this report that all plans for land acquisition were on hold pending instructions from the new Union Government. An interregnum of around six-months followed in which no Union-level SEZ bodies were active. Preparations nonetheless continued throughout 2016 although no acquisitions had been executed as at the end of the year. Because no publically available information could be obtained, and because former officials have not clarified information, it is unclear if the Union Government issued an instruction related to this. When asked in October 2016, members of the former Management Committee could not or would not explain these arrangements for land acquisitions for the SEZ.[458] In November and December 2016, the relevant Union- and State-level Government Ministers did not share information and may not have known of these on going preparations at site-level. [459]

452 CITIC, "Response by CITIC: Foreign Investment Tracking Project," 7 September 2016, Business and Human Rights Resource Centre.
453 Ibid. Note that given experience with project suspension elsewhere in Myanmar, Chinese investors are sensitive to the possibility of project cancelation, and multilateral investment in the SEZ may increase confidence in stability of the project. ICJ communication, independent consultant, Yangon, September 2016.
454 Htoo Thant, "Govt reserves land for Rakhine State SEZ," 7 December 2015, Myanmar Times.
455 Moe Myint, "NGOs Seek Kyauk Phyu SEZ Delay as President Pushes Implementation," 22 December 2015, The Irrawaddy.
456 ICJ interview, businesspeople, Kyauk Phyu, April 2016.
457 Moe Myint, "Kyauk Phyu Awaiting Answers on SEZ Development," 12 January 2016, The Irrawaddy. The ICJ has established through discussions with multiple sources that the GAD has facilitated much of the community engagement in meetings with the Management Committee and CITIC.
458 The ICJ met the former-Management Committee on 4 October 2016.
459 The ICJ met the Union Minister of Commerce on 9 November 2016. The ICJ also met the Rakhine State Minister for Finance, Revenue, Planning and Commerce on 5 December 2016.

Views and perspectives

The development of an SEZ in Kyauk Phyu should be understood in the context of China's strategic interests in the area and foreign affairs between the governments of China and Myanmar.[460] Any reduction in China's reliance on the congested Malacca Strait would be widely considered a strategic win for China and highly significant for regional geopolitics.[461] The importance of the seaports for the Government of China is widely accepted. [462]

Yet the value and viability of an SEZ in Kyauk Phyu is highly contested by actors interviewed for this report as well as among many economists and analysts knowledgeable about the country.[463] On the basis of existing evidence and research on the Kyauk Phyu SEZ, there are significant questions over its economic feasibility and its potential to contribute to economic development of the region.[464] Myanmar currently lacks the skilled labour force that would be required for many of the planned sectors in SEZs, while export manufacturing is already established in neighbouring countries.[465] Many have expressed scepticism about the longer-term viability of an oil and gas industry in Kyauk Phyu. Not all economists share this scepticism.[466] Overall there has been a lack of economic assessments and transparent planning to inform decision-making.

Chart: Stated project timeframes[467]

Project	Stage	Area	Timeframe
SEZ	Phase 1	250 acres	2015—2020
	Phase 2	1325 acres	2020—2028
	Phase 3	925 acres	2028—2038
Seaports	Phase 1	(unknown)	2017—2021
	Phase 2	(unknown)	2021—2025
	Phase 3	(unknown)	2025—2029
	Phase 4	(unknown)	2029—2035
Residential	(unknown)	(unknown)	(unknown)
Additional infrastructure	(unknown)	(unknown)	(unknown)

Many locals who live in Kyauk Phyu are sceptical of plans coming from Chinese investors and Myanmar Government officials, given experiences of unfair and potentially unlawful land acquisitions related to recent investment projects in Kyauk Phyu. Local businesspeople are concerned that foreign ownership arrangements will restrict their

460 As one Myanmar civil society leader told the ICJ in December 2016, "These SEZs are not development projects. These SEZs are political projects." There is a wide range of reporting and scholarship in the English language that discusses and assesses the China-Myanmar relationship.

461 For China, these seaports would establish a western corridor that is alternative or complementary to the China-backed Gwadar Port in Pakistan's troubled Balochistan Province. For info, see: Amy Kamzin et al., "China and Pakistan Pin Hopes on Arabian Sea Port," 2 October 2016, Financial Times.

462 For analysis, see: Shannon Tiezzi, "Chinese Company Wins Contract for Deep Sea Port in Myanmar," The Diplomat, 1 January 2016. See also: David Steinberg, "Modern China-Myanmar Relations: Dilemmas of Mutual Dependence," 2012, Nordic Institute of Asian Studies. Apple Media, "The Development of the Area Along the Way," 18 August 2016 [original article in Chinese Mandarin].

463 Nearly all the people interviewed by the ICJ for this report, from farmers to Union Ministers, were conflicted regarding the challenges and opportunities related to development of the Kyauk Phyu SEZ.

464 For analysis, see: Oxfam, "Responsible Investment in Kyauk Phyu: lessons from experiences of SEZ developments," January 2017. Josh Wood, "The Economics behind Myanmar's SEZs: (Part 2)," Myanmar Business Today, 20 November 2014. William Boot, "Kyauk Phyu SEZ: Economic Reality or Pipedream?," 10 November 2014, The Irrawaddy. See also: Willam Boot, "Kyauk Phyu SEZ Key to China Business Corridor, But Doubts Remain," 19 September 2014, The Irrawaddy.

465 See: The Economist Intelligence Unit, "Maximising the full potential of Myanmar's SEZs," The Economist, 19 April 2016.

466 For analysis, see: Amit K. Khandelwal & Matthieu Teachout, "IGC Policy Note: Special Economic Zones for Myanmar," February 2016, International Growth Centre.

467 Source of information on the SEZ: Internal GAD Document, "Facts about Kyauk Phyu SEZ," 6 June 2016. Source of information on the seaports: CITIC, Video about the Kyauk Phy SEZ, 2016.

ability to engage with and benefit from the SEZ.[468] Members of Rakhine State's largest political party, the Arakan Nationalities Party, have expressed opposition to the project but do not appear to have an official policy position.[469]

In Government, members of the NLD-dominated Rakhine State Cabinet have expressed interest in attracting investment as concerns about the social and environmental impacts, but see the Union Government as the driver of the SEZ.[470] It is understood that the Rakhine State Government did not include the SEZ in economic modelling during the initial development of its Strategic Development Plan in mid-2016; researchers for this report could not verify if the SEZ was included in latter drafts of this document At Union level, among Union Ministers and senior civil servants, there appears to be a mix of scepticism and support regarding the projects. As discussed above, the NLD-led Government's de facto leader, the State Counsellor, has publically affirmed her support for the Kyauk Phyu SEZ.

Proponents of the SEZ tend to speak in broad terms about potential economic benefits for one of Myanmar's poorest provinces. Researchers for this report met Management Committee members as well as the expected project developers. However, neither was forthcoming with information beyond basic high-level details about the SEZ. Publically available information about detailed terms and plans for the SEZ remains limited.

4.2 Displacement and resettlement

4.2.1 Displacement for SEZ subprojects in 2014

In 2014 the Government initiated construction of two dams in Kyauk Phyu Township. The primary purpose of this infrastructure is to service the SEZ,[471] as part of the Government's stated commitments to potential investors.[472] Twenty-six families were displaced from farmlands by land acquisition that took place in order to construct these SEZ subprojects.[473] Some, perhaps not all, of these families had documents to prove their tenure rights to this land. Some reported that, even two years following the land acquisition, they have continued to pay tax on this farmland despite it having already been acquired by the State.[474]

Several government departments, and a private company, were involved in land acquisition and construction activities. A Government body or department that coordinated these SEZ subprojects could not be established with certainty. However the Management Committee at the time, whose membership was reconstituted in 2016, played a central role in negotiating, coordinating and dispensing compensation to displaced residents.

468 ICJ interview, local company director, Kyauk Phyu, April 2016. ICJ interviews, businesspeople, Kyauk Phyu, April 2016. ICJ interview, businessperson, Kyauk Phyu, May 2016.
469 ICJ interview, members of the Arakan Nationalities Party Central Committee, Sittwe, 9 August 2016.
470 ICJ interview, cabinet members of the Rakhine State Government, Sittwe August 2016. ICJ interview, members of the Arakan Nationalities Party Central Committee, Sittwe, 9 August 2016.
471 Office of the Kyauk Phyu District General Administration Department, "Facts about Kyauk Phyu SEZ" 6 June 2016. Myanmar Survey Research, "Kyauk Phyu SEZ Resettlement Plan for Dodantaung and Thaingchaung Dams," 2014. Note that a member of MSR also served on the Management Committee.
472 These infrastructure commitments were included in the SEZ tender announcement. ICJ interview, former Management Committee members, Yangon, October 2016.
473 Around 18 families in Thaing Chaung and eight families in Doe Tan Taung received compensation.
474 ICJ interviews, residents of Pyaing Sit Kay Village, Kyauk Phyu, May 2016.

Chart: Basic data on the SEZ reservoirs

	Thaing Chaung Reservoir	Doe Tan Taung Reservoir
Location:	Inside SEZ area	Adjacent to SEZ area
Size (gallons):	250 million	20 million
Financed by:	Union Government	Rakhine State Government
Constructed by:	Irrigation Department	Zay Yar Aung Company (MKSH)
Compensation paid by:	Irrigation Department (50%) MKSH (50%)	MKSH (100%)

Details of the land acquisition process are opaque. No formal and/or prior notification of the State's intention to acquire farmland appears to have been provided. Residents affected by the Doe Tan Taung Reservoir nearby Pyaing Sit Kay Village[475] say their Village Administrator informed them of the project, after being briefed by Management Committee members.[476] Residents of Thiang Chaung Village say they first learned of the acquisition when trucks and machinery arrived to start construction.[477]

A lack of transparency and documentation makes it difficult to establish the timeline of events. For instance, while the Management Committee commissioned a resettlement plan it is unclear if this occurred prior, during or following the actual displacement of residents.[478] It is understood that a survey was conducted to inform the calculation of compensation,[479] however no Environmental Impact Assessment was conducted for either subproject.[480]

Residents refused an initial offer of financial compensation because they considered that it did not accurately reflect the value of their farmland and was insufficient to restore their livelihoods. Village Administrators and religious leaders mediated with the Management Committee to negotiate better terms of compensation for farmland lost due to construction of the subprojects. A series of meetings took place that at various times included village leaders, civil society leaders and a senior local monk as well as officials from the GAD and the Land and Statistics Department. Representatives from the Myanmar Kyauk Phyu SEZ Holdings (MKSH) Company, engaged by the Government to construct one of the reservoirs, were present at some negotiations.[481]

The rate of compensation increased two or three times before the Management Committee members declared that the matter had been finalized. In the end an initial offer of around 900 United States Dollars (USD) per acre was raised to 3,600 USD per acre, paid in local currency.[482] Payments appear to have also been made for crops, trees and gardens. No housing was directly affected. Management Committee members verbally promised that displaced residents would have access to upgraded local infrastructure, job opportunities and replacement farmland.[483]

475 Pyaing Sit Kay Village is located in in Ohn Taw Village Tract.
476 ICJ interviews, residents of Pyaing Sit Kay Village, Kyauk Phyu, May 2016.
477 ICJ interview, residents of Thaing Chaung village, Kyauk Phyu, May 2016.
478 Unpublished research from late 2014 suggests that construction started before compensation was considered. Internal document, (undisclosed INGO), Yangon, January 2015.
479 ICJ interview, residents of Pyaing Sit Kay Village, August 2016.
480 When asked, no local resident or Government official was aware of an EIA having being conducted.
481 Myanmar Kyauk Phyu SEZ Holdings is a consortium of 12-14 local and national companies.
482 The final rate of compensation was 3,600,000 Myanmar Kyat. At the time the rate of exchange was around 1000 kyat to 1 United States Dollar.
483 Residents say Management Committee members made these promises on 12 October 2014. ICJ interviews, residents and administrator, Thaing Chaung, July 2016. The former Chairperson of the Management Committee confirmed that promises were made for replacement land. ICJ interview, former KPSEZ Management Committee members, Yangon, October 2016.

The Management Committee appears to have facilitated the payment of compensation. Residents were provided with a revenue stamp documenting each payment received.[484] Although residents received a copy of these receipts, in most instances they did not receive documentation about how payments were calculated. [485] Different documents were used at different locations. A variety of authorities appear as signatories authorising these payments, including the GAD, Farmland Management Body Officials, MKSH Company Officials,[486] Management Committee members and others.At both reservoir sites, compensation payments were made under two categories: compensation and *karuna kyay* (compassion money). Half of the total payment provided to displaced residents was categorized as compensation and the other half was categorized as *karuna kyay*. Two documents were provided to residents that received money, one for compensation and one for *karuna kyay*.

Documentation of compensation provided to Thaing Chaung residents shows that these payments were authorized by the Kyauk Phyu Farmland Management Body, citing the 2012 Farmland Rules. Documentation of the *karuna kyay* provided at both sites does not reference any law. Former Management Committee members have not identified the legal basis or other grounds for designating the two different categories of payments. Persons who received these payments could not explain the reason either.

The MKSH made karuna kyay payments to residents displaced by the Thaing Chaung Reservoir, which was constructed and paid for by the Government. While the MKSH Company was apparently involved in the Thaing Chaung Reservoir at its inception stage, it had since withdrawn from the subproject. The ICJ has not been able to determine why the company made these payments. A board member says it was at the request of the Management Committee.[487] MKSH was at the time positioning itself as a local partner for development of the SEZ.[488] Former Management Committee members did not clarify the basis of this arrangement.[489]

4.2.2 Preparations for land acquisition in 2016

The Ministry of Home Affairs initiated a land acquisition process for the entire SEZ area in February 2016. Government documents indicate the Ministry issued a Notification that cites Article 4(a) of the 1894 Land Acquisition Act.[490] The Notification proposes that an area of 1,825 acres will be required for a public purpose. The Act requires that Notifications under Article 4(a) be posted in areas of convenience for persons with an interest in the land as well as being published in the Union Gazette. However, the Notification was not posted in public areas,[491] nor published in the Gazette.[492] It should be noted that during this period the Ministry did in fact publish other notifications related to smaller land allocations in Kyauk Phyu.[493]

In March 2016, an inter-departmental Government team conducted a survey of 250 acres.[494] The area is situated at the centre of the planned SEZ and is earmarked for

484 Government-authorised revenue stamp, Kyauk Phyu, October 2014.
485 ICJ interviews, displaced residents, Kyauk Phyu, May 2016.
486 Zay Yar Aung Company constructed the reservoir on behalf of MKSH. ICJ interview, MKSH Board Member, Kyauk Phyu, August 2016. ICJ interview, Zay Yar Aung representative, August 2016.
487 ICJ interview, MKSH Board Member, Kyauk Phyu, August 2016.
488 Ibid.
489 See: ICJ letter to the Kyauk Phyu Management Committee (in annex).
490 Ministry of Home Affairs Notification 570/2016 (29 February 2016). Cited in: Internal GAD Document, "Facts about Kyauk Phyu SEZ," 6 June 2016.
491 The ICJ spoke with many persons with an interest in this land during this period but none of them knew of the Notification until September, when village administrators obtained details.
492 The ICJ studied all the Union Gazettes from February to November 2016.
493 Union Gazettes from February to November 2016 contain two land-related notices from Kyauk Phyu, both of which relate to the allocation of land for religious purposes.
494 The survey was conducted from 7 to 16 March 2016. Internal GAD Document, "Facts about Kyauk Phyu SEZ," 6 June 2016. The team was comprised of Township GAD officials, the Kyauk Phyu Farmland Management and Statistics Department, the Union Land Statistics Department, the Agricultural Department and the Forest Department. The ICJ previously reported on this, here: Sean Bain, "It's time for transparency over the Kyauk Phyu SEZ," Frontier Magazine, 4 August 2016. See also: Elaine Kurtenbach (Associated Press), "China's plans for Myanmar town hold few local opportunities," 11 November 2016, Pittsburgh Post Gazette.

Phase 1 of the development. Three village tracts lay in the area: Khat Tha Pyay, Thaing Chaung and Kyat Tein. Surveyors conducted their activities over a one-week period. Markers were placed to demarcate plots.[495] Crops, trees and property were measured and enumerated.[496] Land was measured and categorized according to the 2012 land laws, for example, by classifying areas as vacant land or farmland.

Residents in the area say they became aware of the survey mainly by word of mouth. Information was received during the week preceding the survey, after the Township GAD Office arranged a meeting with village administrators from each of the three village tracts in the area.[497] Staff from the Township Agriculture and Forestry Department and the Farmland Management and Statistics Body reportedly joined the discussion. A local businessperson, apparently requested by the GAD to help facilitate the survey, says he took on the role of informing residents.[498] At the time of the survey, village administrators and residents were told it was related to development of the SEZ. Yet it appears no further information was provided, including no information about compensation plans or arrangements.[499]

During the conduct of the survey, disputes arose between the survey team and residents – mostly farmers – who were monitoring the process. Where the surveyors identified land they considered as being unutilized, it was documented according to the classifications of the 2012 Vacant, Virgin and Fallow Land Law. Farmers say they disputed a number of these classifications, for a variety of reasons: the area is pasture land used for grazing animals; the land is used to grow seasonal vegetables; or the land may not currently be in use but is nonetheless governed by customary tenure rights known as *dama oo cha* (ancestor's property).[500]

Where disputes arose, the surveyors reportedly refused to change the classification. Some reportedly retorted that any complaints would have to be addressed by the Parliament.[501] Researchers for this report also heard claims that a company was involved in measuring an area in Kat Tha Pyay Village Tract, and that a 30 acres area was excluded from the survey apparently because a powerful military official claims that land.[502]

Government officials have since prepared documentation based on this survey. These documents include the classification of land as well as data about crops, trees and property. Seventy-seven farmers are identified as being affected by the planned land acquisition.[503] The ICJ is unaware as to whether the authorities have directly shared this information with these persons.

495 ICJ research note, Kyauk Phyu, April 2016. Internal GAD Document, "Facts about Kyauk Phyu SEZ," 6 June 2016, part 30.
496 The team reportedly measured rice paddy, timber trees, fruit trees, vegetable gardens and plants.
497 ICJ interview, business person and head of civil society group, Kyauk Phyu, April 2016
498 ICJ interview, businessperson and head of local civil society group, Kyauk Phyu, April 2016.
499 ICJ interviews, civil society members, Kyauk Phyu, April 2016.
500 ICJ interviews, farmers, Kyauk Phyu, April 2016.
501 Ibid.
502 Ibid.
503 Internal GAD Document, (related to Phase 1 land acquisition), November 2016.

4.3 Human rights impacts of the Kyauk Phyu SEZ

4.3.1 Procedural Rights

Lack of timely and relevant information

Residents affected by the SEZ have so far not had access to timely and relevant information related to its planning and development. In the community there is a general lack of knowledge about plans, timeframes and potential impacts of the project. Most people interviewed for this report were not aware as to which village tracts would be situated within the SEZ area. There is also a dearth of information about legal procedures that have implications for the enjoyment of human rights, the most important being land acquisition, involuntary resettlement and EIAs. Researchers for this report also struggled to find detailed information about the SEZ, in Burmese or English languages, including on the Internet.

When the development of SEZ subprojects was initiated in 2014, affected residents were not informed of the acquisition of land until immediately prior to its confiscation. This meant they did not have sufficient time to plan and adapt their livelihood activities. For example, farmers in Thaing Chaung asked authorities to delay land acquisition until the time was appropriate to harvest their standing crops.[504] The farmers say this request was denied and they lost investments by having to harvest early, without compensation.[505] The compensation process itself was opaque, appearing to have been operated without proper design and planning, administered inconsistently, and not well understood by residents.[506]

Throughout 2016 no information was made publically available about the land acquisition process initiated in February of that year. Village administrators in the SEZ area apparently did not obtain detailed information about the land acquisition until September, more than six months after the process started. At the time of writing, most residents who will be directly affected by the land acquisition have not had access to this information. The limited information people get tends to have trickled down through village administrators and interlocutors with links to local authorities. These authorities should not be relied upon to disseminate Government plans and this type of information sharing is not a substitute for transparent publically available information.[507]

In March 2016, when the Government team undertook a survey of land in the Phase 1 area, residents and farmers learnt of the survey only in the week before it took place. As early as April the survey team had produced a map collating the data. But this was not shared publically despite requests from civil society actors.[508] At the time, GAD officials said that sharing the information was the responsibility of the Management Committee.[509] Committee members were not forthcoming with information.[510] It was also understood that land acquisition would be on hold until the incoming new Union Government provided direction.[511] Yet documents seen in December 2016 show that preparations for land acquisition, including compensation arrangements, had continued since the March survey.[512]

Residents face challenges in requesting information as the Management Committee's office has been based in Yangon and also because in Myanmar people are typically

504 ICJ interview, farmers, Thaing Chaung, May 2016.
505 Ibid.
506 One woman, who is illiterate, said authorities did not explain the content of payment documentation, instead instructing her to just mark 'x' to acknowledge receipt of funds. ICJ interview, farmers in Pyaing Sit Kay, Kyauk Phyu, August 2016.
507 Advanced and exclusive knowledge of project developments may offer economic opportunities, such as land speculation or acting as agents, so there may be incentives to withhold this information.
508 ICJ phone communication, GAD Township Officer, Kyauk Phyu, April 2016. ICJ interview, GAD District Officer, Kyauk Phyu, August 2016.
509 ICJ interview, GAD District Officer, Kyauk Phyu, August 2016.
510 ICJ interview, former KPSEZ Management Committee members, Yangon, October 2016.
511 ICJ interview, GAD District Officer, Kyauk Phyu, August 2016.
512 Internal GAD Document, (related to Phase 1 land acquisition), November 2016.

reluctant to voluntarily approach and question Government authorities including administrative officers.

Lack of meaningful consultation

Project backers say that more than 100 meetings have been held between SEZ officials and community members.[513] Previous Management Committee members and their advisors say this demonstrates their commitment to public consultation.[514] CITIC has suggested these meetings indicate popular support for the SEZ.[515] However interviews conducted in Kyauk Phyu for this report show that most local residents, businesspeople, civil society actors and religious leaders contest these claims and are dissatisfied with a lack of consultation to date.

Among common complaints are that meetings have focused on the dissemination of basic high-level project information and not allowed for genuine dialogue between residents, their representatives and SEZ officials.[516] Meetings were often called at late notice, and there were apparently minimal opportunities for discussion. Requests for the details of land acquisition and resettlement arrangements were reportedly taken on notice by SEZ officials but not subsequently answered, even after residents followed up by sending letters.[517] It appears that most residents affected by the SEZ have not been invited to meetings; instead authorities mainly invited local leaders and elites.[518] Verifiable details of the content of, and participation in, these meetings have not been made publically available.

Myanmar media agencies reported in late 2015 that the Management Committee had established a 'monitoring group' composed of residents of Kyauk Phyu.[519] Former Committee members say this group was formed to enable local participation in development of the SEZ.[520] The ICJ interviewed a range of stakeholders about the role of this group, including: local residents; civil society representatives; businesspeople; village leaders; religious leaders; government officials; members of parliament; and members of political parties. They all said that the group largely excluded local residents and their representatives, met only two or three times and became inactive soon after formation.[521] When asked in written correspondence, former Management Committee members did not provide a response to this finding (see letter in report annexes).

Lack of opportunities to participate in decision-making

Persons affected by the SEZ have not had genuine opportunities to participate in decision-making about project plans or future livelihood and living arrangements. Where meetings have occurred between SEZ officials and residents, there are no known examples of decisions or plans being altered in response to inputs or proposals from residents – apart from in 2014, when compensation was increased but deemed by recipients to be still insufficient.[522]

513 For example, the Union Deputy Minster for Planning and Finance stated this in response to a question by Rakhine MP Daw Htoo May, 15 August 2016, Amyotha Hluttaw Session.
514 ICJ interview, former KPSEZ Management Committee members, Yangon, October 2016. ICJ interview, former international advisor to the KPSEZ Management Committee, Yangon, October 2016.
515 CITIC, "Response by CITIC: Foreign Investment Tracking Project," 7 September 2016, Business and Human Rights Resource Centre.
516 In the many workshops and meetings convened by the ICJ, the overwhelming consensus of participants from the SEZ area was that there has been no genuine consultation regarding the SEZ.
517 ICJ interview, local company director, Kyauk Phyu, April 2016. ICJ interview, local civil society group, Kyauk Phyu, April 2016.
518 ICJ interview, senior Monk, Kyauk Phyu, April 2016.
519 Nyein Nyein, "Govt Tables Kyauk Phyu SEZ Plans in Parliament," 4 December 2015, The Irrawaddy. Htoo Thant, "Govt Reserves Land for Rakhine State SEZ," 7 December 2015, The Myanmar Times.
520 ICJ interview, former KPSEZ Management Committee members, Yangon, October 2016.
521 ICJ interview, members of the Arakan Nationalities Party Central Committee, Sittwe, 9 August 2016.ICJ interview with businessperson, Kyauk Phyu, August 2016. ICJ interview with GAD District Officer, Kyauk Phyu, August 2016.
522 ICJ interview, former KPSEZ Management Committee members, Yangon, October 2016. ICJ interview, former international advisor to the KPSEZ Management Committee, Yangon, October 2016.

Farmers have reported efforts to participate in decision-making related to their own land. For instance, in 2014 Thaing Chaung farmers requested that land acquisition, which they were informed of at short notice, be delayed to allow crops to be harvested at the appropriate time. That acquisition went ahead as planned. In a more recent example related to land acquisition, the Government's survey team classifying land in the Phase 1 area apparently did not consider the inputs of local farmers seeking to clarify information about the usage and ownership of different land plots in the area.[523]

The limited access to information and lack of meaningful consultation also demonstrates there have not been opportunities to participate in decision-making. Input from local civil society groups and businesspeople also does not appear to have been considered in decision making related to the SEZ.[524] The decisions of administrative authorities, such as the Management Committee and land surveyors, can significantly impact people's livelihoods yet there has been limited if any space for participation in these decision-making processes.

4.3.2 The right to an adequate standard of living

Impacts of past displacements on livelihoods

Research for this report indicates that residents displaced in 2014 by the SEZ subprojects experienced deterioration in living conditions that impaired their right to an adequate standard of living. The compensation process and payments are a key source of this problem.

Residents say they were unsatisfied with compensation negotiated with the Management Committee. They disagreed with the way their assets were documented by the Government survey team: young trees were apparently not included in surveys, and the seasonal values of crops and trees were not taken into account. Committee members reportedly told Pyaing Sit Kyay residents to either accept the negotiated offer of compensation or receive nothing.[525] A committee member allegedly publically told a Thaing Chaung resident that the Government would prosecute him according to the law if he continued calling for increased compensation.[526] Residents felt they had no choice but to accept the payments.

Villagers in Thaing Chaung and Pyaing Sit Kay generally have low levels of educational attainment and lack the financial literacy required to effectively manage and reinvest relatively large amounts of cash. However compensation payments were not linked to any support for financial literacy, such as financial planning and saving. Residents who received compensation reported fully expending compensation on children's costs, health and daily expenditures.[527] It is possible compensation was also used in donations to local pagodas.[528]

Residents say that compensation was calculated below market prices and was insufficient to purchase replacement land and assets. There are reports that Government officials did not pay compensation for grazing lands, which farmers say they use to feed and house animals, but which officials apparently classified as vacant land which is ineligible for compensation.

523 ICJ interview, farmer, Kyauk Phyu, April 2016.
524 Moe Myint, "NGOs Seek Kyauk Phyu SEZ Delay as President Pushes Implementation," 22 December 2015, The Irrawaddy. Note also that in December 2016 a group of local businesspeople went to Nay Pyi Daw to lobby the Government to postpone awarding the bid until the new Government entered into office. ICJ interview, local businesspeople, Kyauk Phyu, April 2016.
525 ICJ interview, local leader and farmers in Pyaing Sit Kay, Kyauk Phyu, August 2016.
526 ICJ interview, villages in Thaing Chaung, Kyauk Phyu, July 2016. The Management Committee did not reply to a request for clarification about this alleged incident.
527 ICJ interviews, farmers in Pyaing Sit Kay, Kyauk Phyu, May 2016.
528 This observation is made based upon experience with compensation processes elsewhere in Myanmar. ICJ communication, Dawei civil society leader, Kyauk Phyu, December 2016.

For persons interviewed for this report, compensation does not appear to have covered decreases in income-generating capacity from loss of productive agricultural land. Some farmers reported lending money at a greater frequency, in order to cover basic needs, thus incurring further debt. Vegetable gardens, mainly used for subsistence consumption, were reportedly lost and not subsequently grown again. The right to food and adequate levels of nutrition in the household are likely to be adversely affected as a result. Displacement appears to have decreased the sources of family income, for example where trees have been lost and not replaced. Some residents reported having reduced their investments in household maintenance as a result of displacement.

As noted above, in 2014 Management Committee members said they would provide replacement farmland to farmers displaced by the SEZ subprojects. At the time of writing this report, over two years later, no replacement farmland had been provided.[529] There appears to be no plan in place to fulfil promises made by former Management Committee members. This failure to provide replacement farmland exacerbates the negative impacts of displacement on the human rights of those affected by these subprojects.

Each of these negative impacts of displacement may constitute a violation of the obligation to respect and protect the right to food, to work and to just and favourable conditions of work, and to adequate housing. Change in the diversity of people's livelihoods also increases vulnerability to economic shocks, such as crop failures and health problems. This can compound existing vulnerabilities and further interfere with the enjoyment of these rights – which form the right to an adequate standard of living.

Potential impacts of future displacements on livelihoods

Future compensation plans are unclear however modifications are required to avoid the negative human rights impacts associated with previous SEZ subprojects. It appears that around half of residents in the SEZ area may not receive compensation due to not having formal land tenure. There are also indications that payments will be made based on Government records that do not accurately reflect how residents use land for livelihoods.

At a meeting with the then-Management Committee and CITIC in January 2016, authorities reportedly told local leaders that compensation for land would only be paid to those with land titles – a 'Form 7' Land Use Certificate (LUC).[530] As noted above, it is estimated that around half of farmers in Myanmar, and in Kyauk Phyu, do not hold formal land tenure.

It seems that the application process for an LUC had first opened in Kyauk Phyu only in 2015, up to three years after enactment of the 2012 Farmland Law.[531] A local leader said that when farmers in the SEZ area had tried to register land in 2015, local officials did not process their applications apparently on the basis that the registration was unnecessary.[532]

Farmers in the SEZ area told researchers for this report that they attempted to register land during 2016 in order to qualify for future compensation related to resettlement. However they were unsuccessful in submitting their application for an LUC. Farmers reported difficulties in obtaining the free application form and letter of recommendation from their village tract administrator.[533] This may indicate, among other things, a lack of understanding regarding procedural requirements on part of the farmers as well as village tract administrators.

529 ICJ interview, GAD District Officer, Kyauk Phyu, August 2016. ICJ interview, former KPSEZ Management Committee members, Yangon, October 2016.
530 ICJ interview, senior Monk, Kyauk Phyu, April 2016.
531 ICJ communication, land administration official, Kyauk Phyu, November 2016.
532 ICJ interview, senior Monk, Kyauk Phyu, April 2016.
533 Farmers reported being told on two occasions that the 'Form 1' application form was not available. ICJ phone communication, farmer, Kyauk Phyu, December 2016.

Various problems were also reported related to approaching township-level land officials, including: being instructed to leave and return to the office in groups of five people or more; being informed that the period for accepting applications was currently closed; and being asked for money.[534] Some farmers allege that those who have received LUCs had to pay money, which they cannot themselves afford, to land officials in order to facilitate the administrative process.[535]

An official from the Land Management and Statistics Department said they were accepting applications for LUCs throughout 2016.[536] Officials said that farmers in the area lack understanding about the application procedure for a LUC and the importance of land title.[537]

It appears that the General Administration Department of the Government is preparing to provide replacement land to farmers affected by future displacements related to the SEZ. One location under consideration is Doma Taung, located outside the SEZ area but within Kyauk Phyu Township.[538] Irrigation infrastructure would be constructed in order to make the land suitable for agricultural farming. Much of this area is already under titled ownership. Other parts of the area are legally classified as vacant land, although in practice there are farmers who affirm customary ownership rights and use the land for their livelihoods.[539] While the details and developments of plans for this area have not been publically revealed, it is nonetheless clear that the site at Doma Taung could not provide replacement land for all farmers displaced by the SEZ. It could not be established if there are additional plans to allocate replacement land.

There is a risk that the current land acquisition process does not accurately recognize the way people use land for their livelihoods. This could result in unfair and insufficient compensation where displacement occurs. Administrative barriers to land registration exacerbate this problem. It seems that resettlement plans have not advanced beyond a conceptual stage and therefore these plans are not yet sufficient to manage displacement. Under these conditions, and without plans for alternative livelihood options, any imminent land acquisition and displacement is likely to result in a deterioration of living standards.

Potential livelihood opportunities in future

Information is not publically available regarding the number of people who will be directly affected by development of the SEZ. Project plans, undisclosed to the public, which were citied by the ICJ also do not include the projections of the total number of persons likely to be displaced. Population data, paired with the maps contained in the SEZ plans acquired during research for this report, indicates that up to 20,000 people live in the designated SEZ area and may be facing involuntary resettlement. One third of these [6,568] people reside in the village tracts included in Phase 1 development plans.

For these people, as well as local residents outside the designated zone, there has so far been a lack of planning in two key areas: protecting the livelihoods of people residing in the SEZ area; and supporting future livelihood options, including jobs creation, in the SEZ. Considerations that should inform planning in these areas are discussed below.

534 ICJ interview, senior monk, Kyauk Phyu, April 2016. ICJ interview, NGO member, Kyauk Phyu, June 2016. ICJ interview, local leader and farmers in Pyaing Sit Kay, August 2016. ICJ phone communication, farmer, Kyauk Phyu, December 2016.
535 ICJ phone communication, farmer, Kyauk Phyu, December 2016.
536 ICJ phone communication, land administration official, Kyauk Phyu, November 2016.
537 ICJ interview, land official, Kyauk Phyu, July 2016.
538 ICJ interview, GAD District Officer, Kyauk Phyu, August 2016.
539 ICJ interview, GAD District Officer, Kyauk Phyu, August 2016.

Protecting livelihoods

The apparent decrease in the livelihoods options and income generation of people affected by the development of SEZ subprojects in 2014 demonstrates the negative impacts of displacement, it if is conducted without appropriate planning and resourcing.

The impact of unfulfilled commitments to provide replacement land highlights why the preparation of, transfer of, and relocation to replacement land must take place prior to displacement. This timing is critical so that people experiencing resettlement can immediately invest in restoring their livelihoods. In Kyauk Phyu at present, the process of land acquisition and preparations for financial compensation appear to be occurring ahead of any planning and preparation for replacement land. There is thus a risk that future displacements, particularly in the Phase 1 SEZ area, may also generate negative results similar to the deterioration in livelihoods that occurred following the 2014 displacements.

An interim period between displacement and relocation can negatively affect livelihoods. The experience of a declining income, particularly in a displacement context, tends to result in people taking loans and experiencing higher debts.[540] It may also lead to disinvestments in critical areas such as food and education – negative effects that generally disproportionally affect women and girls. Any delay in restoring livelihoods can have long-term inter-generational impacts on families and communities and must be avoided.

Supporting livelihoods

Corporate communications materials for the SEZ claim that its development and operations are expected to employ over 103,000 local people.[541] It is not clear how CITIC calculated this figure. According to the 2015 Census, the total population of working age in Kyauk Phyu Township is 102,321. [542]

Most people residing in the SEZ area are either primarily or exclusively reliant on subsistence agriculture and or animal husbandry, with limited qualifications or experience in other forms of income generation. As discussed above, the provision of replacement land is considered the most effective way to ensure people can restore the livelihood activities they are skilled in and may prefer. For some families and individuals, access to jobs in and associated with the SEZ may also provide opportunities to engage in alternative livelihoods.

The sectors envisaged for the SEZ, construction and garment manufacturing, are the most likely employment pathways for local people to shift from engaging in agricultural livelihoods to accessing jobs. in the SEZ. Jobs in construction tend to be low paying, precarious and would not be sustainable beyond the SEZ development phases.[543]

A number of recent reports have documented the poor conditions experienced by people, who mostly tend to be women, working in garment manufacturing in Myanmar. Key problems with the sector include poor regulation, weak enforcement of labour standards and limited worker's rights.[544] A study of garment factories released in February 2017 found exploitative labour conditions in a Chinese-owned garment factory in the Thilawa

540 In a study of people displaced for Dawei SEZ, 39 per cent of people reported using compensation to service debt. Dawei Development Association, "Voices from the Ground," 2014, pp. 51.

541 CITIC, "Attachment No. 1: Description of KP SEZ Deep Sea Port Project and Industrial Park Project," Document shared with several NGOs in December 2016.

542 Note this is the total enumerated population of working age people, aged 15-64. Ministry of Immigration and Population, & UNFPA, "The 2014 Myanmar Population and Housing Census: Rakhine State," (Rakhine Table A-6: Population by selected age-groups and dependency ratios by urban and rural).

543 See: Oxfam, "Responsible Investment in Kyauk Phyu: lessons from experiences of SEZ developments," January 2017. There are also reports of foreign workers engaged in construction activities in Myanmar, rather than employing local labourers.

544 Oxfam, "Made in Myanmar: Entrenched Poverty or Decent Jobs for Garment Workers?" December 2015, Oxfam Briefing Paper 209. Action Labour Rights, "A Study of Labour Conditions in Garment Factories in Myanmar which are wholly Korean owned or in a Joint Venture with Korean Companies," March 2016, Action Labor Rights. Business and Human Rights Resource Centre, "Myanmar's Garment Sector – Briefing Note," (forthcoming in 2017).

SEZ (see text box in section 3, above). A late 2014 study of garment factories found many workers were unable to cover basic living expenses, faced exploitation and remained in poverty despite working significant hours.[545] These pressures on garment workers may have since compounded due to increased inflationary pressure and rising living costs.[546]

The precarious conditions experienced by employees in Myanmar's garment factories indicate that job opportunities in the SEZ under regular arrangements would be insufficient to restore the livelihoods of residents affected by involuntary resettlement.

Any State commitments to job creation for locals and persons displaced by the SEZ development must therefore be linked to plans for comprehensive skills training and employment services, in order to support any sustainable changes in livelihood activities.

Programs designed to help people transition from agricultural livelihoods to industrial jobs must include clear, achievable and secure employment pathways for participants. Trainings conducted in Kyauk Phyu to date, by the Government and SEZ-related businesses, are yet to meet these standards.

Plans to support local employment in SEZs – including during resettlement planning – should also consider the potential preferences of businesses in the SEZ. As with many other parts of Myanmar, employers may prefer to hire labour from outside the area, for a variety of reasons, including: cultural prejudices toward locals; expectations outsiders will work harder; and concerns about community entanglement in labour disputes or crimes in the zone. Note that while developers and investors are legally obliged to employ Myanmar citizens they are not required to employ people who are from the SEZ area itself. Previous pledges to create jobs, reportedly made by former Management Committee members to persons displaced in 2014, have not been fulfilled.

In regards to skilled jobs, Chinese State media has reported that Myanmar people would hold 90 per cent of SEZ management positions by 2025.[547] No plan has been made available to support this claim. It is also unclear what constitutes a skilled job versus a non-skilled job. Sectors that require employees with a high level of education attainment are unlikely to attract significant numbers of employees, particularly from local areas.

4.3.3 The right to access remedies and reparation

The role of national courts

Where development projects have interfered with the enjoyment of human rights, affected people have generally not been able to access effective remedies and reparation. As noted above, Myanmar's judiciary and the legal profession lack independence from the executive and military. In 2013, some civil society leaders in Kyauk Phyu were prosecuted and jailed for public protests in campaigning for their rights and against the negative impacts of oil and gas infrastructure.[548] There are allegations that in 2014 SEZ officials warned residents displaced by SEZ subprojects that on going demands for compensation would invite prosecution (see above). In this context, people in Kyauk Phyu have not yet sought to use national courts to seek remedies and reparation.

Many persons in administrative positions as well as in the community appear to have an understanding that the administrative decisions of statutory bodies, such as farmland management bodies, are final. This is legally incorrect because the Constitution guarantees the jurisdiction of national courts (see section 3, above). Nonetheless, this perception has added a barrier against the public willingness to utilise the courts to seek remedies and reparation.

545 Oxfam, "Made in Myanmar: Entrenched Poverty or Decent Jobs for Garment Workers?" December 2015, Oxfam Briefing Paper 209, pp. 3-4.
546 The Irrawaddy, "Commerce Minister Waffles on Inquiry About Rising Food Costs," 17 November 2016, The Irrawaddy.
547 Xinhua, "New Projected SEZ in West Myanmar to Benefit Economic Growth," 1 January 2016.
548 Thaing Naing Soe, "'Arrest us all': Maday residents protest jail terms," The Myanmar Times, 7 October 2016.

Access to statutory bodies

Most recent disputes regarding development projects are related to land issues, and statutory bodies responsible for land governance have been the main sites of non-judicial arbitration. It is understood that the Committee on Confiscated Farmlands and Other Lands (formerly the Land Utilisation Management Committee) is the key body responsible for investigating and arbitrating land-related complaints.[549] The Township GAD Officer, who is generally involved in preparation of land acquisitions, is the chairperson of this committee.

Access to reparation from businesses

Persons affected by land acquisition for business activities in Kyauk Phyu have had difficulties obtaining compensation from liable companies. Years after displacements occurred linked to oil and gas infrastructure projects, there are many on going disputes related to compensation arrangements between companies and communities.[550] Seeking access to remedy and reparation has proven difficult. One group of farmers successfully secured payments for land acquisitions only after making several petitions to local authorities.[551]

A former village administrator was unsuccessful obtaining compensation he says was owed to him by a company involved in the SEZ subprojects. He said that when he first approached the company to follow up on funds owed, they asked him to wait until the 2016 budget year when money would be available. The next time he followed up, company officials apparently said that they were no longer involved in the projects and so were under no obligation to issue payment.[552] Despite losing land he cannot see other avenues for reparations. This example illustrates the types of barriers there are for persons seeking reparations.

Grievance mechanisms

The former Management Committee did not establish any mechanisms to hear or resolve disputes from persons affected by the SEZ. Its office was established in Yangon, with no officers at site-level. The office of the new Management Committee is also in Yangon.

The expected Developer of the SEZ has so far not established any procedures to hear or resolve disputes, such as an Operational Grievance Mechanism. At the end of 2016, CITIC had not yet opened an office in Myanmar.[553]

4.3.4 Human rights impacts on particular social groups

Women and girls

Women in Kyauk Phyu effectively enjoy a lower socioeconomic status, than men, a situation that is maintained and reinforced by ongoing patterns of gender discrimination and gender stereotyping. Positions of authority and decision-making are male dominated: influential religious leaders are men as are all senior GAD officers. All nine Village Tract Administrators in the SEZ area are men, while women in Myanmar generally do not participate in voting for these officials, due to the design of the electoral system for local elections, whereby heads of households, who tend to be men, select administrators.[554] Available information indicates that members of the new Management Committee, formed in September 2016, are all men. Women interviewed for this report say that

549 ICJ phone communication, GAD Township Office Clerk, August 2016.
550 For example, see: Eleven Media, "Kyauk Phyu farmers protest against CNPC," 7 November 2016.
551 ICJ interview, farmers in Lay Khok Sone Village, Kyauk Phyu, August 2016.
552 ICJ interview, former village administrator, Kyauk Phyu, August 2016.
553 CITIC was not registered as a company in Myanmar, according to the Data and Statistics available from Myanmar's Directorate of Investment and Company Administration.
554 Helene Maria Kyed, Annika Pohn Harrisson & Gerard McCarthy, "Local Democracy in Myanmar: Reflections on Ward and Village Tract Elections in 2016," 2016, Danish Institute for International Studies, pp. 4.

it is the practice of authorities to not invite women to township meetings including on discussions on the SEZ.[555] This illustrates how women having limited roles in these decision-making processes.

Women in Kyauk Phyu generally have lower literacy levels than men and also earn lower wages.[556] Rakhine State has the lowest overall labour force participation rates in the country, and these are much lower for women (38.1 percent) than for men (83.2 percent). Rakhine State has also the highest female unemployment rates (12.5 percent) in the country.[557] These factors compound the vulnerabilities of women, particularly widows, and of female-headed households, thought to make up 21 per cent of households in Kyauk Phyu.[558]

As is the case elsewhere in Myanmar, men in Kyauk Phyu generally have a higher rate of formal land tenure rights than women. A contributing factor is that when land is inherited from the wife's side of the family, it tends to be reregistered under the husband's name.[559] These factors are characteristic of the particular disadvantages and marginalization experienced by women in rural areas.[560] Due to these factors, females have a higher risk of experiencing interference in their human rights during and following procedures such as involuntary resettlement. It is thus all the more critical that women have opportunities to exercise their rights to actively participate in consultation processes for the SEZ, including the EIA Procedure.[561]

Most women interviewed for this report expressed hopes that the development of a SEZ would improve livelihood opportunities for females, particularly for young women who potentially may have access to jobs in garment factories. But this is qualified by concerns about likely displacement, demographic changes and the general lack of knowledge about project plans.

Experiences elsewhere in Myanmar and the region indicate that women are more likely than men to be employed in the garment sector.[562] The monitoring and enforcement of laws that protect women from discrimination and sexual harassment will be critical to protect the human rights of women.

Many women and men in Kyauk Phyu express concerns that people from other parts of Myanmar, or from other countries, will pose a risk to women in the community, either by entering into relationships that they are not committed to, or through sexual exploitation.[563] This threat, however real or perceived, tends to be used as an emotive appeal against the employment of migrants or people who have moved from other regions of Myanmar. Significant social transformations involving migration, such as through major infrastructure projects, may compound the existing vulnerabilities of women. However, it is important to note that these sentiments are also linked, to varying degrees, with broader discourses of patriarchy, nationalism and skepticism toward foreigners.

There can be also be a relationship between increased women's participation in the workforce and their experiences of gender violence.[564] Note too that in areas affected by conflict, the incidence of unemployed men, particularly youth, can emerge as a

555 ICJ workshop notes, female member of a civil society organisation, Kyauk Phyu, May 2016.
556 ICJ interview, local leader, Kyauk Phyu, July 2016. It has been estimated that women's wages are around 33% lower than men for the same job, see: Oxfam, "Kyauk Phyu: a baseline socio-economic assessment," 2016, pp. 17.
557 Asian Development Bank, "Gender equality and Women's rights in Myanmar: a situational analysis," 2015, Manilla.
558 Ministry of Immigration and Population, & UNFPA, 'The 2014 Myanmar Population and Housing Census: Rakhine State', April 2014.
559 ICJ interview, local leader and farmers, Pyaing Sit Kay, August 2016..
560 This is recognized in Article 14 of CEDAW.
561 For discussion, see: Centre for Environment and Community Research, "Assessing Women's Engagement in EIAs on Infrastructre Projects in Vietnam: Recommendations for Policy and Public Participation in EIA," 31 December 2015.
562 World Bank Group and International Finance Corporation, "Fostering Women's Economic Empowerment Through Special Economic Zones: Comparative Analysis of Eight Countries and Implications for Governments, Zone Authorities and Businesses," 2011, pp. ix.
563 ICJ interview, members of the Rakhine Women's Association, Kyauk Phyu, September 2016. See also: Oxfam, "Kyauk Phyu: a baseline socio-economic assessment," 2016.
564 For analysis, see: Mara Bolis and Christine Hughes, "Women's Economic Empowerment and Domestic Violence," 2015, Oxfam Intersectionality Series, Oxfam.

conflict dynamic.[565] A gendered analysis thus must be applied to planning processes for the SEZ.

Muslim residents of Kyauk Phyu Township

Muslims in Rakhine State experience severe restrictions on their movement.[566] The Muslim community in Kyauk Phyu were predominantly based in town prior to being driven out during religious violence in 2012 (see introduction, above).

Kyauk Ta Lone Camp is the larger of the two camps mostly populated by Muslims, many of whom previously worked as merchants and traders in Kyauk Phyu Town. Persons interviewed for this report said they do not have housing or livelihoods in the designated SEZ area.[567] Displaced Muslim residents residing elsewhere are reportedly in the same situation.[568] Camp leaders, the women's committee and youth volunteers all say they had very little knowledge about the SEZ, and have never been invited to any related consultations or information sessions. This is a response not dissimilar to that of non-Muslim residents in the area, and again demonstrates the lack of inclusive planning for the SEZ.

It is unclear how development of the SEZ will affect the displaced Muslim community in Kyauk Phyu. Given the scale of the investment, it is likely that most if not all residents in the town will have their livelihoods affected. But at present no plan appears to be in place for these residents to return. Most identify as being Kaman Muslim, which, unlike the Rohingya designation, is recognized by the State as an official ethnicity in Myanmar. Non-Muslims married to Muslims also live in the camps.

At least half the camp population participated in a controversial national verification process, conducted in 2016 by the Immigration Department. This is supposedly meant to create a pathway to citizenship. Many people already hold citizenship documents but generally these are no longer recognized by authorities or the surrounding communities.[569] Their citizenship status is a highly sensitive and disputed political issue.

The Muslim community in Kyauk Phyu appears to have little if any influence among civil society actors and Government authorities in the township. Many civil society actors and community organizers appear to be opposed to the reintegration of Muslim residents.[570] This should also be understood in a broader context in which civil society groups and aid workers who work with Muslims in Rakhine State tend to face backlash from local communities, as well as their own.[571]

Camp residents are already experiencing severe interference by the State in the enjoyment of human rights and so for them the SEZ is not considered a priority. However any significant infrastructure development and demographic changes in the area may affect the status of the camps. Nonetheless the status of Muslim residents has not been considered in planning related to the SEZ, nor do potential conflict dynamics appear to have been taken into account.

565 For analysis, see: Harini Amarasuriya et al. "Rethinking the Nexus Between Youth, Unemployment and Conflict – Perspectives from Sri Lanka," 2009, International Alert.
566 See: Yanghee Lee, "Report of the Special Rapporteur on the situation of human rights in Myanmar", UN Doc A/HRC/28/72, paras. 38-48.
567 ICJ interviews (total of 3) with the Camp Management Committee, Women's Group and Volunteer Youth Group at Kyauk Ta Lone Camp in Kyauk Phyu on 6 August 2016.
568 ICJ interview, GAD District Officer, Kyauk Phyu, August 2016.
569 ICJ interviews at Kyauk Ta Lone Camp. ICJ saw examples of all forms of citizenship documentation.
570 ICJ observations, discussions and workshops, Kyauk Phyu, April-December 2016.
571 For discussion, see: Joe Freeman, "Buddhist Aid Workers Face Backlash for Helping Myanmar's Rohingya Muslims," 15 November 2016, Irin News.

4.4 Legal assessment

4.4.1 SEZ laws

Lack of coordination for the sequencing of legal procedures

The SEZ laws do not contemplate the full implementation of critical legal procedures to be carried out in the implementation of the Kyauk Phyu SEZ. These procedures include those governing land acquisition, EIA and involuntary resettlement. The sequence of these procedures is already occurring out of sequence, with land acquisition preparations entering an advanced stage prior to the development of an involuntary resettlement plan. The Management Committee should coordinate this sequencing in Kyauk Phyu, as part of its function to coordinate between departments and investors, and as part of its duty to ensure compliance with applicable laws.

Undefined functions and duties in resettlement

While the SEZ laws themselves do not establish duties on State officials related to human rights, they do reaffirm the obligations contained in other national laws. Implementation of the SEZ in Kyauk Phyu has so far been inconsistent with Myanmar's land laws and environmental laws.. But the SEZ laws do not clarify who is responsible or who may be held accountable for discharging duties under these laws. .

The substandard resettlement process undertaken when SEZ subprojects were constructed in 2014 highlights problems related to legal ambiguities in the SEZ laws. Research for this report shows that in 2014, procedural rights were breached during this process, and that the impacts of displacement have interfered with the right to an adequate standard of living.

Former members of the Management Committee played a central role in coordinating resettlement arrangements related to the development of SEZ subprojects in 2014. Other government departments and government bodies were also involved. The SEZ laws do not clearly differentiate the functions and duties of the different actors related to resettlement. So it is difficult to establish administrative accountability or legal liability.

Article 80 is the only provision in the 2014 SEZ Law that contemplates any protection for persons who are displaced, by stating that displacement must not lower a person's standard of living.[572] This provision makes the Developer or Investor liable to fulfil this right, rather than the State. But it is generally the Management Committee that directs resettlement.

The liabilities of MKSH, the company that built the Doe Tan Taung Reservoir, are not defined. Having undertaken construction related to the SEZ, there is a legal basis for classifying this company as the Developer, although it is unclear as to whether this was the understanding of company and Government officials at the time.[573] Developers and investors are obliged to cover resettlement costs and to ensure that displacement does not result in deterioration in living conditions.[574] If liability were established, the company could be found to have failed to fulfil these obligations at Doe Tan Taung Reservoir.[575] While the Management Committee directed the resettlement process, the company may be held liable for its substandard implementation.

Duties and functions of the Management Committee must be clearly specified in law in order to establish administrative accountability and legal liabilities as well as incentivize good governance. The Management Committee, and any Supporting Body, should include persons with expertise in law, human rights and environmental protection as well as in investment. Members of the community and or their representatives should also be included. This would help enable public participation in line with rule of law principles.

572 2014 SEZ Law, Art. 80(a)(b).
573 2014 SEZ Law, Art. 3(e).
574 2014 SEZ Law, Arts. 80(a)(b).
575 At Thaing Chaung, the Government constructed the reservoir, so the company cannot be the Developer.

4.4.2 Land laws

1894 Land Acquisition Act

The land acquisitions that took place in 2014 and the land acquisition process that commenced in 2016 have not followed important legal procedures in the 1894 Land Acquisition Act. In both instances, public notices about the proposed acquisition were not issued. The Ministry of Home Affairs Notification in February 2016, which proposes land acquisition for the entire SEZ area, was not published in the Union Gazette (see above).

Public notification both at site-level and in the Gazette is mandatory under the Act.[576] Notification establishes the legal basis for authorities to survey lands, and is necessary to allow interested persons to lodge objections in accordance with the Act.[577] A failure to follow procedure makes land surveying and possession by the State unlawful under the Act.

During the 2014 land acquisition, it appears that other legal procedures were also not respected, including the documentation requirements outlined in the Land Acquisition Manual.[578] The legal basis for these land acquisitions therefore must be called into question.

The land acquisition initiated in 2016, which is far more significant in size and impacts, has so far not been carried out in accordance with the Act and is therefore unlawful. In order to be lawful, this process must be immediately suspended. It should only be resumed following the development of a resettlement plan, through consultation, and then carried out in accordance with the procedures codified in the Act as well as in conformity with international standards on involuntary resettlement, as required by the EIA Procedure.

2012 Farmland Law

Reports that farmers have had difficulty registering land under the 2012 Farmland Law suggest the administrative process for issuing LUCs is not working effectively in Kyauk Phyu. For farmers who have not been able to submit an application, these administrative issues may have significant long-term impacts for their enjoyment of the right to an adequate standard of living. It has been reported that the possession of an LUC will be a key factor in determining compensation rights for persons living in SEZ area. If eligible farmers cannot formally register their land tenure rights they will not be able to access fair and appropriate compensation.

2012 Vacant, Virgin and Fallow Land Law

Official land records and designations of land use do not always match the realities of how people use land their livelihood activities. Farmers in areas where subprojects were constructed in 2014 claim that land they used for grazing animals was designated as vacant land under the 2012 Vacant, Virgin and Fallow Land Law. They say they did not receive due compensation on this basis. Similar complaints have arisen during preparations for land acquisition in the Phase 1 area. Outside the SEZ itself, the proposed relocation site at Doma Taung hosts land plots that are classified as vacant, but in practice used by farmers who affirm customary tenure rights.

Displacing farmers from land being used for livelihoods without reparation may interfere with the right to an adequate standard of living. No displacement should occur until after farmers in Kyauk Phyu have had an opportunity to apply for an LUC, including for land that may be presently classified as vacant, virgin or fallow. Administrative decisions regarding land classifications must be conducted in consultation with communities and be subject to review.

576 1894 Land Acquisition Act, Art. 4(a).
577 1894 Land Acquisition Act, Arts. 4(b), 5.
578 1947 Burma Land Acquisition Manual, Part 4: Forms and Registers.

4.4.3 Environmental laws

An Environmental Impact Assessment needs to occur before land acquisition

Implementation of the land acquisition process in Kyauk Phyu risks being unlawful if the process is not carried out in compliance with international standards on involuntary resettlement, as required by Article 7 of the 2015 EIA Procedure. A core objective of these international standards is to avoid resettlement where possible, and, where it is not possible, to undertake resettlement planning through consultation to ensure that livelihoods are restored when resettlement occurs. Carrying out land acquisition before a resettlement plan is developed breaches these objectives.

Furthermore, current project plans, including for land use, may change significantly as an outcome of the EIA. Measures to ensure compliance with international standards on involuntary resettlement may also require changes to current plans.[579] Land that is acquired prior to the finalisation of project plans, which is later excluded from the SEZ area, will not have been acquired for a public purpose so there is not a legal basis for acquisition of such land under the Land Acquisition Act.[580]

4.4.4 International law and standards

Procedural safeguards

International law and standards applicable to the rights of people affected by development projects were described in section in 2 above. In the development of the SEZ so far Myanmar authorities have acted in contravention of a number of these standards. For instance, those affected have lacked access to timely and relevant information; there has been a systematic lack of meaningful consultation on substantive and procedural questions affecting human rights, including resettlement and an overall lack of opportunities to participate in decision-making. The failure of the State to respect these standards engenders human rights violations and breaches the State's obligations to protect and respect the human rights, including the right to an adequate standard of living and the right to work and to just and favourable conditions of work.

Right to an adequate standard of living

The right to an adequate standard of living creates obligations upon States to respect and protect the right to food, and the right to adequate housing, the right to work and the right to just and favourable conditions of work (see section 2, above). Persons displaced by the SEZ subprojects in 2014 received inadequate compensation without other support to restore their livelihoods. The deterioration in their standard of living as a result of displacement, including decreased access to food and income, constitute human rights violations. Those whose rights have been violated have the right to an effective remedy and reparation. It is incumbent upon the Myanmar authorities to provide reparation to persons displaced in 2014 in order to restore enjoyment of these rights to pre-displacement levels and to go beyond those levels where they do not meet minimum essential levels as required under international law.

The State must respect and protect the right to an adequate standard of living during development and implementation of the Kyauk Phyu SEZ. To this end, it will be critical for procedural rights to be respected and protected. Access to remedy and reparation will also be important to stop rights violations that are occurring and to address rights violations where they have occurred or may occur.

579 2015 EIA Procedure, Art. 7.
580 State land acquisition must be for a public purpose. 1894 Land Acquisition Act, Arts. 40, 41.

Right to access remedies and reparation

The right to have access to effective remedies and reparation in the event of rights violations or abuses is a general principle of international law (see above section) Typically disputes and rights violations related to land are arbitrated through State non-judicial mechanisms at township level. These bodies are staffed by officials from the General Administration Department, which also manage land acquisitions. People in Myanmar are generally reluctant to lodge complaints with local Government officials. In Kyauk Phyu, it appears that few complaints receive remedy.

Myanmar's judiciary lacks independence and it is understood that there has not been any human rights litigation related to the SEZ in Kyauk Phyu's courts. Neither the courts nor administrative mechanisms in Kyauk Phyu are sufficiently independent and they have not provided access to remedy or reparation for persons whose rights may have been violated during development of the SEZ or other infrastructure projects.

The UN Basic Principles and Guidelines on Development-Based Evictions and Displacement

An eviction may only be carried out in exceptional circumstances, in which there are appropriate procedural protections and access to an effective remedy in line with international human rights law. Displacements related to the construction of SEZ subprojects in 2014 do not meet these criteria for a lawful eviction and therefore constitute forced evictions. The preparations for land acquisition that were carried out during 2016 so far do not meet the criteria for lawful eviction, so there is a risk that future displacements may also constitute forced evictions, illegal under international law.

International standards on involuntary resettlement

In the process of developing SEZ subprojects in 2014, authorities at the time did not seek to avoid displacement, nor did they undertake efforts to minimise adverse impacts upon persons who lost farmland. Persons who were displaced experienced deterioration in their living conditions. This process was therefore wholly inconsistent with the shared policy objectives of IFIs on involuntary resettlement: avoid as possible, minimize adverse impacts, and improve or at least restore livelihoods.[581]

Given the lack of participatory planning and transparency to date, the land acquisition process in Kyauk Phyu that was initiated in 2016 risks breaching international standards on resettlement. Since 2015, national laws require that SEZs, as an EIA-type project, conform to these standards.[582] One important international principle, which is not reflected in the 1894 Land Acquisition Act, is that people who are resettled must be granted security of land tenure, even if they did not have it prior to the resettlement.

The EIA for the SEZ must include efforts to avoid resettlement and minimize its adverse impacts. The EIA may lead to changes in project plans as a result. Land acquisition occurring before completion of the EIA would interfere with the core principles of international standards on involuntary resettlement.

4.4.5 Policy and planning

Lack of planning and policy

There has been an overall lack of economic planning, and policy making, to protect the livelihoods of local residents, and to create sustainable employment opportunities for Myanmar people in the development and implementation of the Kyauk Phyu SEZ.

581 Op Cit. INSERT AT END
582 2015 EIA Procedure, Art. 7.

At present it is not clear how persons who experience involuntary resettlement will be able to restore their livelihoods, or sustainably transition to other income-generating activities. It is also unclear if employment created by the SEZ, which is likely to involve a large number of low skilled manufacturing jobs, will help the State deliver on commitments to respect, protect and fulfil the human right to an adequate standard of living.

Affected communities, and their representatives in civil society and parliament, have not had opportunities to inform and participate in decisions and policy making related to the SEZ.

Strategic Environmental Assessment

Given this context, it is appropriate for the Government of Myanmar to commission a Strategic Environmental Assessment (SEA). This should be done to inform policy and planning related to the SEZ in Kyauk Phyu. A project of this size and significance merits this assessment, which is part of Myanmar's legal framework under the 2015 EIA Procedure.[583]

The Assessment would examine the cumulative environmental and socio-economic impacts of the SEZ, deep seaports, transport infrastructure, labour, migration and resettlement. It could consider the working conditions generally experienced by women working in the garment sector in Myanmar. It could also consider the particular vulnerabilities of Muslims in Rakhine State including the displaced persons living in Kyauk Phyu.

This must involve genuine public participation in line with international standards, and should be designed to correct the lack of meaningful consultation in development of the SEZ to date. It should seek to support policy linkages with Rakhine State economic development plans and initiatives. Ultimately the Assessment should also inform planning for sustainable development inline with the State's international law obligations to respect and protect human rights to an adequate standard of living and to the right to work and just and favourable conditions of work.

583 2015 EIA Procedure, Ch. 10.

5. RECOMMENDATIONS

Laws, policies and practices related to the development and implementation of SEZs must be reviewed and amended to ensure alignment with the State's international law obligations and international standards to protect human rights. In Myanmar's SEZs, particularly in Kyauk Phyu, there are opportunities to avoid further human rights violations during their development and implementation.

5.1 Recommendations for the Government of Myanmar

To the SEZ Central Body:

1. Order a moratorium on the development of SEZs, and on entering new related investment agreements, until the SEZ laws have been amended to ensure conformity with international human rights law obligations.
2. Direct the Kyauk Phyu SEZ Management Committee to suspend the land acquisition process that commenced in February 2016 and has not been carried out lawfully.
3. Ensure that Management Committees respect the principles of equality and non-discrimination, in particular by ensuring that substantial representation of women, representatives of communities in SEZ areas and legal experts in the protection of human rights and the environment.
4. Issue a Notification to reaffirm the unqualified role of other statutory bodies in SEZs, including the determination powers of MONREC for EIAs.

To the Ministry of Commerce:

5. Protect human rights by amending the SEZ Law and SEZ Rules, through meaningful consultation, to:
    a. Ensure genuine public participation in planning and decision-making;
    b. Establish specific duties and lines of accountability for the Management Committees in the protection of human rights;
    c. Specify differentiated responsibilities for involuntary resettlement in SEZs, in alignment with the 2015 Environmental Impact Assessment Procedure;
    d. Ensure national laws and standards are respected and fully applied in SEZs, including through clearly reaffirming the statutory authority of concerned Ministries in SEZs, including MONREC. This includes repealing Article 22 of the SEZ Rules.
    e. Ensure robust and effective monitoring mechanisms to ensure investors are compliant with legal obligations in SEZs.
    f. Revise or amend poorly phrased provisions that are superfluous and create rules that are confusing and or contradict other parts of the legal framework;
    g. Require a Community Grievance Mechanism, in line with international standards, to address issues arising in the development of SEZs.
6. Commission a Strategic Environmental Assessment (SEA), in line with Chapter 10 of the EIA Procedure, to inform policy and planning for the Kyauk Phyu SEZ, that would:
    h. Examine the cumulative environmental and socio-economic impacts of the SEZ, deep seaports, transport infrastructure, labour, migration and resettlement.
    i. Inform and support policy linkages with Rakhine State economic development plans and initiatives.

j. Ensure that there meaningful and fully participative consultations in development of the SEZ to date.

k. Consider and meaningfully address the situation of residents of Rakhine State to ensure that there are no adverse impact on their livehood.

l. Meaningfully address the particular vulnerabilities of Muslims in Rakhine State including the displaced persons living in Kyauk Phyu.

7. Direct Management Committees to ensure full compliance with the EIA Procedure.

To the Kyauk Phyu SEZ Management Committee, including the District GAD Officer:

12. Suspend land acquisition at least until after the completion of a resettlement plan developed through fully participative consultation in line with international standards and national law.

13. Establish an effective mechanism to enable genuine public participation, open to all stakeholders, in decision-making.

14. Provide for access to an effective remedy for human rights violations, particularly those that occurred in 2014, and providing reparation to persons displaced in order to restore, their livelihoods at a minimum to pre-displacement levels and to minimum essential levels under international law and standards.

15. Effectively coordinate the critical EIA, involuntary resettlement and land acquisition processes in line with national laws and international standards.

To the Union Legislature and the President of the Union:

16. Align land laws to conform with international human rights law obligations and with the 2016 National Land Use Policy, which recognize customary land tenure and women's rights to own and use land. This alignment should include amendment, repeal or replacement of the 1894 Land Acquisition Act, through full public consultation, to ensure that people will have security of tenure if they are resettled, and to bring the definition of public purpose land acquisition in line with international standards.

17. Take steps to reform and enhance judicial and administrative capacity to provide for effective remedies and reparations.

18. Ratify the International Covenant on Economic, Social and Cultural Rights.

19. Protect the human rights of all residents of Rakhine State and respect the rule of law, including by ensuring protection of rights of Muslim residents in line with the State's international law obligations.

To the National Minimum Wage Committee:

20. Raise the national minimum wage, which is insufficient to earn a decent living.

5.2 Recommendations for civil society actors and lawyers

To civil society actors and community leaders:

1. Monitor and document SEZ developments and engage in advocacy with a view to ensuring that they are in line with international and domestic law and standards.
2. Seek and make use of international and domestic cooperation and assistance, including legal, technical and technological support from local and international INGOs, international and domestic and civil society and international experts to strengthen advocacy work on SEZs.
3. Consider opportunities to collaborate with lawyers on strategic litigation cases where rights violations and/or abuses are at risk of occurring, are occurring or have occurred.
4. Engage, where feasible and appropriate, with parliamentarians, political parties, government administrative officials and SEZ bodies, to call for laws, policies and practices to be in line with international law and standards.

To lawyers:

5. Undertake, where feasible, strategic litigation test cases as a means to ensure effective remedies and reparation for rights violations and to prevent or stop current rights violations associated with SEZs.

5.3 Recommendations for private sector actors

To developers and investors in SEZs:

1. Comply with all national laws related to the protection of the environment and human rights, including but not limited to labour laws, and the 2012 Environmental Conservation Law and its related rules and procedures.
2. Carry out business activities and planning in line with the UN Guiding Principles on Business and human rights, including by establishing and using Operational-level Grievance Mechanisms (OGM) to address concerns affecting individuals and local communities that arise from their operations.
3. Take heightened due diligence to ensure investments are responsible and are not complicit in human rights abuses. As part of this:

a. Before entering a land lease agreement, ensure the land has been lawfully acquired and is not linked to human rights violations.

b. Duly consider peace and conflict dynamics when investing in SEZs.

4. Establish procedures to facilitate or provide access to effective remedies, in accordance with the UN Guiding Principles on Business and Human Rights.

To EIA consultants:

5. Ensure that an EIA can be carried out lawfully and effectively before entering a contract with an SEZ Developer and/or Investor to undertake EIAs.

6. ANNEXES

6.1 Overview of Myanmar's system of laws

6.1.1 Hierarchy of laws

Myanmar's legal system is derived from the English common law system as implemented in colonial India, although in practice the current system rarely utilizes such standard components of the common law system as written judgments and reliance on precedent.[584]

Myanmar's Union Parliament authorizes[585] ministries, departments and government organisations – such as the SEZ bodies – to develop bylaws. Bylaws generally come in the form of rules and procedures to implement the respective law. Though bylaws must conform to the function and purpose of parent legislation, drafters often have significant scope for determining stipulations for the laws implementation and clarifying any vague provisions. Laws often authorise the relevant Ministry to revoke or amend earlier stipulations at any time without requiring a parliamentary review.[586] Informal and non-binding resolutions and decisions emanating from senior officials can also play an influential role in the interpretation of legal mandates.

The Union Parliament often enacts legislation that authorizes a Union-level government organization – such as a ministry or directorate – to issue implementing legislation so long as it is consistent with the related law.[587] The authorized organization may issue these rules, regulations and bylaws directly; there is no legal procedure for parliamentary review. However the parliament may resolve to amend or annul such legislation if its members deem it as being inconsistent with the parent legislation.[588] In addition to advising legislators, the Attorney General is empowered to submit such cases to the parliament.[589] All rules, regulations and bylaws are published in the Union Gazette, generally as a notification issued by the authorized government organization.

6.1.2 Differentiated legislative powers

The Constitution prescribes lists that differentiate the legislative powers of the Union Parliament and the Region or State Parliament.[590] The Union Parliament is granted exclusive authority to legislate in regards to industrial zones and major ports.[591] The power of the Region or State Parliament to legislate for industrial sectors only extends to industries not governed at Union level.[592] The Union Government may choose to form a joint economic venture with a Region or State Government.[593]

Whilst the Constitution sets out a process to resolve a conflict of laws between different legislatures,[594] it does not provide guidance for when a conflict occurs between different Union-level laws. Some laws include provisions to deal with this. For example, if a government department or organisations issues a regulation that is in conflict with

584 ICJ Right to Counsel Myanmar, pp. 4.
585 2008 Constitution of Myanmar, Art. 97(a). "When the Pyidaungsu Hluttaw enacts a law, it may: (i) Authorize to issue rules, regulations and by-laws concerning that law to any Union level organization formed under the Constitution; (ii) Authorize to issue notifications, orders, directives and procedures to the respective organization or authority" and that "(b) The rules, regulations, notifications, orders, directives, and procedures issued under the power conferred by any law shall be in conformity with the provisions of the Constitution and the relevant law."
586 For example, the 2012 Farmland Rules revoke the 1953 Nationalisation of Farmland Rules. Note that the Union Parliament is also authorized to repeal and amend bylaws (Constitution of Myanmar, A97(c)(e)).
587 2008 Constitution, Art. 97(a)(b).
588 2008 Constitution, Art. 97(b)(c)(d)(e).
589 2010 Attorney General of the Union Law, Art. 12(b)(c).
590 Myanmar is politically divided into 14 geographic entities: 7 states and 7 regions. See: 2008 Constitution, 'Schedule One: Union Legislative List' and 'Schedule Two: Region or State Legislative List.'
591 2008 Constitution of Myanmar: The Union Government is authorised to run industrial zones (Schedule One, Union Legislative List, 7 (b)) and major ports (8e).
592 2008 Constitution. Schedule 2, Region or State Legislative List (5a)
593 2008 Constitution. A455(a)(b).
594 2008 Constitution, A198

another regulation, and both have jurisdiction, then the higher standard prevails.[595] Consideration should be given to the authority of the issuing party: the Labour Ministry should have final decision on labour standards, for example. Whilst this principle does not appear to be established it is nonetheless the only remedy on offer in the current laws and practice.

6.1.3 Presidential Ordinances

The 2008 Constitution authorises the President of the Union to promulgate ordinances. A Presidential Ordinance only takes legal effect following: a) submission to and approval by the Pyidaungsu Hluttaw,[596] or b) if the ordinance relates to implementation of a law that includes a provision authorising the President to do so.[597] Letters and directives only have authority if they meet this test.

6.1.4 The Constitution

A variety of rights are constitutionally guaranteed in Myanmar, although many of these are paired with an essential clause enabling contravention of that right. The Constitution recognizes general rights to political participation, and specifically the rights to participate in matters related to education and health.[598] The principles of consultation and consent are contemplated for cases in which people may be adversely affected by actions of the State.[599] The Government is obliged to enact laws protecting the rights of peasants and workers,[600] and take steps to improve the people's livelihoods,[601] without discrimination. [602] Rights to private property and security of the home are protected.[603] The Constitution recognizes the right to access remedies in accordance with principles of judicial independence and due process.[604] The Government is constitutionally obliged to provide for many of the economic, social and cultural rights – in Chapter One on Basic Principles of the Union; and Chapter Eight on the Fundamental Rights and Duties of Citizens.[605] A number of political and civil rights are included in the Constitution,[606] including a clause prohibiting penalties that violate human dignity.[607] Forced labor is prohibited except as a legally prescribed criminal penalty.[608] The Constitution also creates obligations upon both the Union and its citizens in regards to environmental protection and conservation.[609]

595 For example, see Article 12 of the 2012 Environmental Conservation Law: "If any environmental quality standard stipulated by any Government department, Government organization under any existing law is more than the quality standard stipulated by the Ministry, it shall remain in force; however if it is less than such standard, only the standard stipulated by the Ministry shall be in force."
596 2008 Constitution of Myanmar, Art. 104.
597 2008 Constitution of Myanmar, Art. 97.
598 2008 Constitution of Myanmar, Arts: 38(a); 28(b).
599 2008 Constitution of Myanmar, Art. 365.
600 2008 Constitution of Myanmar, Art. 23(a)(b).
601 2008 Constitution of Myanmar, Arts. 24, 31, 36(c).
602 2008 Constitution of Myanmar, Arts. 349, 350.
603 2008 Constitution of Myanmar, Art. 37(c), 357.
604 2008 Constitution of Myanmar, Arts. 19, 381.
605 2008 Constitution of Myanmar, Arts. 28, 366, 367.
606 2008 Constitution of Myanmar, Arts. 6(e), 21(a)(d).
607 2008 Constitution of Myanmar, Art. 44.
608 2008 Constitution of Myanmar, Art. 359.
609 2008 Constitution of Myanmar, Arts. 45, 390(b).

6.2 Legal procedures

6.2.1 Timeline of Myanmar's EIA Procedure

Phase	Event	Timeframe
Screening	1. Project Proponent develops project proposal to MONREC	(As required)
	2. ECD determines if an EIA is required	15 days
Scoping	3. Proponent nominates the proposed EIA Consultant and ECD determines if the Consultant is qualified	7 days
	4. Proponent ensures scoping activities occur, including consultations, to inform the Scoping Report	(As required)
	5. Proponents submits Terms of Reference for EIA	(As required)
	6. ECD determines if ToR accepted	15 days
Investigation & Preparation of Report	7. EIA investigation & report preparation	(As required)
	8. Submission of EIA Report to ECD	(As required)
	9. Disclosure of EIA Report to local communities, civil society & stakeholders	Within 15 days of submission to ECD
Review of the Report	10. Review by Report Review Body and ECD 11. ECD notifies of decision to approve or reject 12. Submission of appeals (if any – within 30 days of public disclosure)	Within 90 days of receipt of EIA Report
Compliance	Monitoring and enforcement by the ECD	Ongoing

6.2.2 Public Participation at Key Stages in the EIA Process [610]

Summary	Myanmar
Screening	No requirements to consult with PAP.
Scoping/TOR	Yes. Clear requirements for PP.
Preparation	TOR must provide details of PP plan to be approved by MOECAF
Assessment	MOECAF must hold PP meetings and receive comments.
Approval	ECC must be made publically available including EMP.
Monitoring	No requirement for community involvement.
Enforcement of EIA Process by PAP	No.

610 Table abridged from Mekong Network & Matthew Baird (forthcoming Mekong Region EIA Manual)

6.3 Composition of the SEZ governance bodies

SEZ Body	Members (appointed by NLD Government, August 2016)
Central Body	Vice-President of the Union (Chairperson). Ministry of office of the state conselling; Ministry of internal affairs; Ministry of agriculture, livestocks and dams; Ministry of transport and communications; Ministry of resources & environmental conservation; Ministry of electricity and energy; Ministry of labor, immigration & public strength; Ministry of industry; Ministry of projects and finance; Ministry of Construction; Attorney General of the Union, Union Attorney General's Office; Concerned Minister of state/regional Government group; Ministry of Economic and Trade; Permanent Secretary, Ministry of Economic and Trade.[611]
Central Working Body	Minister of Commerce (Chairperson). Deputy Minister, Ministry of Projects and Finance; Deputy Minister, Ministry of Internal Affairs; Deputy Minister, Ministry of transport and communications; Deputy Attorney General, Union Attorney General's Office; Permanent Secretary, Ministry of agriculture, livestock and dams; Permanent Secretary, Ministry of resources and environmental conservation; Permanent Secretary, Ministry of Electricity and Energy; Permanent Secretary, Ministry of labor, immigration, and public strength; Permanent Secretary, Ministry of Industry; Permanent Secretary, Ministry of Economic and Trade; Permanent Secretary, Ministry of Construction. Director General, DICA Ministry of Project and finance; Director General, Myanmar Trade Enhancement Group; Ministry of Economic and Trade; Director General, Trade department; Ministry of Economic and Trade.[612]
Management Committees	(The three committees were reformed in October 2016).

6.4 Kyauk Phyu SEZ information

6.4.1 Planned demarcation areas according to internal government documents

Facility	Acre
Textile Industrial Park 1	783.50
Textile Industrial Park 2	324.68
Construction Industrial Park 1	314.84
Construction Industrial Park 2	1022.05
Residential Park 1	652.01
Residential Park 2	283.17
Residential Park 3	300.25
Deep Sea Port 1	370.66
Deep Sea Port 2	237.22
TOTAL	**4288.38**

611 Presidential Notification 59/2016 (12 August 2016) http://www.president-office.gov.mm/zg/?q=briefing-room/news/2016/08/15/id-11686

612 Presidential Notification 59/2016 (12 August 2016) http://www.president-office.gov.mm/zg/?q=briefing-room/news/2016/08/15/id-11686

6.4.2 Villages in the Kyauk Phyu SEZ area

Village Tract	Textile Industrial Park 1	783.50
ကန်ဦး Kan Tee	Min Tat Taung, Nann Phay Taung, Kan Tee, Mi Kyaung Tet, Hnget Pyaw Chaung	5
ချောင်းဝ Chaung Wa	Kalabar, Chaung Phya, Chaung Wa,	3
သိုင်းချောင်း Thaing Chaung	Zai Chaung, A Chun, Chaung Phya, Taww Pring, Pyar Kywin, Chaung Mraung, Thai Chaung, Kraung Khoe	8
စစ်တော Sit Taw	Say Maw, Kran Chaing, Sit taw, Thike Pope Taung	4
ကတ်သပြေ Kat Tha Pye	Chauk Chaung, Pya Tae, Kat Tha Pyay	3
Pya Dae Kyunn	Prin, Kyauk Tann, Ramak	3
ဒိုးမတောင် Do Ma Taung	Pyar Chai, Taung Maw, Prunlakaung	3
မင်းပြင် Min Pyin	Ranantaung, Minpyin, Minkhone Tin	3
ကြတ်တိန် Krat Tein	Thafannkhar, Thapyutaung, Krat Tin	3
		35

6.5 Correspondence

International Commission of Jurists

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org

To: H.E. Dr. U Than Myint

Minister of Commerce

Chairperson of the SEZ Central Working Body

Republic of the Union of Myanmar

From: The International Commission of Jurists (ICJ)

Subject: Cooperation and legal advice on Special Economic Zones in Myanmar

Date: 18 November 2016

Dear Excellency,

Thank you and your colleagues for taking the time to meet with the ICJ in Nay Pyi Taw last week. It was a privilege to have the opportunity to discuss legal and regulatory issues related to the development of Special Economic Zones in Myanmar. Your expressed commitment to investment that is compliant with local laws and international human rights laws was reassuring.

The ICJ offers congratulations for establishing positions for advisors on socio-economic and environmental issues on the Management Committees. As discussed, we suggest that these appointees include members of affected communities or their representatives. Appointees should also include persons with expertise in law, human rights and environmental protection as well as in investment. This would help enable public participation in line with the Rule of Law.

We understand that this week the State Counsellor, Daw Aung San Suu Kyi, expressed the Government's renewed commitment to developing SEZs. Therefore, to inform future policy related to the SEZ in Kyauk Phyu, the ICJ suggests that the Government commissions a Strategic Environmental Assessment (SEA). This would consider the cumulative environmental and socio-economic impacts of the SEZ, deep seaports, transport infrastructure, labor, migration and resettlement of communities. It would involve public participation. And it would support policy linkages with Rakhine State economic development plans and initiatives. A project of this size and significance merits this assessment, which is part of Myanmar's legal framework (see annex). Support from development partners would help ensure an SEA is professionally undertaken. If requested to, the ICJ is prepared to offer further support on this matter.

The ICJ again welcomes the invitation to cooperate and looks forward to humbly offering advice, based on our legal expertise and our work with lawyers and civil society in the SEZ areas.

Sincerely,

Dr Daniel Aguirre

International Legal Adviser

International Commission of Jurists [Myanmar]

International Commission of Jurists

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org

To: U Winston Set Aung

Chairperson of the Thilawa Special Economic Zone Management Committee

Thanlyin Township, Yangon

Republic of the Union of Myanmar

From: The International Commission of Jurists (ICJ)

Subject: Request for clarifications regarding law and governance matters at the Thilawa SEZ

Date: 18 November 2016

Dear U Winston Set Aung,

The ICJ is developing a report identifying and assessing the legal framework for SEZs in Myanmar. This report will be released publically early in the New Year. To date we have met, among others: the new Central Working Body; Kyauk Phyu Management Committee; Director of DICA; NGOs such as the IGC; civil society; developers, investors and communities in SEZ areas.

Comprised of 60 eminent jurists and lawyers from around the world, the ICJ was established in 1952 and is active on the five continents, with office locations including Geneva, Bangkok and Yangon. The ICJ promotes and protects human rights through the Rule of Law, by using unique legal expertise to develop and strengthen national and international justice systems. In Myanmar, the ICJ has been working with the Directorate of Investment and Company Administration, the Attorney General's Office and the Supreme Court of the Union, as well as with civil society groups. Some of these activities, related to responsible investment, have been conducted in partnership with the Myanmar Centre for Responsible Business. The ICJ also works with local lawyers, civil society groups and government to improve legal literacy related to SEZs.[613]

The ICJ is encouraged by your Committee's steps to improve public disclosure via its website. To ensure impartial and factual reporting, the ICJ seeks further clarifications from the Committee. We would be grateful to receive a written response to these questions before the New Year:

1. Prior to the Union Government's issuance of the Environmental Impact Assessment Procedure in December 2015, the Thilawa Management Committee developed a process for determining and reviewing environmental impact assessments and Environmental Conservation and Prevention Plans in the SEZ.[614] The ICJ understands that the Committee and project developers are still following this process, which is now inconsistent with Myanmar law.[615] One key point of difference between the old process in Thilawa SEZ, and the EIA Procedure, is that the Environment Ministry, not the Management Committee, has exclusive legal authority to determine if an assessment is

613 For example, in September 2016 the ICJ conducted a workshop on EIA: www.icj.org/myanmar-environmental-impact-assessment-workshop-held-in-kyauk-phyu/

614 The Management Committee's advice to investors sets out this process. See: http://www.myanmarthilawa.gov.mm/investment-application (accessed 17 November 2016).

615 In May 2016 and June 2016, EIA reports for different components of the SEZ's Zone B were submitted, by Myanmar Japan Thilawa Development Ltd., and by Thilawa Property Development Ltd., respectively. In cover letters to the Committee, each company says it understands the ECPP process remains in effect.

required. Linked to this, EIA-type projects may only proceed after an EIA has been conducted in accordance with the Procedure, and only after an Environmental Compliance Certificate has been issued by the Ministry. The ICJ heard from the MCRB that a JICA Team is supporting your Committee to align the old process with Myanmar's legal framework. Can you please clarify, has this process been updated to conform to the Procedure? If not, what, if any, steps are being taken to align EIAs with local laws?

2. This week, state media reported that 68 companies have been approved to invest in the Thilawa SEZ. For each of these investments, has the Environment Ministry been involved in screening projects to determine if an assessment is required, in line with the EIA Procedure? If not, why? If yes, is this information publically available?
3. During our research, the ICJ obtained and reviewed a copy of the draft Resettlement Work Plan for Area 2-1 (100ha), published by the Management Committee in February 2016. The draft RWP does not acknowledge the legal requirements under Myanmar law to conform to the Asian Development Bank and World Bank policies on involuntary resettlement.[616] Can you please clarify, does or will the final RWP reflect legal obligations to conform to these policies? If not, why? Also, is the final RWP publically available?
4. In February 2015, the Management Committee established a company to implement some of its functions.[617] Can you please clarify why this entity, tasked with implementing government functions, was established as a limited liability company instead of as a government body? Does the company incur profits? Who has financial interests in it?

Please do not hesitate to contact me if you have any comments or questions. The ICJ hopes that lessons learnt in Thilawa may inform the development of SEZs in line with environmental and human rights laws. We look forward to your response and cooperation on these matters.

Sincerely,

Mr Sean Bain

International Legal Consultant, International Commission of Jurists [Myanmar]

616 For selected examples of incorrect legal analysis, see the following non-exhaustive list of problems with the Draft Resettlement Work Plan for Area2-1 (100ha) dated February 2016, Table 4.2: authors incorrectly state there are no local laws governing involuntary resettlement [note that Article 7 of the 2015 EIA Procedure is applicable]; authors incorrectly state there are no local laws guaranteeing livelihood restoration to pre-project levels [Article 80(b) of the 2014 SEZ Law applies; Article 7 of the EIA Procedure applies; compensation procedures in key land laws can also have this effect if followed lawfully]; authors incorrectly state that local laws do not require consultations and public participation [Chapters 2, 3, 4, 5 and 6 of the EIA Procedure all include legal requirements related to public participation for EIA-type projects].

617 The Thilawa SEZ Management Committee Co., Ltd. was established on 5 February 2015. See: Thilawa Management Committee, 'Notice to Investors regarding the Status of Thilawa Special Economic Zone Management Committee' Notice No. 2/2016 (27 May 2016).

International Commission of Jurists

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org

To: U Myint Thein

Former Chairperson of the Kyauk Phyu Special Economic Zone Management Committee

Republic of the Union of Myanmar

From: The International Commission of Jurists (ICJ)

Subject: Human Rights and Resettlement at the SEZ in Kyauk Phyu, Rakhine State

Date: 30 November 2016

Dear U Myint Thein,

Thank you and your colleagues for taking the time to meet with the ICJ earlier last month in Yangon. We appreciated having the opportunity to discuss issues related with development of the Kyauk Phyu Special Economic Zone, to ensure that our research report considers information from all stakeholders. As we discussed, the ICJ has visited Kyauk Phyu at least ten times to monitor the impacts of the SEZ on human rights and the environment. As noted in our meeting, we would appreciate your assistance in providing some more information to improve the ICJ's research report on SEZs, which includes a study of the SEZ developments in Kyauk Phyu.

To ensure the accuracy of our findings, we would like to present some preliminary findings from our research in Kyauk Phyu, followed by specific questions that would help clarify our findings. We apologize for imposing on you and hope that you can respond to some of the issues raised by people we have interviewed during the course of our research, to help us understand the whole situation accurately.

We would appreciate your help in understanding the circumstances surrounding the construction of two dams at the SEZ between 2014-16. Residents displaced by these projects claim they did not receive timely information, were displaced with short notice, and did not have opportunities to participate in planning or decision-making related to their displacement.

Documents seen by the ICJ show that two categories of payments were made to residents: compensation; and karuna kyay (compassion money). In October 2014, the Government made some payments and the MKSH Company made some payments. Some revenue stamps, which were provided to residents in order to document payments, include the signatures of Management Committee members.

Question 1: Please clarify the Management Committee's roles in the resettlement process.

Question 2: Could you please help us understand why two different categories of payments were made to residents displaced by the dams? What is the legal basis for paying 'karuna kyay'?

Question 3: We understand that the MKSH Company made payments to residents displaced by the Thaing Chaung Reservoir, which was constructed and paid for by the Government. Can you please explain the legal basis for payments by the MKSH Company in Thaing Chaung?

Residents displaced by the two dams say compensation was insufficient to reestablish livelihoods, and that their living conditions deteriorated as a result. Based on interviews in Kyauk Phyu, and our discussion with your Committee, we understand that the Government promised replacement land to displaced residents but that this has not been provided.

Question 4: Can you please explain when and how promises of replacement land will be fulfilled?

Residents displaced by the Thaing Chaung reservoir claim that, in a meeting with Government officials regarding resettlement, a Committee member told a resident that he would be prosecuted by the Government if he did not accept the amount of compensation offered.

Question 5: Is this information correct? If yes, please clarify the legal basis for prosecution?

In March 2016, a Government Team surveyed the 250 acres of land allocated for Phase 1 of the SEZ project. This appears to be part of a bigger land acquisition process – for 1825 acres – commenced by the Home Affairs Ministry in January. Many affected residents, as well as senior Union-level Government officials, seem unaware that this acquisition process has started. Residents of the 250a area say they were not properly notified or consulted – before or after the survey. They suggest that some land was incorrectly classified, for example as vacant land instead of as farmland. They also worry that proper compensation will not be provided. Some residents allege that local officials have refused to process their applications to register farmlands in this area. Some local officials suggested land registration had closed in the area.

Question 6: Please describe how the land acquisition was initiated for the 1825 acres. What was the role of your Management Committee in this process?

Question 7: Was registration of farmland - known as 'Form 7' – closed to residents? If yes, why?

The Management Committee told the ICJ about a 'multi-stakeholder monitoring group' that was formed to enable local participation in development of the SEZ. The ICJ interviewed a range of stakeholders about the role of this monitoring group, including: local residents; civil society representatives; businesspeople; village leaders; religious leaders; government officials; members of parliament; and members of political parties (NLD & ANP). They all said the group had few meetings and largely excluded community members and representatives.

Question 8: Could you please assist us to better understand the nature of the monitoring group? It would assist us if you could share any examples of project plans being amended or reconsidered in response to inputs from residents affected by development of the SEZ.

Thanks again for taking the time to meet, and consider the above questions. We look forward to your assistance on these matters, and hope to receive a response before January, so our report can accurately reflect events in Kyauk Phyu during development of the SEZ to date. Meanwhile, please do not hesitate to contact us if you have any comments or requests for clarification.

Sincerely,

Mr Sam Zarifi

Regional Director, Asia and the Pacific

International Commission of Jurists

Bangkok, Thailand

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International Commission of Jurists

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org