

International and domestic laws and contracts related to extractive industries - Myanmar's Context -

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Myanmar's Changing Policy and Legislative Context for Investment

Investment

- ▶ Foreign Investment Law (2012) & Myanmar Citizen Investment Law (2013)
 - ▶ New, combined Investment Law (Draft 2015)
- ▶ Myanmar Companies Act (1914)
 - ▶ New Myanmar Companies Act (Draft 2015)

Tax

- ▶ Union Tax Law 2015

Environment & Land

- ▶ Environmental Conservation Law (2012)
 - ▶ Environmental Quality Standards (Draft 2015)
 - ▶ Environmental Impact Assessment Procedures (Draft 2015)
- ▶ Land Acquisition Act (1894); Farmland Law (2012); Vacant, Fallow and Virgin Lands Management Law (2012)
 - ▶ National Land Use Policy (Draft 2015) to eventually develop new, umbrella "Land Law"

Myanmar's Extractive Industries: Oil & Gas

➤ Oil Fields Act (1918)

➤ Petroleum Act (1934)

- The above legislation is seen as out-dated, and is not applied in practice



Ministry of Energy

Union Minister

Deputy Minister

Myanmar Oil &
Gas Enterprise
(MOGE)

Myanmar
Petrochemical
Enterprise (MPE)

Myanmar Petroleum
Products Enterprise
(MPPE)

Energy Planning
Department

All O&G operations in Myanmar are governed by contracts entered into between MOGE and private operators (including PSCs and improved petroleum recovery contracts)

Myanmar's Extractive Industries: Mining

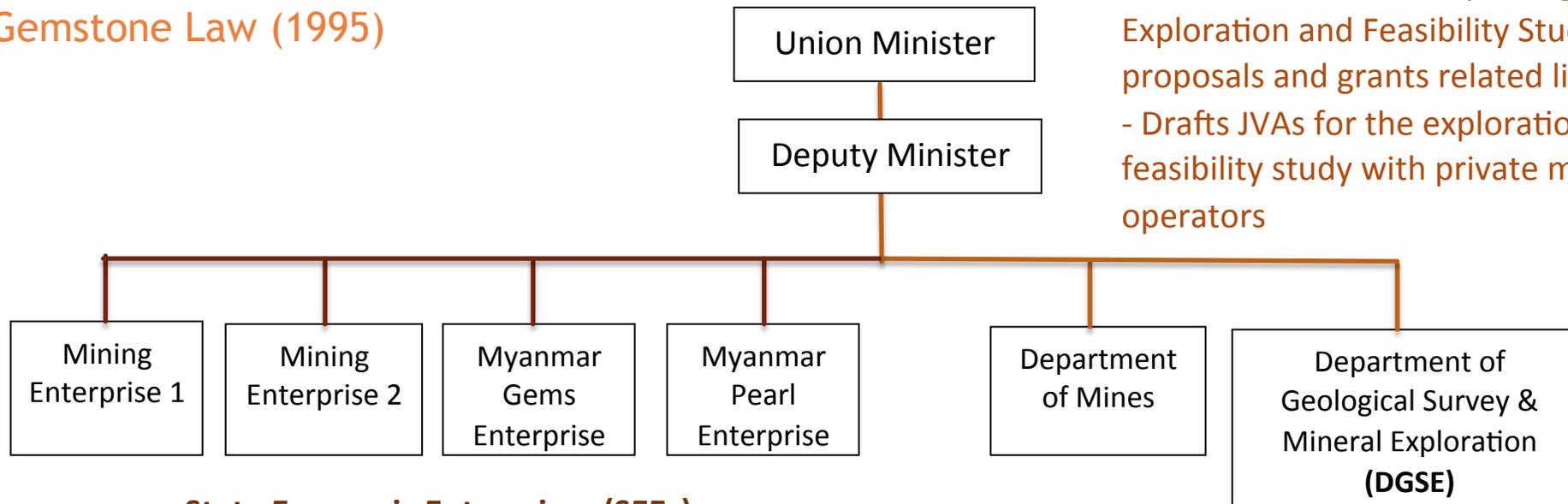
- Myanmar Mines Law (1994) under amendment (draft 2015)
- Gemstone Law (1995)



Ministry of Mines

DGSE:

- Receives Mineral Prospecting, Exploration and Feasibility Study proposals and grants related licenses
- Drafts JVAs for the exploration and feasibility study with private mining operators



State Economic Enterprises (SEEs):

- Are responsible for different minerals
- Receive exploitation proposals and grant production licences
- Negotiate Production Sharing Contracts
- Enter into joint venture agreements (JVAs) with private operators

Myanmar Extractive Industry Transparency Initiative (MEITI)

- ▶ Formal Commitment to become an EITI country (Presidential Decree 99/2012), Extractive Industry Transparency Initiative Candidate Country status (2014)
- ▶ First EITI report due January 2016; January 2017 deadline to meet all 7 EITI Requirements in order to gain 'EITI Compliant' status
- ▶ Myanmar must amend some of its legislation to support EITI
 - ▶ Confidentiality provisions in existing PSCs with MOGE and private operators and model PSC used by Ministry of Energy
 - ▶ Impose EITI reporting obligations on companies through the investment regulatory regime; including mining law currently under amendment

Myanmar and International Investment Law

- ▶ GATT Member (1948)
- ▶ WTO Member (1995)
 - ▶ Agreement on Trade-Related Investment Measures (TRIMs)
- ▶ Accession to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2013)
 - ▶ This is relevant for disputes

Myanmar's Investment Agreements

Bilateral Investment Treaties (BITs)

(Signed and entered into force)	(Signed but not entered into force)
<ol style="list-style-type: none"> 1. India 2. Japan 3. China 4. Thailand 5. The Philippines 	<ol style="list-style-type: none"> 1. Vietnam 2. Lao PDR 3. Kuwait 4. The Republic of Korea 5. Israel

Myanmar & ASEAN

Regional investment treaty	ASEAN+ Agreements	ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA)
ASEAN Comprehensive Investment Agreement (ACIA)	<ol style="list-style-type: none"> 1. ASEAN-China Agreement on Investment 2. ASEAN-India Agreement on Investment 3. ASEAN-Republic of Korea Agreement on Investment 	“Investment Chapter” in AANZFTA

Myanmar's Investment Agreements

BITs Under Negotiation

Priority	Pending
Bangladesh, Canada, EU, Hong Kong, Mongolia, Russia	Belarus, Czech Republic, Democratic People's Republic of Korea, Iran, Qatar, Serbia

Disputes and Investment Treaties

- ▶ Most investment treaties allow foreign investors to bring claims that a host state has failed to live up to the protections guaranteed by an investment treaty directly to international arbitration.
- ▶ A three-person arbitral tribunal then decides the dispute.
- ▶ If the arbitral tribunal upholds an investor's claim, it will issue a final, binding award requiring the host state to compensate the investor.
- ▶ This is a “one-way” system: investment treaties allow foreign investors to bring claims against states but do not allow states to bring claims against foreign investors to international arbitration.

Disputes, Investment Treaties & Policy Space

- ▶ Investors have challenged a range of measures enacted by different arms of government: national legislatures, investment authorities, specialised regulatory agencies and sub-national levels of government.

Do investment treaties unduly limit host states' "policy space" to adopt legitimate regulatory measures in the public interest?

- ▶ Challenges to government regulations designed to protect the environment
- ▶ Challenges to government regulations designed to protect public health
- ▶ Challenges to governments' responses to financial crises
- ▶ Challenges to government's use of performance requirements intended to ensure that foreign investment contributes to the sustainable development of host countries

Additional Concerns

Process of investor-state arbitration

- Lack of transparency
- High legal costs (estimated to average over \$US 9 million per case)
- Inconsistent decisions - notably, in the interpretation of key treaty provisions
- Magnitude of compensation awarded by arbitral tribunals (two recent investment disputes resulted in awards running into the billions of US dollars)

Additional Concerns

Consistency between the provisions of investment treaties and national laws and policies in developing countries

- Most developing countries investment treaties are based on model treaty texts prepared by developed countries
- Generally, developing countries have not systematically reviewed the compatibility of investment treaty provisions with their laws and policies before signing these treaties
- ❖ This is particularly serious in relation to: liberalisation provisions of investment treaties
 - Many developing countries appear to have signed treaties that contradict conditions and restrictions that apply to foreign investment as a matter of their national laws and policies
 - This kind of inconsistency is confusing for investors
 - This kind of inconsistency creates a significant risk of future investment disputes for the host country

DICA and UNDP-UNEP PEI

- ▶ DICA collaborated with UNDP-UNEP PEI to develop a treaty negotiation reference document (2014/2015)
- ▶ This is an internal negotiation-support document for government staff, structured in the format of a BIT, with proposed model provisions, drafting commentary, and policy commentary on those provisions
- ▶ It is intended to assist government staff to identify key issues and drafting choices to translate policy choices into legal text
- ▶ It can also serve as the standard negotiation reference document to carry out comparative review of draft treaty proposal content
- ▶ **However, key negotiating decisions depend on Myanmar's policy choices**

Government Policy:

- ▶ How is Myanmar planning to maintain the government’s “policy space” (i.e. ability to make effective public policy in areas such as environment and health / safety) within its international investment treaties while still attracting investment?

Myanmar’s context

- ▶ Some of Myanmar’s BITs include “General Exceptions” which include government measures necessary to protect public health or relating to environmental conservation, among others.
- ▶ Myanmar’s national laws follow a common policy to protect the environment and public health

BUT

- ▶ Myanmar does not currently follow any specific policy in its investment treaties to maintain policy space to regulate in the public interest
- ▶ Myanmar can consider this for the future

Government Policy:

- ▶ How is Myanmar viewing the interaction between investor state arbitration and investment treaties? Has the government looked at ways to limit the scope of disputes that could be viewed as relating to “treaty obligations” subject to investor state arbitration?
- ▶ Myanmar is not a signatory to ICSID

Myanmar’s Context:

- ▶ In ACIA, Article 40 (2), allows a state to seek a joint interpretation of treaty provisions from the state parties. The joint interpretation issued by the state parties is binding on an arbitral tribunal deciding a dispute under the ISDS procedure
- ▶ Some treaties exclude the application of ISDS to certain clauses

BUT

- ▶ Myanmar does not currently follow any specific policy in its investment treaties to limit the scope of disputes
- ▶ Myanmar can consider it for the future

Challenges for Myanmar

- ▶ **Negotiating partners are likely to increasingly request Myanmar to sign investment treaties that require investment liberalization**
- ▶ **Myanmar is mainly a destination, rather than a source, of foreign investment**
 - ▶ So, treaty partners may have an incentive to include more onerous investment protections and stronger ISDS provisions in treaties with Myanmar than those same countries would accept in negotiations with third countries
- ▶ **Maintaining policy space**

Challenges for Myanmar

- ▶ Myanmar could consider adopting **a systematic common position** across all investment treaty negotiations (opposite of ad hoc basis)
 - ▶ Then, Myanmar could review existing investment treaties for consistency with Myanmar's new policy position
- ▶ BUT legal capacity is a major challenge for Myanmar right now:
 - ▶ The need to update many national laws in all sectors is a priority
 - ▶ Developing a systematic investment treaty policy is not seen as a priority

Challenges for Myanmar

- ▶ Without a common policy approach to investment treaty negotiations there is a risk that Myanmar will enter into investment treaties that are inconsistent with national laws and policies

Two particular concerns are:

- ▶ The consistency of liberalization commitments in investment treaties with existing Myanmar laws and policies that place conditions/restrictions on foreign investment
- ▶ The consistency of restrictions on performance requirements in investment treaties with existing Myanmar laws and policies that place conditions on foreign investment

Myanmar Going Forward

- ▶ Myanmar seeks to continue the process of reforms it has begun
- ▶ Myanmar seeks to honor its international commitments and to adhere to international standards, but at the same time...
- ▶ ...Myanmar seeks to develop its own policies, laws and national regulatory framework to become stronger and to create its own sustainable development path

Thank You

- ▶ For more information on Myanmar's EITI process, please visit:
<http://myanmareiti.org>
- ▶ Directorate of Investment and Company Administration:
<http://dica.gov.mm.x-aas.net/>