

Rule of Law Handbook for  
**Environmental Law**

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**for**  
**Environmental Law**

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# Table of Contents

- 1** About the Konrad-Adenauer-Stiftung
- 3** Acknowledgements
- 5** Introduction – Rule of Law Handbook for Environmental Law  
Jonathan Liljeblad
- 15** Myanmar’s Legal System  
Kyaw Min San
- 31** Summary of International Environmental Law and Adoption by Myanmar’s Legal System  
William (BJ) Schulte
- 43** Myanmar Laws on Forests, Biodiversity and Ecosystems in Myanmar  
Su Yin Htun
- 57** Myanmar Laws & Mechanisms to Address Cases Involving Flora & Fauna Trafficking  
Marla Bu
- 73** Myanmar’s Legal Framework for Air and Water Pollution Control  
William (BJ) Schulte
- 85** Participatory Mechanisms in Myanmar for Environmental Impact Assessment  
Matthew Baird



# About the Konrad-Adenauer-Stiftung

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The basic principles underlying the work of the Konrad-Adenauer-Stiftung (KAS) are freedom, justice and solidarity. KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU), named after the first Chancellor of the Federal Republic of Germany, Konrad Adenauer (1876-1967), who united Christian-social, conservative and liberal traditions. His name is synonymous with the democratic reconstruction of Germany and his intellectual heritage continues to serve both as our aim as well as our obligation today.

We make a contribution underpinned by values to helping Germany meet its growing responsibilities throughout the world. With 100 offices abroad and projects in over 120 countries, we make a unique contribution to the promotion of democracy, the rule of law and a social market economy. To foster peace and freedom we encourage a continuous dialogue at the national and international levels as well as the exchange between cultures and religions.

We are guided by the conviction that human beings are the starting point in the effort to bring about social justice and democratic freedom while promoting sustainable economic activity. By bringing people together who embrace their responsibilities in society, we develop active networks in the political and economic spheres as well as in society itself. The guidance we provide on the basis of our political know-how and knowledge helps to shape the globalization process along more socially equitable, ecologically sustainable and economically efficient lines.

We cooperate with governmental institutions, political parties, civil society organizations, media and think tanks, building strong partnerships along the way. In particular, we seek to intensify political cooperation in the area of development cooperation at the national and international levels on the basis of our objectives and values. Together with our partners we make a contribution to the creation of an international order that enables every country to develop in freedom and under its own responsibility.

Since 2006, Konrad-Adenauer-Stiftung has had an active presence in Myanmar. The Myanmar country project focuses on four objectives:

- Strengthening society's representation in the legislature by enabling parliaments and parties to do effective work
- Building out the capacities of democratic and legal institutions as well as civil society and media
- Promoting a sustainable Social Market Economy
- Developing mechanisms of cooperation among Southeast Asian countries, Europe and Germany on the basis of democratic and peace-supporting principles

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# Acknowledgements

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The donor and editorial staff wishes to express sincere appreciation and thanks to the contributors to this volume. The work of writing is not a minor task, and KAS is grateful to the efforts of the authors to provide their individual expertise to this collective effort. Individually and collectively, the contributions from the authors are a work of public service directed towards helping Myanmar's ongoing transition. Each chapter is a product of goodwill, commitment, and hard work to a more functional liberal democracy in the future for the people of Myanmar. It is with respect and gratitude that KAS acknowledges the dedication and labor of each author, particularly under the challenges posed by current political circumstances. Conditions may change, and when they do KAS reserves the possibility of issuing a revised version of the contents herein.

Last, additional thanks should also be given to the administrative personnel, translators, and copy-editors that comprised the support staff for this handbook. The outcome of a project involving multiple members relies upon coordination, organization, attention to detail, and awareness of timelines. Such responsibilities were shouldered by the support staff, who worked tirelessly to keep the project going. The contributions of support staff are without names, but their labor deserves as much credit as the authors whose names grace the chapters in this book.





# Introduction – Rule of Law Handbook for Environmental Law

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**Australian National University**

## **Background**

This handbook is a part of a series arising from the initial Rule of Law Handbook for Journalists in Myanmar (ROLH for Journalists) published in 2017. The outcome of a partnership between Konrad Adenauer Stiftung (KAS) and the United Nations Development Programme (UNDP), the ROLH for Journalists was a dual-language edited volume with contents in both English and Myanmar languages aimed at lay audiences. The general purpose was to educate readers unfamiliar with technical language with information relevant for journalists in Myanmar, with a succinct review in ordinary language of Myanmar government, laws, court system, and ethics affecting journalists. While focused on the topic of journalists, the previous book reached out to Myanmar society to provide a broader understanding of the status and treatment of journalists in Myanmar.

In keeping with the general basis for the ROLH for Journalists, the present volume seeks to serve a similar function for the topic of environmental law in Myanmar. Environmental law is a critical issue for Myanmar, which is experiencing a degradation in its natural resources despite the work of domestic and international entities to advance conservation in the country. There are continuing problems that include deforestation, habitat loss, ecosystem degradation, endangered species trafficking, and pollution. Environmental issues, however, are also associated with issues such as development, land tenure, access to natural resources, participation in decision-making, cultural rights, and ethnic conflict. In response, the past few years have witnessed the passage of new environmental laws intended to mitigate the damages to Myanmar's environment. The effectiveness of such laws, however, is contingent upon Myanmar state and society having awareness of the laws, a commitment to protect the environment, and knowledge about how to use the laws to conserve Myanmar's environment.

Towards such ends, the following chapters seek to present information about the current state of environmental law in Myanmar, using brief summaries written in non-technical language understandable to readers with less education. The goal is to support the growth of an informed population in Myanmar capable of understanding and engaging debates in Myanmar law or politics. In reaching out to lay readers, this handbook seeks to make Myanmar environmental law accessible to a broader portion of Myanmar's population.

In using this handbook, it should be noted that the framework of the handbook distinguishes between an education function and an advocacy function. On the topic of environmental law in Myanmar, the education function would seek to inform a broad range of readers about Myanmar's laws affecting the formation and operation of environmental laws. In contrast, the advocacy function (not to be confused with the profession of Advocates in Myanmar's legal system) would seek to argue in support of specific perspectives regarding potential problems in the text or implementation of Myanmar laws. Both functions are important for critical analysis, in that the education function is necessary to ensure that all people understand the current status of laws (e.g., what the law is), and the advocacy function is a component of debate advancing changes in the laws (e.g., what the law should be). In essence, education is seen as a precursor to advocacy, such that if advocacy is to reflect debates between informed parties

diligently evaluating diverse perspectives then it calls for the provision of education to as broad a range of society as possible to foster an informed and diverse populace. The focus of this handbook is more towards the education function, with the intent of promoting an informed and diverse population capable of understanding and participating in debates on environmental law in Myanmar.

This book adopts the position that education about law should be accessible to everyone. Education about law can be construed as the domain of legal professionals like lawyers and judges, with legal education having a critical role in ensuring that lawyers and judges have sufficient competency to apply laws as part of a larger legal system that maintains expectations for rule-of-law.<sup>1</sup> Education about law, however, goes beyond legal professionals, in that the rule-of-law means that laws apply equally to all members of state and society and legal actors like lawyers and judges use law on behalf of all members of state and society. To promote these efforts, it is beneficial for everyone, including legal and non-legal members of state and society, to have some understanding about law. The chapters in this handbook serve an education function aimed at reaching such a broad range of readers.

As a result, in using this handbook a number of points should be observed:

- The purpose is to summarize Myanmar laws in a way that reaches a diverse population with different levels of reading ability or understanding of politics and law. This advances the growth of civil society in Myanmar politics by supporting the development of an informed population regarding Myanmar environmental law.

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<sup>1</sup> Jonathan Liljeblad, Democracy, Rule-of-Law, and Legal Ethics Education in Context: Directing Lawyers to Support Democratization in Myanmar, *Georgia Journal of International and Comparative Law* 47: 451-477 (2019).

- The information presented in the chapters provides readers a common understanding of Myanmar environmental law, and thereby gives readers a base of knowledge that allows them to reflect and discuss potential ways to improve the language or implementation of Myanmar laws. In essence, while the chapters serve an education function about laws and reserve debates over laws for other policy-oriented forums, the chapters provide a necessary step that helps readers understand and engage in such debates.
- The orientation of the chapters furthers social justice, in that the chapters seek to present information in a way understandable to lesser educated readers unfamiliar with Myanmar laws. By using ordinary language and short summaries of law, the chapters serve segments of Myanmar's population that are otherwise marginalized by technical terms or specialized knowledge from the country's policy discussions. The chapters, in effect, support equity in terms of helping marginalized readers to become more informed about Myanmar laws, foster inclusion by allowing such readers to become informed members of a Myanmar civil society, and help access by giving readers sufficient information to understand and engage in Myanmar politics.
- The chapters deal with what the donor(s) considered to be the more critical aspects of environmental law in Myanmar, and so are not intended to be a comprehensive text either in breadth or depth. The chapters do not intent to replace textbooks or institutional instruction (e.g., universities, capacity-building programs, etc.). The presentation of topics in the chapters is meant to supplement such alternative efforts.
- The handbook is intended to be one of an ongoing series of books dealing with different rule-of-law topics in Myanmar. As a result, topics not covered by the chapters in this handbook may be addressed in the future by subsequent handbooks.

The present handbook supports a spirit of enquiry with critical analysis, and under the above observations welcome—and fully encourage—readers to use the contents of the following chapters as a basis for further reflection, discussion, and debate about the language and application of environmental laws within Myanmar’s larger political and legal development.

## **Contents**

The authors in this volume committed themselves to serve the purpose of education that serves Myanmar’s transition to democracy. The authors provided their respective chapters as a public service to Myanmar, contributing their expertise so that their knowledge could be shared openly and without cost to the government and people of Myanmar. Each chapter reflects a topic that the authors thought readers should understand regarding environmental law in Myanmar:

- **Chapter 1: Kyaw Min Sann –**  
Basic Information on Myanmar’s legal system
- **Chapter 2: William (BJ) Schulte –**  
Summary of International Environmental Law and Adoption by Myanmar
- **Chapter 3: Su Yin Htun –**  
Myanmar Laws Regarding Ecology
- **Chapter 4: Marla Bu –**  
Myanmar Laws on Trafficking of Flora and Fauna
- **Chapter 5: William (BJ) Schulte –**  
Myanmar Laws on Air and Water Pollution
- **Chapter 6: Matthew Baird –**  
Participatory Mechanisms in Environmental Law

Some exceptions in content were made in the above list of topics due to issues associated with space constraints, uncertain status, or fluid conditions. The exceptions include topics such as land law, which is a topic of scale and complexity that calls for more careful treatment with its own dedicated volume.

The authors were invited to participate in this volume because of their expertise on topics regarding environmental law in Myanmar. Specifically, each author is a scholar or practitioner in law possessing familiarity with Myanmar and Myanmar's legal system. Moreover, each author has prior experience on the topic of their chapter.

Authors were also invited for their ability to offer diversity in perspectives. While the contents of the chapters reference international norms, the book as a whole is intended to educate Myanmar readers regarding Myanmar law. As a result, this volume sought to host chapters reflecting a mixture of international and domestic experts who work or reside in Myanmar.

Myanmar's laws are undergoing a broad process of reform, with the government drafting and issuing new legislation to further the country's political and economic development. The authors collectively recognize the dynamic conditions in Myanmar law. Care should be taken in applying the chapters in this volume, since the contents of each chapter reflect the status of Myanmar law recognized by the respective author at the time of writing (approximately May 2019). Effort has been made to keep the information as current as possible, but the editors reserve the right to revise the contents of this volume with updated laws as they may arise in the future.

Myanmar's current political transition is accompanied by numerous challenges that foster a tense environment for public debates. Such difficulties impede the public deliberation necessary for a functional democracy. In serving an education function to inform readers about environmental law in Myanmar, the authors are working to support the growth of public deliberation that provides constructive debate leading to effective solutions that address the challenges facing Myanmar's democracy.

## **International and Domestic Law**

In addition to the preceding discussion, it is also necessary to provide a comment regarding the association of international and domestic laws. Much of Myanmar's transition following the 2008 Constitution has been conducted with reference to international standards, with capacity-building efforts by various non-government organizations (NGOs) regarding rule-of-law involving reforms that bring Myanmar into greater alignment with international principles. Similarly, the chapters in this handbook also connect to international standards, both in terms of norms that set standards for appropriate (or inappropriate) conduct or rules enforcing standards of conduct. The existence, however, of an international legal system containing norms and rules does not automatically mean direct application into domestic law, and so it is important to use some caution in connecting international law with domestic law.

The application of international law into a domestic legal system depends on each individual state (e.g., Myanmar). Under international law the concept of a state involves an attendant concept of legal personality, which means that a state holds rights and duties that can be enforced in the international legal system. Generally speaking, the legal personality of a state involves rights and duties as a sovereign, which means that the state has sovereignty in terms of holding exclusive control over the population, territory, and resources inside the state's borders. The consequence of sovereignty is that a state decides its own domestic legal system and hence decides the status of international laws within its domestic legal system.



Despite the unique status of each state, there are categories that indicate trends in how countries deal with international law. Broadly speaking, there are the Monist and Dualist perspectives on international law. Monist perspectives, which are prevalent in countries that follow a Civil Law tradition (e.g. France, Germany, Spain), see international law and domestic law as parts of a universal system of law, such that international law can be readily implemented as domestic law. Dualist perspectives, which are prevalent in countries that follow a Common Law tradition (e.g., Australia, Canada, United Kingdom), assert that there is a difference between international and domestic law, where international law exists through the consent of states such that state action is necessary to implement international law as domestic law. With respect to Common Law countries, there is also a difference between Doctrine of Incorporation and Doctrine of Transformation. Doctrine of Incorporation essentially means that international law can automatically become domestic law so long as there is no inconsistency between them. In contrast, Doctrine of Transformation does not view international law as automatically becoming domestic law, and instead requires that international law must be made into domestic law by a domestic statute or judicial decision.

For Myanmar, the approach to international law held by the Union Attorney General's Office and Office of the Supreme Court of the Union is presented in *Evgoni T. Kovtunenko v U Law Yone (1960)*, which observes that Burmese courts can only enforce international law that has been enacted by domestic legislative statutes.<sup>2</sup> As a result, to the extent that Myanmar follows the court cases of Burma, it appears that Myanmar effectively follows a Dualist approach consistent with a Common Law tradition, exercising the Doctrine of Transformation in terms of requiring parliamentary legislation to implement international law.

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<sup>2</sup> Evgoni T. Kovtunenko v U Law Yone (1960), Burma Law Reports 1960: 58-59.

It should be noted that enactment via domestic law is not necessarily the same thing as ratification or accession. The process of making international agreements (e.g., treaties) involves negotiation between states, and at the conclusion of negotiations member states place signatures on the agreement to indicate their intent to comply with the agreement's terms. After signature, a state follows domestic procedures for ratification, which means that a state approves adoption of the agreement and expresses consent to be bound by the agreement. States that were not present at the negotiation and signing of an international agreement can choose accession, which means that a state declares that they will accept and comply with an international agreement. Neither ratification or accession, however, necessarily declares how an international agreement will be applied in a domestic legal system. Enactment, in contrast, addresses how an international agreement is enforced in a domestic legal system, and can occur separate from ratification or accession. Enactment involves the passage of domestic laws that implement an international agreement, so that it is possible for state offices to enforce it upon the population, territory, and resources within a state's borders.



# Myanmar's Legal System

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**Kyaw Min San, LL.M (HKU)**  
**Supreme Court Advocate and Legal Consultant**

## Introduction

Myanmar's earliest legal system was introduced by the dynasties of the Bagan period. There was a system of absolute monarchy in the three branches of power: executive, legislative and judiciary. The King had power to make laws and make decisions in jurisdiction and administration.

The King decided criminal and civil matters based on Dhammathat, Yazathat and Phyat-htone. "Dhammathat" is the compilation of Myanmar customary practice, later called Myanmar customary law. It is the source of Myanmar's legal system and includes Myanmar social norms and culture. U Kaung, senior minister to Kings Mindon and Thibaw, wrote 36 series of "Dhammathat" in 1893 under British colonial rule (1255 in the Myanmar Calendar). This is well-known and is used in Myanmar's Courts today. "Yazathat" refers to the King's Royal Decisions and Ordinances and is composed of the King's commands and criminal laws. "Phyat-htone" (precedents) refers to the judicial decisions made by the King's Hluttaw and various Benches and Courts in the country.

British rule introduced a colonial legal system in the country with a formal judicial system. On 4 April 1897 the British made Myanmar a substate of India. The 1861 India Council Act gave all Indian laws power in Myanmar. In 1852 the British founded the Chief Court of Lower Burma and various levels of courts in Burma. In 1886, the British established the Court of Judicial Commissioner for Upper Burma in Mandalay. In 1922, the High Court of Judicature of Yangon, then known as Rangoon, was established after the abolishment of the Lower and Upper Burma Courts. Sub-Divisional Courts, District Civil and Session Courts, and Township Courts were also established with specific jurisdictions. In addition, the British introduced several criminal laws as well as civil laws including the Indian Penal Code (1860), the Criminal Procedure Code (1862), the Indian Evidence Act (1872) and the Civil Procedure Code (1859). In 1935 the British introduced the Government of Burma Act 1935, which separated Burma from India and defined the exclusive jurisdiction and power of the High Court of Rangoon.

During and after the British period, compilations of Court cases and digests were made, with examples including U Po Thar's Digest of Burma Rulings Civil and Criminal (1937-1955), U Thein Han's Digest of Burma Rulings Civil and Criminal (1956-1976), U Ba Thaug Tin's Digest of 50 years in Criminal Law (1923-1973) and U Than Aung's Digest of Myanmar Rulings, Criminal and Civil (1971-2010).

Even after Burma's independence on 4 January 1948, Burma (later Myanmar) continued to apply and still continues to apply the Common Law legal system. The Supreme Court, High Court and other subordinate Courts were established at different levels under the Union Judiciary Act of 1948. The Supreme Court was the highest court as well as the final appeals court throughout the Union and its decisions were binding over all other courts. The Burma Code comprises 13 volumes and is the collection of all the laws since the British period until 1954. The Burma Law Reports are the collection of judgements of the Union Supreme Court. After 1954, the Burma Law Reports were called the Myanmar Law Reports and were used as valid precedents for deciding cases in Myanmar.

In 1962, the Revolutionary Council abolished the formal judicial system and formed the Chief Court to be in line with socialism. In 1974, it further introduced a new Constitution under which the Central Court, the State and Divisional Courts, the Township Courts, the Wards and Village Tracts courts were established.

In 1988, the State Law and Order Restoration Council transformed this socialist judicial system. The Supreme Court and High Court were re-established in the same year. In 2000 they were again repealed by the State Peace and Development Council. In 2010 the Union Judiciary Law was enacted to adopt Myanmar's current judicial system under the 2008 Constitution.

## **Myanmar Constitutions**

Before independence from the British, Myanmar (then called Burma), was governed by the Government of India Act (1915), the Government of India Act (1919, with a diarchical form of government), and the Government of Burma Act (1935). During the period of Japanese occupation there was the 1943 Constitution of Burma.

After independence from British rule on 4 January 1948, Burma/Myanmar had three constitutions: the Constitution of the Union of Burma, 1947 (1947 Constitution); the Constitution of the Socialist Republic of the Union of Burma, 1974 (1974 Constitution); and the Constitution of the Republic of the Union of Myanmar, 2008 (2008 Constitution). Under the 1947 Constitution Burma was a wealthy democratic country in South East Asia. This period only lasted for 10 years from 1948 to 1958, under the U Nu Government. From 1958-1960 there was civil war, and in 1962 a military coup led by General Ne Win abolished Burma's multiparty democratic system. Military rule without parliament prevailed from 1962-1974.

Under the 1974 Constitution the country was ruled in a one party socialist system, its market economy was abolished and all industries were nationalized. The country's economy became poor. In 1988, there were widespread protests and demonstrations and the socialist regime was brought down. The military ruled the country from 1988 to 2010. Various large demonstrations such as the 1996 student demonstration and the 2007 Saffron Buddhist Monks Movement led to the finalization of the 2008 Constitution (which had been in process since 1993). Under the 2008 Constitution, the Union Solidarity and Development Party (USDP) won the 2010 national election. The National League for Democracy (NLD) led by Daw Aung San Su Kyi boycotted the election. U Thein Sein's Government ruled the country for five years. In the 2012 by-election, the NLD won 43 out of 44 seats and entered Parliament (Hluttaw). In the 2015 election the NLD won a landslide victory and has governed the country until now.

### **The Constitution of the Union of Burma, 1947**

The 1947 Constitution was adopted on 24 September 1947 at the National Constituent Assembly of the Union of Burma, and ended in 1962 by military coup. It only existed for 14 years. The Head of State was the President and the Head of Government was the Prime Minister who was the key person driving the nation. The form of government was a democracy with a bicameral parliamentary system. There were two Hluttaws: the Chamber of Deputies and the Chamber of Nationalities.

The 1947 Constitution had 14 chapters and 234 sections. Chapters 1 and 2 explained the form of state, fundamental rights of the people such as the rights to equality, freedom and religion, economic, cultural and educational rights, criminal matters and constitutional remedies. Chapter 3 covered relations of the state to peasants and workers and Chapter 4 outlined directive principles of state policy. Chapters 5, 6, 7 and 8 covered the roles of the President, Parliament, the Union Government and Judiciary. Chapter 9 dealt with Shan State, Kachin state, Karen State, Karenni state, the Special division of Chins and new states. Chapter

10 described the right of secession and Chapter 11 provided for amendment of the constitution. Chapters 12 and 13 were about international relations, general provision and interpretation. Chapter 14 was a transitory provision. The 1947 Constitution, although democratic, cannot be described as federal because there was no state or regional parliament and government.

### **Constitution of the Socialist Republic of the Union of Burma, 1974**

Drafted by the Burma Socialist Programme party, the Constitution of the Socialist Republic of the Union of Burma was adopted and enacted on 3 January 1974. With this constitution, Myanmar became a socialist state under a one party system. This constitution ended on 18 September 1988, lasting only 14 years. The form of government was presidential where the Head of State was the President (Chairperson of the State Council). There was only one Hluttaw (a unicameral system) for legislation. Under the 1974 Constitution, U Ne Win was the supreme authority of the nation and the Socialist Party was the only political party in the country.

The 16 chapters of the 1974 Constitution described the state, its basic principles and structures, the Pyithu Hluttaw (the People's Parliament), Council of State, Council of Ministers, Council of People's Justice, Council of People's Attorneys, Council of People's Inspectors, the People's Council, the fundamental rights and duties of citizens, the electoral system, recall, resignation and replacement, the state flag, state seal, national anthem and state capital, amendments to the constitution and general provisions. There were 209 articles in the constitution. Different administrative areas were formed with wards or village-tracts, townships, states or divisions and the state (the Union). There were 14 states and regions under the 1974 Constitution. It was not democratic or federal because there was only one Union parliament and no regional or state Hluttaws or governments.



## **Constitution of the Republic of the Union of Myanmar, 2008**

The 2008 Constitution took 14 years to be written, from the 1993 National Convention until its completion on 3 September 2007. It was adopted on 29 May 2008 by means of a national referendum. This is Myanmar's current constitution. There are fifteen chapters, with 457 sections and 5 schedules. It sets out basic principles of the Union, state structures, the role of the Head of State, the legislature, executive, judiciary and defense services, the fundamental rights and duties of citizens, elections, political parties, provisions for a state of emergency, amendments to the constitution, the state flag, state seal, national anthem and the capital (Nay Pyi Taw), transitory provisions and general provisions. It lays down a presidential system and a bicameral system with the Union level House of Nationalities and House of People with 14 regional and state Hluttaws (parliaments), respectively. The Constitution is based on multi-party democracy but the military gets 25% of the seats in Union and regional or state parliaments. The military controls three main ministries: Defense, Home Affairs and Border Affairs. This Constitution can be described as a quasi-federal democracy because it has union and state or regional Hluttaws (parliaments) and Union and state or regional administrations. However, the President of the Union controls the appointment of Chief Ministers of the regions and states, and this Constitution does not recognize the autonomy of any states or regions.

## **Myanmar's Judicial System**

### **1948 - 1962**

After Independence Myanmar's courts followed the 1947 Constitution and the 1948 Union Judiciary Act. The Supreme Court and High Court were established and conferred jurisdiction to these courts. The Supreme Court was the court of appeal and the decision of the Supreme Court was in all cases final. The Supreme Court had the power to interpret questions as to the validity of any law regarding the provisions of the Constitution. The head of the Supreme Court was Chief Justice of the Union, and there were no more than five judges on the Supreme Court.

The High Court was a court of first instance and had power to determine all matters and questions whether of law or of fact. A Chief Justice headed the High Court and there were no more than 11 judges of the High Court. The High Court had exclusive original jurisdiction relating to any treaty made by the Union, all disputes between the Union and a unit or between one unit and another.

There were four classes of criminal courts in Myanmar: the Court of Session, Magistrate of the First Class (District Court), Magistrate of the Second Class, and Magistrate of the Third Class according to the Code of Criminal Procedure. This system is still in use now. There were also juvenile courts, special criminal courts and special criminal appeal courts. In the 1950 Courts Act, the Rangoon City civil court was established together with other civil courts such as the district civil courts, sub-divisional civil courts and township civil courts. From 1948 to 1962 these courts were independent and impartial, and people could apply for writs with respect to fundamental rights at the Supreme Court.

#### 1962 - 1974

In 1962 the Revolutionary Council took power in a military coup and introduced an authoritarian system. The Chair of the Revolutionary Council solely controlled and practised legislative, executive and judiciary power. The Supreme Court and the High Court were abolished and a Chief Court was established. Subordinate courts were still the same and special criminal courts were also established. In 1972, a people's judiciary system was initiated and three representatives of farmers and labourers became the judges. Under the Chief Courts, there were state and division people's courts, township people courts and village and ward people's courts.

## 1974 - 1988

The 1974 Constitution stipulated a People's Justice Body (a central court), state and division Justice Bodies (people's courts of state and division levels), township Justice Bodies (people's township courts), and village and ward Justice Bodies (people's courts of villages and wards). A People's Justice Body also sat at the Central Court and was accountable to legislative and administrative authority. Judges for the People's Justice Body were nominated by the People's Parliament (Pyithu Hluttaw) and judges for the different levels of justice bodies were also nominated by relevant various levels of council such as state/regional council, township council, ward and village council. The Central Court was the highest court of the country and there were subordinate courts such as people's courts of state and division, people's courts of township and people's courts of villages and wards. In addition there were also People's Legal Councils for the purpose of legal advice to the state. However, the courts were not independent and impartial at this time.

## 1988 - 2018

The 1988 Judiciary Law established the Supreme Court with a maximum of five members including the Chief Justice and other Judges. The law also established state/regional courts and township courts. Subsequently, the 2008 Constitution and the 2010 Union Judiciary Act established a Supreme Court and under it High Courts for each state and region, Courts of Self-Administered Divisions, Courts of Self-Administered Zones, District Courts, Township Courts and the other courts constituted by law. Courts of Self-Administered Zones have the same ranking as District Courts. In case of appeal, they appeal to the High Court of the respective state or region. If there is a conflict of law, statutory law overrules customary law and Common Law precedents.

In addition, there are courts-martial and the Constitutional Tribunal of the Union. Courts-martial adjudicate cases relating to defence service personnel. The Constitutional Tribunal has nine members including a Chairperson. The functions and duties of the Constitutional Tribunal of the Union are as follows:

- a) interpreting the provisions of the Constitution;
- b) ensuring that laws promulgated by the Pyidaungsu Hluttaw, Regional Hluttaw, State Hluttaw or a Self-Administered Division Leading Body or a Self-Administered Zone Leading Body are in conformity with the Constitution;
- c) checking whether measures of the executive authorities of the Union, the Regions, the States, and the Self-Administered Areas are in conformity with the Constitution;
- d) deciding Constitutional disputes between the Union and a Region, between the Union and a State, between a Region and a State, among Regions, among States, between a Region or a State and a Self-Administered Area and among the Self-Administered Areas;
- e) deciding disputes arising out of the rights and duties of the Union and a Region, a State or a Self-Administered Area in implementing the Union Law by a Region, State or Self-Administered Area;
- f) checking and deciding matters intimated by the President relating to the Union's Territory;
- g) other functions and duties conferred by laws enacted by the Pyidaungsu Hluttaw.

The Supreme Court has the original jurisdiction in matters arising out of bilateral treaties concluded by the Union and in other disputes except for constitutional problems. It has jurisdiction between the Union Government and a regional or state Government, among the regions, among the states, between regions and states and between the Union Territory and a region or state; and in other matters as prescribed by any laws. The judgements of the Supreme Court are final and conclusive. The Supreme Court also has the power to issue writs concerning fundamental rights of the people for the following: habeas corpus, mandamus, prohibition, quo warranto and certiorari. Supreme Court judges may number between seven to eleven, including the Chief Justice,

State and regional High Court judges may number from three to seven. They hear and determine civil cases in which the amount in dispute or value of the subject matter exceeds 500,000,000 kyats. High Courts of regions or states are not normally concerned with any criminal offences as courts of first instance except where special circumstances require them to do so. The High Court of a region or state has appellate jurisdiction on the judgment, decree and order passed by a Court of a Self-Administered Division, Court of a Self-Administered Zone or a District Court, and revisional jurisdiction on a judgment or order in accord with law. They also adjudicate on the transfer of cases from one court to another within a Region or State. High Courts of the regions or states adjudicate on appeal against acquittal of any subordinate court. When an accused person is convicted of an offence and sentenced by the High Courts of a region or state, he can appeal against his conviction, sentence, or both to the Supreme Court of the Union.

The hierarchy of Courts in Myanmar is as follows:

- Union Supreme Court
- States/Regional High Court
- District Court (if there are no self-administered areas in the region or state or in the Union Territory) or Court of Self-Administered Division (if there is a self-administered division) or Court of Self-Administered Zone (if there is a self-administered zone)
- Township courts

District Courts, Courts of a Self-Administered Division, and Courts of a Self-Administered Zone have jurisdiction relating to original criminal cases, original civil cases, appeal cases or matters prescribed by any law. Township Courts have jurisdiction relating to original criminal cases, original civil cases or matters prescribed by any law.

In addition, there are also Juvenile Courts and other courts founded according to the laws to try municipal and traffic cases.

## Myanmar's Legal Practitioners

There are two classes of lawyers in Myanmar: Supreme Court Advocate and Higher Grade Pleader. A Supreme Court Advocate can practise in every level of court including the Supreme Court but a Higher Grade Pleader can practise only in township and district courts. Legal practitioners are governed by the Bar Council Act (1926) and the Legal Practitioner Act (1879).

The minimum requirement to practice in the Courts of Myanmar is a Bachelor of Laws degree (LL.B) plus one year's practice as a Chamber Student with a Chamber Master who is an advocate of at least five years of experience. After completing this a person can apply to be a Higher Grade Pleader. After three years practice as a Higher Grade Pleader, he or she can apply to be a Supreme Court Advocate. The Bar Council of the Union then has the right to investigate cases of lawyer misconduct and report the case to the Union Supreme Court for disciplinary action such as disbarment if they have doubts about a candidate's suitability. Lawyers must follow a code of conduct published as a book entitled the *Ethical Principles of Lawyers and Practitioners*, published in 1990 and 1997.

There is a bar association in every capital city of Myanmar's states and regions. The Independent Lawyers' Association of Myanmar was founded in 2013 with support from the International Bar Association. In addition, there are many lawyers' networks such as Myanmar Legal Aid Network and Myanmar Lawyers' Network. The Legal Aid Law was passed in 2016 and legal aid management bodies were set up in 2018 at all levels from the Union to township. Legal aid allows poor people, women and other vulnerable people to access justice and legal assistance if they are not able to afford lawyers themselves.

Judges and public prosecutors are recruited by the Union Supreme Court and Union Attorney General's Office, respectively, by government entrance examinations after graduating with a Bachelor of Laws (LL.B). Currently the Union Supreme Court has developed a Court Management System under the Judicial Strategic Plan. The Supreme Court website is open to the public and it is easy to see reported cases and case lists. The Code of Judicial Ethics was developed and published on 2 August 2017, enabling judges to be independent and impartial.

## **Myanmar Laws**

### **Customary Law**

Customary law is practised in Myanmar in relation to inheritance, marriage, divorce and administration of property. Myanmar customary law applies to Buddhists. For Christians, Muslims and Hindus related customary laws are applied based on their religion. Decisions are based on justice, equality and good conscience.

In Myanmar U Mya Sein's book *Customary Law* is well known. According to Myanmar customary law, polygamy was allowed but the new marriage law introduced in 2015 abolished polygamy and only allows monogamy. This overrules all previous customary law; polygamy is currently criminalized in Myanmar.

## Criminal Law and Civil Law

Myanmar's criminal law was introduced by the British as the Penal Code of India Act (1861) and the Code of Criminal Procedure (1898). The Penal Code involves 511 sections and the Code of Criminal Procedure has 565 sections and five schedules. The Penal Code covers punishments, general exceptions, the right to private defence, abetment, criminal conspiracy, offence against the state, offences relating to the constitution and the art of parliaments, libel against foreign powers, offences to the Army, Navy and Air Force, offences against the public peace, offences by or relating to public servants, offences in relation to elections, contempt of the lawful authority of public servants, false evidence and offences against public justice, coins and government stamps, weights and measures, offences affecting public health, safety, convenience, decency and morals, offences affecting the human body, offences against property, offences relating to documents, to trade or property marks, offences relating to marriage, defamation, criminal intimidation, insult and annoyance, attempts to commit offences. In addition, there are different laws enacted by parliament such as child law, traffic law, anticorruption law, etc.

The Code of Civil Procedure (1909) is also applied in Myanmar for civil cases.

Myanmar's Courts Manual relates to the administration of courts for both civil and criminal matters. The Evidence Act (India Act 1872) is very important for both criminal and civil matters for deciding a case. It covers relevancy of facts, proof including oral and documentary evidence, production and effect of evidence, witness, the examination of witnesses, improper admission and rejection of evidence.

There are also laws enacted by Parliaments relating to different government ministries, called special and general laws. Examples include a Gambling Law (2018), Forestry Law (2018), Anti-Money Laundering Law (2019), Telecommunications Law (2013), etc.



## Conclusion

Myanmar is currently in transition to federal democracy and can abolish some of the laws which infringed on human rights such as the laws on household registration, the law safeguarding the state from the people who want to destroy it, the amendment of quarter and ward administration act, etc. The Myanmar Company Law (2017) opens up space for local and international investors to do business in Myanmar; it is very easy to establish a company in Myanmar. In February 2019 the Union Parliament set up a Constitutional Reform Joint Committee for further reforms to the 2008 constitution with different parties and military representatives working together.

The Union Supreme Court has published its Judicial Strategic Plan for 2018-2022, following its three-year Strategic Plan (2015-2017). The Union Supreme Court plans to facilitate public access to law and court services, to promote public awareness, to enhance judicial independence of administrative capacity, to promote and ensure the professionalism, accountability and integrity of the judiciary and to promote case management and court specialization.

The Legal Aid Law was passed in 2016, a collaborative effort of Myanmar Legal Aid Networks, the Union Attorney General office, the Union Supreme Court, the Bill Committee of Pyithu Hluttaw, the UNDP and the UNODC. The Union Attorney General's Office has actively promoted the rule of law in Myanmar and fair trials. This handbook is part of that effort.

Anticorruption laws were also passed in 2014 and amended in 2016, 2017 and 2018. To promote the rule of law, the NLD government has actively pursued law enforcement on anticorruption since 2015.

To conclude, Myanmar is in a legal reform process working towards a democratic federal system, highlighting the rule of law and Human Rights.

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# Summary of International Environmental Law and Adoption by Myanmar's Legal System

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## **Introduction**

International environmental law is a body of law concerned with protecting the environment and promoting sustainable development. The main sources of international environmental law consist of: customary international law; international, regional, and bilateral treaties; and the decisions of international courts. For the purposes of this Handbook, this Chapter will focus on international, regional, and bilateral treaties, which are often referred to as multilateral environmental agreements (MEA).

MEAs are agreements or treaties negotiated or agreed to by nations such as Myanmar, and they often involve commitments by these nations (which are referred to as “Parties”) to take certain actions to implement the goals and objectives of the relevant MEA. This typically means that Parties to MEAs commit to developing policies, laws, or regulations in order to make their own domestic legal systems consistent with the requirements of the MEA, as well as active participation in the governance of the MEA through attendance of periodic meetings of the MEA’s Conference of Parties (COP) and through reporting to the COP on their progress with regard to implementing the MEA.

Nations such as Myanmar typically are not automatically bound by MEAs when they sign one. They must undergo a separate process in order to “ratify” the MEA, and thereby become a party to it. In Myanmar, the authority to ratify an MEA and agree to be bound by its terms lies with the Pyidaungsu Hluttaw. Under the terms of Myanmar’s Constitution, the President should submit international, regional, and bilateral treaties to the Pyidaungsu Hluttaw for approval.<sup>3</sup> If the Pyidaungsu Hluttaw approves the treaty, then the President shall ratify it.<sup>4</sup> The Constitution also authorizes the Pyidaungsu Hluttaw to permit the President to ratify international, regional, or bilateral treaties without first obtaining the Hluttaw’s approval.<sup>5</sup>

Myanmar has ratified a wide variety of international environmental treaties and agreements, too many to cover thoroughly in this Handbook. This Chapter will provide a brief introduction to three of the main international environmental agreements that Myanmar has ratified, and a summary of how those agreements are being incorporated into Myanmar’s legal system and other actions Myanmar is taking to implement these agreements. These three agreements are: the Convention on International Trade in Endangered Species of Wild Fauna and Flora; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; and the United Nations Framework Convention on Climate Change.

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<sup>3</sup> Constitution, Article 108(a).

<sup>4</sup> Constitution, Article 209(a).

<sup>5</sup> Constitution, Article 108(b); see also Constitution, Article 209(b).

A comprehensive list of the international agreements that Myanmar has ratified can be found at [Needs Assessment for Effective Implementation of the Environmental Conservation Law in Myanmar, Appendix 5 (2016)].

### **Convention on International Trade in Endangered Species of Wild Fauna and Flora**

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>6</sup> was concluded on March 3, 1975 and entered into force on July 1, 1975. Myanmar acceded to CITES on June 13, 1997 and CITES entered into force in Myanmar on September 11, 1997.

CITES is designed to regulate the international trade in selected endangered species in order to ensure that such trade does not threaten their continued survival. CITES seeks to accomplish this goal by subjecting the trade in species that are listed in the Appendices to the Convention to requirements relating to the export, import, and re-export of these species. Appendix I includes species that are “threatened with extinction,” and trade in Appendix I species shall only be authorized in “exceptional circumstances”.<sup>7</sup> Appendix II includes species which “although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation,” and other species “which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control”.<sup>8</sup> And finally, Appendix III includes all species “which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other Parties in the control of trade”.<sup>9</sup> This lists of species contained in the Appendices may be amended periodically in accordance with the procedures contained in Articles XV and XVI.

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<sup>6</sup> The text of the Conventional on International Trade in Endangered Species (CITES) can be found at: <https://www.cites.org/eng/disc/text.php#II>.

<sup>7</sup> CITES, Article II(1).

<sup>8</sup> CITES, Article II(2).

<sup>9</sup> CITES, Article II(3).

CITES prohibits international trade in these species except when a permit has been granted or presented in accordance with specific requirements contained in Articles III-V of the Convention. However, Article VII of the Convention provides for certain exemptions to these requirements. Finally, CITES requires Parties to take measures to enforce the terms of the Convention, including penalizing the trade or possessions of specimens of the species in Appendices I-III, and confiscating or returning such specimens to the State of export.<sup>10</sup>

In order to facilitate the implementation of the provisions of CITES, the Convention also requires Parties to set up certain institutional bodies. Specifically, Parties must designate a “Management Authority” that is “competent to grant permits or certificates”.<sup>11</sup> Parties must also establish a “Scientific Authority,” whose purpose is to provide technical advice on the impacts of international trade in species covered under the Convention.<sup>12</sup> Parties must also prepare periodic reports on the actions they have taken to implement the Convention and submit these reports to the Convention Secretariat.<sup>13</sup>

Myanmar submitted its most recent report to the CITES Secretariat in 2017.<sup>14</sup> Among other things, Myanmar reported that it was developing legislation relevant to CITES implementation – namely, the Conservation of Biodiversity and Protected Areas Law (CBPAL). The CBPAL was ultimately adopted by the Pyidaungsu Hluttaw on May 12, 2018.<sup>15</sup>

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<sup>10</sup> CITES, Article VIII(1).

<sup>11</sup> CITES, Article IX(1)(a).

<sup>12</sup> See, e.g., CITES, Article III(2)(a).

<sup>13</sup> CITES, Article VIII(7).

<sup>14</sup> Link to the CITES report:

<https://www.cites.org/sites/default/files/reports/17Myanmar.pdf>.

<sup>15</sup> Conservation of Biodiversity and Protected Areas Law, Pyidaungsu Hluttaw Law No. 12/2018, 7<sup>th</sup> Waxing day of Nayone, 1380 M.E. (May 21, 2018).

The CBPAL designates the Director General of the Forest Department within the Ministry of Natural Resources and Environmental Conservation as the Management Authority for CITES.<sup>16</sup> The CBPAL also directs the Minister of MONREC to designate a “suitable person or persons” as the Scientific Authority for CITES.<sup>17</sup> The CITES website does list Myanmar’s Scientific Authority for flora/ fauna and fish and aquatic species, respectively, but this appears to have been last updated in 2014 and is probably not up to date.<sup>18</sup> Notably, Myanmar’s 2017 country report to the CITES Secretariat notes that neither the Management Authority nor the Scientific Authority had sufficient funding, staff, or skills to function properly.<sup>19</sup>

As the Management Authority for the Convention, the Director General is given responsibility under the CBPAL to stipulate the conditions under which various entities (including local and foreign Government departments, Government organizations, non-government organizations and individual persons) could be permitted to capture, transport, possess, breed, cultivate, import or export protected animal and plant species (including alien species).<sup>20</sup> Articles 39 to 45 of the CBPAL lay out a series of specific offences related to violating the law and the associated penalties for these violations.<sup>21</sup>

As of 2018, the Ministry of Natural Resources and Environmental Conservation was developing a set of Rules designed to add further clarity for the implementation of the CBPAL’s requirements. However, it is unclear if these Rules have been

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<sup>16</sup> Conservation of Biodiversity and Protected Areas Law, Article 20(a); see also Article 2(q) (defining “Director General” as the Director General of the Forest Department).

<sup>17</sup> Conservation of Biodiversity and Protected Areas Law, Article 20(b); see also Article 2(p) (defining “Minister” as the Union Minister of the Ministry of Natural Resources and Environmental Conservation).

<sup>18</sup> See, Myanmar Country Page: Convention on the International Trade in Endangered Species (<https://www.cites.org/eng/cms/index.php/component/cp/country/MM>).

<sup>19</sup> Myanmar CITES Implementation Report for 2017, Indicator 2.2.1(d) (available at <https://www.cites.org/sites/default/files/reports/17Myanmar.pdf>).

<sup>20</sup> See, e.g., Conservation of Biodiversity and Protected Areas Law, Articles 21-23.

<sup>21</sup> See Conservation of Biodiversity and Protected Areas Law, Articles 39-45.



finalized and adopted yet.

## **Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal**

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)<sup>22</sup> was concluded in 1989 and entered into force on May 5th, 1992. Myanmar approved the Basel Convention on June 1, 2015 and it entered into force in Myanmar on June 5, 2015.

The overall goal of the Basel Convention is to protect the environment and public health against the negative impacts arising from hazardous wastes and other types of wastes. The Basel convention seeks to achieve this goal through three main priorities: first, to reduce the overall amount of hazardous waste that is generated and promote environmentally sound management of hazardous wastes; second, to prohibit the transboundary movement of hazardous wastes except where it is in compliance with environmentally sound management; and third, to establish a system of regulations to control the transboundary movement of hazardous waste.<sup>23</sup> “Hazardous wastes” and “other wastes” that are subject to regulation under the Convention are identified in Article I and in the Annexes to the Convention.

In order to support the implementation of the Convention domestically, the Convention requires Parties such as Myanmar to “designate one or more competent authorities and one focal point.”<sup>24</sup> A “competent authority” is a governmental entity that is made responsible for receiving and responding to notifications of the transboundary movements of hazardous or other wastes in accordance with Article 6 of the Convention.<sup>25</sup> Myanmar has appointed the Environmental Conservation Department within the Ministry of Natural Resources

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<sup>22</sup> The text of the Basel Convention can be found at:

<http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>.

<sup>23</sup> “Overview,” at <http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx>.

<sup>24</sup> Basel Convention, Article 5(1).

<sup>25</sup> Basel Convention, Article 2(6).

<sup>26</sup> Myanmar Country Profile: Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (<http://www.basel.int/Countries/CountryProfiles/tabid/4498/Default.aspx>).

and Environmental Conservation as the competent authority.<sup>26</sup> The “focal point” is the governmental entity that is made responsible for making notifications to other Parties and to the Secretariat of the Convention under Articles 13 and 16.<sup>27</sup> Myanmar has appointed the Pollution Control Department within the Ministry of Natural Resources and Environmental Conservation as the focal point.<sup>28</sup>

Similar to CITES, the Basel Convention also requires Parties to submit annual reports to the Convention Secretariat, which includes information on the transboundary movement of hazardous and other wastes within that Party’s jurisdiction, the measures the Party has adopted to implement the requirements of the Convention, and measures implemented for the development of technologies to reduce the production of hazardous and other wastes, among others.<sup>29</sup> As of February 28, 2019, Myanmar had not yet submitted a report to the Basel Convention Secretariat.

However, Myanmar is taking actions to implement the requirements of the Basel Convention. For example, Myanmar is actively developing a Master Plan for Hazardous Waste Management. The Master Plan is being developed by the Ministry of Natural Resources and Environmental Conservation as part of a Myanmar-Norway Bilateral Environmental Programme. A Final Consultation Meeting on the Master Plan for Hazardous Waste Management took place in Naypyidaw on February 13, 2019.<sup>30</sup>

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<sup>27</sup> Basel Convention, Article 2(7).

<http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>.

<sup>28</sup> Myanmar Country Profile: Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (<http://www.basel.int/Countries/CountryProfiles/tabid/4498/Default.aspx>).

<sup>29</sup> Basel Convention, Article 13.

<sup>30</sup> “Waste Management: Final Consultation on Hazardous Waste Management Master Plan,” MITV.com (February 13, 2019) (<https://www.myanmaritv.com/news/waste-management-final-consultation-hazardous-waste-management-master-plan>).

## UNFCCC, Kyoto Protocol, and Paris Agreement

Climate change is widely recognized as one of the greatest global threats that the planet faces today. In an effort to address this threat, the international community negotiated and adopted the United Nations Framework Convention on Climate Change (UNFCCC)<sup>31</sup> on May 9, 1992 and it entered into force on March 21, 1994. Myanmar ratified the UNFCCC on November 25, 1994, and it entered into force in Myanmar on February 23, 1995.

The ultimate goal of the UNFCCC is to stabilize “greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.<sup>32</sup> Article 3 of the UNFCCC establishes a set of foundational principles that should guide Parties in achieving this goal. Notably for Myanmar, Article 3(1) states that the Parties “*should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities*”. Article 3(2) then states that “the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration”. Accordingly, the UNFCCC divides countries into two separate groups – Annex I includes developed countries, and Annex II includes developing countries.

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<sup>31</sup> The text of the United Nations Framework Convention on Climate Change (UNFCCC) can be found at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

<sup>32</sup> United Nations Framework Convention on Climate Change, Article 2.

While the UNFCCC does set out a number of commitments to be undertaken by Parties, the UNFCCC contains no enforcement mechanisms. Rather, the Convention sets up a process by which Parties can negotiate and agree on “protocols” designed to implement the Convention’s commitments. The first of these, the Kyoto Protocol, was adopted in December 1997 and entered into force in February 2005.<sup>33</sup> In accordance with the principle of “common but differentiated responsibilities” established in the UNFCCC, the Kyoto Protocol commits Annex I Parties, or developed countries, to specific emissions reductions targets for six greenhouse gases that are contained in Annex A to the Protocol. The Protocol also established several “flexibility mechanisms” to allow the Annex I Parties to pursue different types of measures to reduce greenhouse gas emissions. One of these was the Clean Development Mechanism, which essentially allows developed countries to work toward their emissions reductions targets by contributing to sustainable development projects in non-Annex I countries.

Although the Kyoto Protocol represented a significant step toward addressing the worldwide impacts of climate change, it was beset by problems. The United States never ratified the Kyoto Protocol, and China was not subject to any emissions reductions commitments. These two countries represent the largest sources of greenhouse gas emissions in the world. As such, the effectiveness of the Kyoto Protocol with regard to reducing greenhouse gas emissions and addressing climate change is questionable. In an attempt to address these issues, the Parties to the UNFCCC negotiated and signed a new agreement at the 21<sup>st</sup> Conference of the Parties in Paris, France in 2015. This agreement is commonly referred to as the “Paris Agreement”.

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<sup>33</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), available at <https://unfccc.int/sites/default/files/kpeng.pdf>.

The Paris Agreement “aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty” by taking actions to hold the increase of global average temperatures to “well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”; increase Parties’ abilities to adapt to the adverse impacts of climate change; and to make “finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development”.<sup>34</sup>

In order to achieve these goals, the Paris Agreement differs significantly from the Kyoto Protocol. Essentially, instead of imposing binding emissions limits on Parties, the Agreement requires Parties to make “nationally determined contributions to the global response to climate change” and to increase their efforts over time “while recognizing the need to support developing country Parties for the effective implementation of the Agreement”.<sup>35</sup> The Agreement requires each Party to prepare their own nationally determined contributions that they intend to achieve, and to periodically make successive nationally determined contributions that “represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”.<sup>36</sup>

Myanmar submitted its first Nationally Determined Contribution (“NDC”) to the UNFCCC Secretariat on September 19, 2017. The Ministry of Natural Resources and Environmental Conservation acts as the focal point for the development of Myanmar’s NDC. In its NDC, Myanmar has identified a number of mitigation actions and policies in the forestry and energy sectors designed to contribute to the reduction of global climate change. Additionally, Myanmar identified actions in sectors including agriculture, forestry, water, infrastructure and biodiversity that are designed to increase Myanmar’s ability to adapt to the adverse impacts of global climate change. In large part due to the fact that Myanmar has relatively

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<sup>34</sup> Paris Agreement (2015), Article 2.

Available at [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf).

<sup>35</sup> Paris Agreement (2015), Article 3.

<sup>36</sup> Paris Agreement (2015), Article 4(2,3).

low greenhouse gas emissions and is a net carbon sink, Myanmar's NDC states that it "wishes to highlight to the international community that, while committed to making an evidence-based contribution to global mitigation efforts, the national priority is to adapt to the devastating effects of climate change".<sup>37</sup>

With regard to mitigation, Myanmar has identified actions including: increasing the country's share of hydroelectric power generation; increasing access to clean sources of electricity amongst communities and households currently without access to an electric power grid system; increasing energy efficiency in the industrial sector; and increasing Myanmar's total area of Reserve Forests, Protected Public Forests, and Protected Areas Systems.<sup>38</sup> In terms of adaptation, Myanmar's NDC captures "several examples of actions which demonstrate the determination of the country to adapt to climate change and to reduce the risks of disasters", and as such does not represent an exhaustive list of Myanmar's adaptation actions.<sup>39</sup> In the agricultural sector, Myanmar's NDC states that it is researching and promoting climate smart agriculture, including research on crop varieties and diversification of crops, addressing water resources and food security in Myanmar's Dry Zone, livestock management, loans for farmers impacted by climate change, etc.<sup>40</sup> In the forestry sector, examples of Myanmar's mitigation actions include restoring degraded forests "through community based reforestation and enhancing rural livelihoods in degraded watershed areas, coastal areas and northern hilly regions" and mangrove restoration projects.<sup>41</sup>

In order to provide a framework for achieving these actions, Myanmar is developing a National Climate Change Policy, Strategy and Action Plan. At the time of writing this, the Policy, Strategy and Action Plan have not yet been finalized and issued.<sup>42</sup>

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<sup>37</sup> Myanmar's Nationally Determined Contribution (2017), page 2. Available at <https://www4.unfccc.int/sites/NDCstaging/pages/Party.aspx?party=MMR>.

<sup>38</sup> Myanmar's Nationally Determined Contribution (2017), pages 3-4.

<sup>39</sup> Myanmar's Nationally Determined Contribution (2017), pg. 10.

<sup>40</sup> Myanmar's Nationally Determined Contribution (2017), pages 10-11.

<sup>41</sup> Myanmar's Nationally Determined Contributions (2017), pg. 11.

<sup>42</sup> For more information on the Climate Change Policy, Strategy, and Master Plan, see Myanmar Climate Change Alliance, <https://myanmarccalliance.org/en/mccsap/>.



# Myanmar Laws on Forests, Biodiversity and Ecosystems in Myanmar

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## **Introduction**

Myanmar is abundant in diverse natural habitats with numerous forms of wildlife, plants and trees in large forests. Although Myanmar has plentiful natural resources, its environment is seriously threatened by the unsustainable extraction activities of illegal logging, large scale mining, land degradation and rising populations in urban area. Myanmar's biodiversity is also decreasing, especially in the Indo-Myanmar biodiversity "hot spot" where economic development and human population growth is placing pressure on natural habitats and species populations. The major contributors to environmental degradation are (i) the conversion of closed forests for other land uses, (ii) shifting cultivation, (iii) weak regulation and control of commercial exploitation and trade in endangered flora and fauna, and (iv) insufficient environmental impact assessment and integration of biodiversity concerns into development activities affecting land use change.



Recognizing the environmental degradation, Myanmar's government enacted the Environmental Conservation Law in 2012 and its rules in 2014. Currently, the existing Myanmar National Laws are well developed to promote investment and to protect the country's natural environment and ecosystems.

## **Environmental Profile of Myanmar**

The Republic of the Union of Myanmar is the second largest country in Southeast Asia (smaller only than Indonesia). Myanmar covers an area of approximately 677,000 square kilometres ranging roughly 936 kilometres from east to west and 2051 kilometres from north to south. To the north and east of Myanmar lies the People's Republic of China and to the east and southeast, Laos and Thailand . To the south lies the Andaman Sea and Bay of Bengal, and to the west Bangladesh and India .Myanmar has an estimated coastline of 1930 kilometres and a total water area of 23,070 square kilometres. Myanmar is a land of hills and valleys bordered in the northeast and west by mountain ranges. Enclosed within the mountains are the flat and fertile lands of the Ayeyarwaddy, Chindwin and Sittaung River valleys. Myanmar has rainy, hot, humid summers (with a southwest monsoon, June to September) and scant rainfall, mild temperatures and lower humidity during winter (December to April)<sup>43</sup>.

## **Impacts on the Environment in Myanmar**

Myanmar is one of the most forested countries in South-east Asia. The forests are home to many endangered and endemic species and are globally attractive for biodiversity and conservation. However, Myanmar faces a serious deforestation problem year by year. In the early 1990s, Myanmar had a total forest cover of about 442 000 square kilometres, over 67% of the nation's land area. By the early 2000s, the forest area had declined to 430 000 square kilometres (65% of the land area)<sup>44</sup>. In 2015, the forest area had declined to 290,410 square kilometres (44% of the land area)<sup>45</sup>. Because of the deforestation, major environmental

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<sup>43</sup> [https://en.m.wikipedia.org/wiki/Geography\\_of\\_Myanmar](https://en.m.wikipedia.org/wiki/Geography_of_Myanmar)

<sup>44</sup> Peter Leimgruber, forest Cover Change Patterns in Myanmar 1990-2000, P-1.

<sup>45</sup> <https://tradingeconomics.com/myanmar/forest-area-sq-km-wb-data.html>

problems arise such as loss of water quality in the delta region, flooding, damage to fisheries and aquatic habitats, and climate changes such as shorter monsoon duration and loss of biodiversity. Illegal logging is a challenging issue in Myanmar.

Cyclone Nargis on 2<sup>nd</sup> May 2008 was the worst natural disaster in Myanmar's history. It affected the Ayarwaddy delta region especially Bogale, Labutta and some towns. The government did not issue an exact number of deaths resulting from the catastrophic destruction but the United Nations estimated that 1.5 million people were affected by this cyclone.<sup>46</sup>

Numerous adverse environmental impacts and human rights concerns are caused by mining projects. In 1996 at the Letpadaung copper mine around 26 villages and up to 2,500 people<sup>47</sup> were displaced when land, including forests, was apparently cleared for hydraulic and pit mining operations. Waste from the mining process, including mercury contaminated rocks and soil, is disposed in ponds within the project area.

In Tenasserim Region's Dawei District in 2012, residents of Myaung Byo village faced severe environmental damage to their farmlands caused by Heinda mine's wastewater. There was more flooding causing further destruction of houses, plantations and water sources along Myaung Byo creek, which is now filled with waste and sediment from the mining project.<sup>48</sup>

Tigyit coal mine, begun in 2002 by China National Heavy Machinery Corporation and Burmese companies Eden Group and Shan Yoma Naga in south eastern Shan state, lies 13 kilometres from Inle Lake and is Myanmar's biggest open pit coal mine, producing 2,000 tons of coal daily. Polluted water from the mine and waste from the power plant flow via Balu creek into Inle Lake. As yet there has been no study on the impact of the project on the lake. Two villages were forced to relocate, and over 500 acres of farmland was confiscated.

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<sup>46</sup> *Joint Typhoon Warning Center (2008)*. "Cyclone Nargis Warning NR 023". Retrieved 2 May 2008.

<sup>47</sup> Myanmar Ahlin Newspaper, Volume 52, Number 163, 12<sup>th</sup> March, 2013.

<sup>48</sup> [www.earthrightsinternational.com](http://www.earthrightsinternational.com)

Land degradation, particularly soil erosion in upland agricultural areas and dry zones, contributes to environmental degradation in Myanmar. In 2008, of the country's total cultivated area, 33% was estimated as vulnerable. Natural processes in vulnerable farming areas are aggravated by human interventions such as extensive forest harvesting, mono-cropping practices, and shifting cultivation. Population growth is a key issue for land degradation and land productivity changes. From 1980 to 2008, the population in the uplands unexpectedly increased by 7 million to 17.5 million people, or about 30% of the national population.<sup>49</sup>

Environmental impacts of climate change have occurred in Myanmar in recent decades. Many areas have experienced heat waves, droughts, floods, cyclones, and wildfires, especially in large scale project areas, economic zones and industrial zones. As Myanmar has recognized environmental issues, the government has provided policy, laws and regulations, from time to time.

### **Environmental Regulation in Myanmar**

The Constitution of the Republic of the Union of Myanmar lays down the state's responsibility to protect and conserve the natural environment.<sup>50</sup> The national legislature enacts laws to protect the environment and help restore areas degraded or damaged by mining and forestry activities or those that have experienced destruction of plants, wildlife, and habitat.<sup>51</sup> In addition, every citizen has a duty to "assist" the government in carrying out environmental conservation.<sup>52</sup> The 2008 Constitution permits economic activities such as cooperatives, joint-ventures, and private enterprises<sup>53</sup> for the development of the national economy.

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<sup>49</sup> Interim Country Partnership Strategy: Myanmar, 2012-2014, Asia Development Bank, 2014.

<sup>50</sup> Chapter 1, Section 45 of the Constitution of the Republic of the Union of Myanmar, 2008.

<sup>51</sup> Chapter 4, Section 96, of the Constitution of the Republic of the Union of Myanmar, 2008.

<sup>52</sup> Chapter 8, Section 390, Ibid.

<sup>53</sup> S.36 of the Constitution of the Republic of the Union of Myanmar, 2008

Policies and legal regulations that have been promulgated over the past two decades to address forest management, environmental conservation practices and wildlife protection in Myanmar are as follows: Myanmar Forest Policy (1995), Myanmar Agenda 21 (1998), Public Health Law (1972), Territorial Sea and Maritime Zone Law (1977), Fishing Rights of Foreign Vessels Law (1989), Marine Fisheries Law 1990, Pesticide Law (1990), Plant Pest Quarantine Law (1993), Fertilizer Law (2002), Conservation of Water Resources and River Law (2006), National Code of Forest Harvesting Practices in Myanmar (2000), Investment Law (2016), Conservation of Biodiversity and Protected Area Law (2018) and Myanmar Forest Law (2018).

The main themes of environmental conservation are based on environmental policy formulated in 1994 concerned with: public education and participation; food and nutrition; food production; essential consumption items; production methods; research and studies; and institution building.<sup>54</sup> To establish sound environment policies in the utilization of water, land, forests, mineral, marine resources and other natural resources in order to conserve the environment and prevent its degradation, the Government of the Union of Myanmar adopts policies for people, cultural heritage, environment and natural resources. The policies aim to achieve harmony and balance between environmental considerations and development processes to enhance the quality of life of all citizens. The development of environmental protection is a primary objective.<sup>55</sup>

On 30<sup>th</sup> March 2012, the Environmental Conservation Law came into being (Notification No.9/2012). With respect to forestry management, the relevant government departments and government organizations shall, in accordance with the guidance of the Union government and Environmental Conservation Committee, conserve, manage for beneficial and sustainable use and the enhancement of regional cooperation, Myanmar's forest resources.<sup>56</sup> The management, conservation and enhancement of environments for the protection

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<sup>54</sup> [www.un.org/es/agenda/21/natlinfo/countr/myanmar/eco.htm](http://www.un.org/es/agenda/21/natlinfo/countr/myanmar/eco.htm)

<sup>55</sup> Notification No. 26/94 on 5<sup>th</sup> December 1994, the Government of the Union of Myanmar.

<sup>56</sup> Section.18 of the Environmental Conservation Law.

of the ozone layer, conservation of biological diversity, conservation of coastal environments, mitigation and adaptation to the effects of global warming and climate change, combating desertification and management of non-depleting substances and of other environmental matters is part of the duties and powers of the Ministry of Natural Resources and Environmental Conservation (MONREC, or the “Ministry”).<sup>57</sup>

The Environmental Conservation Law 2012 vests responsibility with MONREC for stipulating the following environmental quality standards: suitable surface water quality standards re use of rivers, streams, canals, springs, marshes, swamps, lakes, reservoirs and other inland public water sources; water quality standards for coastal and estuarine areas; underground water quality standards; atmospheric quality standards; noise and vibration standards; emissions standards; effluent standards; solid wastes standards; other environmental quality standards stipulated by the Union Government.<sup>58</sup>

In order to implement the environmental law, the Environmental Conservation Rules were enacted on 5<sup>th</sup> June 2014, according to S.42 of the Environmental Conservation Law.<sup>59</sup> MONREC can publish these standards ( in the government gazette) with the approval of the Union government and the Environmental Conservation Committee. The Ministry will determine categories of hazardous wastes and set requirements for businesses to treat solid and hazardous wastes, including setting up facilities individually or collectively. In respect of mineral resources, the relevant Government departments and Government organizations are responsible for the conservation, management for beneficial and sustainable use and the enhancement of regional cooperation.<sup>60</sup> The Ministry of Natural Resources and Environmental Conservation shall maintain a comprehensive monitoring system and implement measures by itself or in co-ordination with relevant Government departments and organizations.<sup>61</sup>

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<sup>57</sup> Section.7, Ibid.

<sup>58</sup> S.10 of the Environmental Conservation Law 2012.

<sup>59</sup> Environmental Conservation Rules, 5<sup>th</sup> June 2014, Notification No.50/2014, [www.burma.library.org](http://www.burma.library.org)

<sup>60</sup> S.18 of the Environmental Conservation Law 2012.

<sup>61</sup> S.13 (c), Ibid.

The Natural Disaster Management Law was enacted in 2013 after Cyclone Nargis hit Myanmar. A National Natural Disaster Management Committee was formed to assign the functions and duties of relevant Ministries, departments and government organizations, and to guide, supervise and ensure effective and expeditious implementation of disaster risk reduction.<sup>62</sup> The law also provided for Regional or State Natural Disaster Management Bodies to be created, comprising the Chief Minister of the relevant Region or State as chairperson together with suitable persons to assign duties and power.<sup>63</sup> Relevant departments are assigned the duties of preparatory measures, preventive measures, emergency response plans, rehabilitation and reconstruction activities, and establishing funding.<sup>64</sup> Although there is no human rights provision, procedural rights, such as information systems, rehabilitation and rescue activities, cooperation plans and preventive measures are stipulated.

The Myanmar Forest Law was enacted on 3<sup>rd</sup> November 1992 by Notification No.8/92. It focuses on state control and policing and does not recognize tribal or communal ownership of forest lands but provides private and communal tenure of various durations.<sup>65</sup> A Community Forestry Instruction was issued in 1995; since then there has been a gradual trend towards greater participation of local communities in forestry matters. In accordance with the Forest Law, forest crimes can be dealt with via forest administrative means or by prosecution in courts. Through forest administrative means, the local forest officer uses the power of examination and sets penalties for some forest crimes. There is no monitoring mechanism to track successful prosecutions.

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<sup>62</sup> S.5 of the Natural Disaster Management Law, 2013.

<sup>63</sup> S.7 of the Natural Disaster Management Law, 2013.

<sup>64</sup> S.13 of the Natural Disaster Management Law, 2013.

<sup>65</sup> Forest Law 1994.

Myanmar's Parliament enacted a new Forest Law on 20<sup>th</sup> September 2018 and repealed the Forest Law of 1994. The new law aims to eliminate illegal logging by a variety of punishments, the most severe being 15 years imprisonment,<sup>66</sup> or fines, confiscation, and removing licenses.<sup>67</sup> Forestry Department staff can be punished for accepting bribes or for being involved in the extraction, transfer or possession of illegally cut logs and forest products. Forest crime is a cognizable offence<sup>68</sup> and accused persons' sentences will include damages.<sup>69</sup> The law stipulates that MONREC recognizes conservation of natural forests and mangrove forests by residents using their own traditional methods. This is approved by the Naypyitaw Council and the region, state or national government.<sup>70</sup> By this Law, the Government and Director General of the forestry department are responsible for the sustainable development of forestry management, prohibition of deforestation and loss of biodiversity, protection of mangrove forests, the conservation and preservation of dry deciduous forests and limits on trade in forest products.<sup>71</sup>

The Investment Law<sup>72</sup> 2016 restricts foreign and citizens' investment activities which may cause harm to the natural environment and ecosystems.<sup>73</sup> Responsibilities of investors are outlined in Chapter 16 of the Investment Law 2016. They must obey the regulations, notifications and procedures of the concerned department, orders and directives;<sup>74</sup> They shall follow the procedures and standards for the impact on environmental, social and cultural heritages;<sup>75</sup> They should pay adequate compensation to the victims if suffering or loss is caused by the investment activities.<sup>76</sup> They are responsible for carrying out

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<sup>66</sup> S.43 of the Forest Law 2018.

<sup>67</sup> Chapter 12 of the Forest Law 2018.

<sup>68</sup> S.48 of the Forest Law 2018.

<sup>69</sup> S.47 (c) of the Forest Law 2018.

<sup>70</sup> S.7 of the Forest Law 2018.

<sup>71</sup> Chapter 3 of the Forest Law 2018.

<sup>72</sup> Investment Law, Notification No.40/2016 on 18<sup>th</sup> October 2016.

<sup>73</sup> S.41 (e) of the Investment Law 2016.

<sup>74</sup> S.65 (c) of the Investment Law 2016.

<sup>75</sup> S.65 (g) of the Investment Law 2016.

<sup>76</sup> S.65 (o) of the Investment Law 2016.

environmental conservation and protection during the project in accordance with the existing laws, managing the system to dispose industrial waste from factories, contributing funds for corporate social responsibility (CSR) and submitting reports to the relevant Ministries and the Myanmar Investment Commission.

In May 2018, Myanmar's Parliament passed the "Conservation of Biodiversity and Protected Areas Law"<sup>77</sup> which replaced the old "Protection of Wildlife and Conservation of Natural Areas Law" of 1994.<sup>78</sup> This Law categorized protected areas such as national parks, marine parks, wildlife sanctuaries etc.<sup>79</sup> Section 8 recognizes "Community Protected Areas" as a category of protected area. The Forestry Department is responsible for technical coordination and management support for Community Protected Areas, to maintain the habitats of wild species and to protect wildlife conservation using the traditional customs of indigenous peoples.<sup>80</sup> The Director General of the Forestry Department has power, with the approval of the Minister, to administer a buffer zone, cooperating with the local community to maintain a balance between sustainable socioeconomic development of local communities and the conservation of biodiversity.<sup>81</sup>

Myanmar Laws provide for natural resources to be exploited by business with prior permission for any activities which will cause harm to the natural environment and ecosystems.

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<sup>77</sup> The Conservation of Biodiversity and Protected Areas Law, Notification No.12/2018 on 21<sup>st</sup> May 2018.

<sup>78</sup> The Protection of Wildlife and Protected Areas Law, SLORC Law NO.6/94 on 8<sup>th</sup> June 1994.

<sup>79</sup> S.7 of the Conservation of Biodiversity and Protected Areas Law 2018.

<sup>80</sup> S.17, *Ibid.*

<sup>81</sup> S.13, *Ibid.*



## International Commitment for Ecosystem Conservation

Myanmar's government fully recognizes that Myanmar's forest areas face a diverse and growing range of environmental challenges which can be addressed through international agreements. Myanmar has signed 82 international environmental agreements of which 72 are ratified but 10 are not.<sup>82</sup> International Environmental Law reflects the close relationship between environmental protection and sustainable economic development. Myanmar is a founder member of most international environmental conventions such as the Convention on Biological Diversity (Rio Convention, or CBD), the Framework Convention on Climate Change (UNFCCC), and the Convention on the International Trade of Endangered Species (CITES).

International environmental laws and policies have implications for the Environmental Impact Assessment (EIA) systems of countries that sign or endorse them. The relevant instruments in this context fall into two main categories. First, there are non-binding instruments, such as the Rio Declaration on Environment and Development, which establish important principles and aspects that may need to be reflected in EIA arrangements and approaches. Secondly, there are legal conventions and treaties related to environmental protection at the global and regional level. These carry various obligations for Myanmar as a signatory country that shall be implemented, *inter alia*, through EIA arrangements.<sup>83</sup>

Principle 17 of the Rio Declaration refers to EIA as a national instrument which "shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and applies a precautionary approach for threats to environmental damage".<sup>84</sup> If irreversible damage occurs cost effective

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<sup>82</sup> <https://sedac.ciesin.columbia.edu/entri/countryProfile.jsp?ISO=MMR>

<sup>83</sup> Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, Hussein Abaza, DTIE-ETB, UNEP, 2004, P-47

<sup>84</sup> Ibid, P-32

measures will be taken to prevent environmental degradation.<sup>85</sup> Myanmar attended the Rio +20 Conference in Rio De Janeiro on 20<sup>th</sup> to 22<sup>nd</sup> June 2012 and participated in molding the common vision.<sup>86</sup>

Myanmar fulfils its international commitments in environmental treaties in the areas of agriculture, forests, wildlife, mineral resources, biodiversity, cultural and natural heritage management, fisheries, hazardous waste management and pollution problems for sustainable development without any harm to the environment. As a result of following international environmental law, universally accepted environmental principles such as good neighbourliness, precaution, polluter paying, prevention, sustainable development, state sovereignty and prior informed consent (PIC) are found in national laws and policies.

## **Environmental Protection Bodies**

Environmental protection in Myanmar generally comes under the authority of the National Commission for Environmental Affairs (NCEA), formed in 1990. The National Sustainable Development Strategy (NSDS) was drawn up in 2009, part of a broader programme of the UN Sustainable Development Commission set up after the World Summit on Sustainable Development in 2002. Myanmar had signed the Global Agenda 21 at the Earth Summit in Rio De Janeiro in 1992 and agreed to develop an NSDS by 2010 in line with the Millennium Development Goals (MDGs).<sup>86</sup> A working group for environmental protection exists, formed of the Directors of the Forest, Mining, Meteorology, Public Health, Agriculture, Rural Development, Industrial Coordination, Electric Power Planning, Oil and Gas and, Road Transport Administration Departments and the Central Statistical Organization. They have worked on the Green Growth Policy Framework and Action Plan, a National Climate Change Policy Strategy Action Plan (2016-2030), a National Waste Management Strategic Action Plan (2017-2030) and Myanmar's Sustainable Development Plan (2018-2030).

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<sup>85</sup> Principle 15 of Rio Declaration on Environment and Development 1992

<sup>86</sup> <https://sustainabledevelopment.un.org/rio20/futurewewant>

## Conclusion

The Myanmar Government, fulfills its responsibility to the environment under International Law by drafting rules, policies and laws, implementing the rules by sub-committees, identifying environmental risk assessment by relevant ministries, monitoring and verification of progress, providing environmental awareness training, engaging in adequate and timely communication and consultation with the communities directly affected by environmental impacts. National and international legal frameworks have been developed to achieve environmental rights in a sustainable manner by providing substantive rights and procedural rights. In order to minimize the risk of harm to the environment and human rights, Myanmar still needs to support the legal remedy of a human rights development approach. There is also a necessity and imperative to cooperate in environmental incidents and to extend humanitarian assistance to areas where the environment is negatively impacted.

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# Myanmar Laws & Mechanisms to Address Cases Involving Flora & Fauna Trafficking

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## Introduction

Myanmar is rich in flora and fauna. It boasts 258 mammal species (Megafauna), 153 reptile species, 1056 bird species (Avifauna), 775 marine and fresh water fish species (Piscifauna, Microfauna) and 11,800 plant species (flora).<sup>88</sup> As part of government attempts to protect this vast diversity, 42 Protected Areas<sup>88</sup> have been instituted. This chapter will discuss flora and fauna in Myanmar in terms of existing laws to prevent trafficking, and their enforcement. Matters relating to general environmental law are discussed elsewhere in this handbook.

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<sup>87</sup> *Wildlife Crimes in Myanmar*. Supreme Court of the Union of Myanmar, International Relations Unit, Research Department. Daw Aye Aye Hlaing, Deputy Director

<sup>88</sup> Assuming Chapter 1 and 2 will discuss definition of Protected Area further

The importance of environmental conservation is highlighted in Myanmar's 2008 Constitution. The government is duty-bound to “protect and conserve the natural environment”<sup>89</sup>, and citizens must “assist the Union in carrying out ... matters [relating to] (a) preservation and safeguarding of cultural heritage; (b) environmental conservation; (c) striving for development of human resources; and (d) protection and preservation of public property”.<sup>90</sup>

Myanmar is attuned to the necessity to defend its flora and fauna; it has legal mechanisms in place to protect and conserve its biodiversity and safeguard its environment. The country's dedication to stewardship of its nature and wildlife ensures a degree of protection of the environment. More recently, such efforts have involved local communities and provided them with opportunities to discuss their concerns. While there have been successes in combating flora and fauna trafficking, a number of challenges remain.

## Flora

- What is Flora?

Flora is a term used to refer to a group of indigenous plants in an ecosystem of a geographical region. Myanmar's flora exists within the geographical regions of the country's seven states and seven divisions where trees, plants, and flowers that are indigenous to these areas form their own unique and identifiable ecosystem. They are native plants to the area. They grow in different regions with varying climates that affect their nature and definitions.

Flora in Myanmar that are distinct to the country include plants such as *Zingiber barbatum* (*meik-thalin*), a therapeutic ginger found in Yangon, Bago and Mandalay; *Strobilanthes dyeriana*, the Persian shield, a tropical evergreen shrub; or *Pachystoma nutans*, a member of the orchid family, found in Shan State. There are also mangroves, seagrass beds, and seaweed, or algae, such as *Ulva burmanica*, a green alga that is found in Bago. The tree population is vast and complex. These are, of course, only a few examples of the nation's botanical diversity.

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<sup>89</sup> Constitution of the Republic of the Union of Myanmar 2008, Article 45

<sup>90</sup> Ibid Article 390

## Fauna

- What is Fauna?

Fauna is a term referring to a group of indigenous animals of any geographical region. Myanmar's Fauna exists in the geographical regions of our seven states and seven divisions where distinct animals indigenous to these states and divisions form their own unique and identifiable ecosystem.

Myanmar's unique fauna includes tigers, red pandas and elephants, the Sumatran and Javan rhinoceros (*Dicerorhinus sumatrensis*, *docerorhinus sondaicus*), the Indian water buffalo (*Bubalus arnee*) or the Snub-nosed monkey (*Rhinopithecus strykeri*), which inhabits Mount Imawbum. Fish species of interest include the Irrawaddy dolphin (*Orcaella brevirostris*) or the Nga Tha Lauk (*Hilsa ilish*). Among reptiles, the Burmese star tortoise (*Geochelone platynota*) deserves mention, while the bird population includes Jerdon's minivet (*Pericrocotus albifrons*), or the Burmese bush lark (*Mirafra microptera*). Many of these species thrive on Lake Indawgyi, a Ramsar Site and UNESCO Biosphere Reserve.

- Current trafficking situation for fauna

Trafficking of wild animal parts is a multi-million dollar business. Harvesting and trading of wild species and their body parts reflects a huge demand throughout Asia, especially for supposed medicinal purposes. Due to Myanmar's abundant wildlife, the country is targeted by animal poachers who seek to make lucrative trade with parts of tigers, elephants, pangolins and other species. Proximity to the Golden Triangle region facilitates illegal trafficking in the region with easy access to China and to other parts of Southeast Asia through Thailand and Laos, the other two border countries of the Golden Triangle.



According to Myanmar's Ministry of Environmental Conservation and Forestry<sup>91</sup>, the Asian elephant (*Elephas maximus*) and the tiger (*Panthera tigris*) are the main targets of illegal trafficking which has resulted in a sharp decline in their population in Myanmar. Other mammals also undergoing the same fate are the black musk deer (*Moschus fuscus*), Chinese and Malayan pangolins (*Manis pentadactyla*, *javanica*), and the sunbear (*Healarctos malayans*). The government's efforts to support the wildlife sanctuaries have shown an improvement in population numbers for some of these animals, but challenges remain.

## The Legal Framework

### (A) Laws on Environmental Protection in Myanmar

*Please refer to Chapter 1 on the general legal landscape and Chapter 2 on international legal frameworks, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora also known as the Washington Convention (CITES).*

The following is a list of some of the relevant laws, rules and notifications that prevail in Myanmar.

- Forest Law of 1992, revised in 2018 to impose tougher penalties for offenders of up to 15 years imprisonment.
- Elephant Preservation Act (1879)
- Protection of Wildlife Act (1936)
- Protected List of Wildlife (1994) (PLW)
- Protection of Wildlife and Protected Areas Law (1994) – PWPAL
- Community Forest Instructions (1995). These promoted more community participation in forestry decision making.
- Law Relating to Aquaculture (1989)

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<sup>91</sup> Ministry of Environmental Conservation and Forestry, Report, March 2014, Nay Pyi Taw7 -=tyu,mjkl;'lk

- Pesticide Law (1990)
- Freshwater Fisheries Law (1991)
- Law Relating to Fishing Rights of Foreign Fishing Vessels (1989, amended in 1993)
- Myanmar Marine Fisheries Law (1990, amended in 1993). The law established conditions, prohibitions, orders and directives relating to the conservation and protection of the fisheries. The amendment in 1993 covers the offences and penalties related to the prohibitions outlined under the 1990 law.
- Myanmar Mines Law (1994)
- Plant Pest Quarantine Law (1993, amended in 2011)
- Fertilizer Law (2002)
- Conservation of Biodiversity and Protected Areas Law (2018) *(Replaced The Protection of Wildlife and Wild plant and Nature Areas of Law (1994), Rules (2002))*
- Myanmar's Wildlife Protection and Protected Areas Law 1994, revised and enacted on 21 May 2018.
- Environmental Conservation Law (2012) and the Environmental Conservation Rules (2014) – ECL, ECR
- Animals Health and Development Law (2012) The Forest Rules (1995)
- Conservation of Water Resources and Rivers Law (2017)
- Biodiversity and Conservation of Protected Areas Law (2018). Regulates the trade of wild animals, plants and their derivatives and products; establishes seven categories of Protected Areas (scientific reserve, national park, marine national park, nature reserve, wildlife sanctuary, geo-physically significant reserve, and local community Protected Areas.

As can be seen above, Myanmar has extensive legislative texts on environmental protection. However, establishing effective governance and enforcement, along with community engagement in matters affecting the environment, continue to pose challenges to environmental conservation and protection.

The main legal framework for environmental conservation is the Environmental Conservation Law (2012). This law provides guidance on the regulation of the private sector by instituting a permit system to ensure that businesses operate in a manner that protects Myanmar's flora and fauna. In practice, this means all companies must undergo an Environmental Impact Assessment Procedure (EIA)<sup>92</sup> by MONREC to assess their environmental and social impact. If approved, the Ministry issues an Environmental Compliance Certificate (ECC) which is valid for 5 years, and the company can commence operating.

The Ministry may not issue the ECC if there is "Adverse Impact" which is defined as "any 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, including but not limited to, the environment, flora and fauna, where such effect is attributable to any degree or extent to, or arises in any manner from, any action or omission on the part of the Project Proponent, or from the design, development, construction, implementation, maintenance, operation, or decommissioning of the Project or any activities related thereto".<sup>93</sup>

### *The lead Ministry*

The Ministry of Environmental Conservation and Forestry (MOECAF), formed from the Ministry of Forestry in 2011 and responsible for protecting the flora and fauna of Myanmar, has since been renamed as the Ministry of Natural Resources and Environmental Conservation (MONREC).

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<sup>92</sup> MOECAF (2012). The Environmental Conservation Law.

The Republic of the Union of Myanmar, Ministry of Environmental Conservation and Forestry.

<sup>93</sup> *ibid*

The Ministry comprises the following departments:

- (1) **Planning and Statistics**  
Responsible for monitoring the implementation of the policies and targets of the projects undertaken by the Ministry. This department also coordinates the collection of the statistics, and promotion of Myanmar's activities on international platforms through liaison with international organizations.
- (2) **Environmental Conservation**  
Responsible for implementing the strategy, policies and framework of environmental sustainable development.
- (3) **Forestry** – has a Nature and Wildlife Conservation Division which oversees 20 Parks and Sanctuaries as protected areas.  
Responsible for protecting Myanmar's forests and natural resources in a sustainable manner.
- (4) **Myanmar Timber enterprise**  
In charge of harvesting and processing Myanmar timber.
- (5) **Dry Zone Greening Department**  
Has the goal of greening the central Myanmar dry zone and protecting and maintaining the 20 million acres of dry forests in central Myanmar.
- (6) **Survey Departments**  
Responsible for mapping the topography of Myanmar for the purpose of furthering the Ministry's work.

*Please refer to Chapter 1 and Chapter 2 for further details on the institutional framework of Myanmar's government and legal system.*

MONREC's duties and powers are set out in the Environmental Conservation Law (2012) and the Environmental Conservation Rules (2014). MONREC also works with the following ministries in fulfilling its constitutional mandate to protect Myanmar's environment:

- Ministry of Agriculture and Irrigation
- Ministry of Livestock, Fisheries and Rural Development
- Ministry of Science and Technology
- Ministry of National Planning and Economic Development
- Ministry of Mines
- Ministry of Health

The Environmental Conservation Committee (ECC) was formed in 2011 in order to strengthen the synergy between the ministries in safeguarding Myanmar's environment. With MONREC's minister as Chairman and the deputy ministers of other relevant ministries as members, ECC's objective is to follow policy on environmental protection, act as a regulator for assessing environmental damage and promote activities to conserve the environment in Myanmar through education programmes.

The ECC is organized into five working committees (WC) and five special task forces (STF):

- Policy, Law, Rules, Procedures and Quality Standards (WC)
- Industry Planning, Urban and Rural (WC)
- Natural Resource and Cultural Heritage Conservation (WC)
- Climate Change Adaptation and Migration (WC)
- Environmental Education and Awareness Raising (WC)
- Land Use (STF)
- Rivers, Streams and Wetlands (STF)
- Industrial Projects, Large Industries and Urban and Rural Areas (STF)
- Environmental Policy, Law and Procedures (STF); and
- Environmental Education and Awareness; Climate Change

### *Myanmar National Wildlife Law Enforcement Task Force*

Formed in 2011, the body implements an action plan to combat poaching and illegal trade in cooperation with local and international organizations, to comply with the Convention on International Trade and Endangered Species of Wild Fauna and Flora (CITES), a multilateral treaty to protect endangered plants and animal species. Its main purpose is to close loopholes in existing laws to give Myanmar a strong illegal wildlife trade law.

### *CITES*

CITES is the Convention on International Trade in Endangered Species of Wild Fauna and Flora. It is an international agreement between governments. CITES is among the conservation agreements with the largest membership, and there are now 183 State Parties.

Because the trade in plants crosses national borders, the effort to regulate it requires international cooperation to protect certain species from over-exploitation. The purpose of the Convention is to ensure that international trade in specimens of wild animals and plants does not threaten their very survival. International wildlife trade is estimated to be worth billions of dollars annually, and to include hundreds of millions of plant specimens.

Today, CITES accords varying degrees of protection to thousands of species of plants, whether they are traded as live specimens or dried herbs. Since 2017, each Party is required to submit an annual illegal trade report on all seizures for violations involving CITES-listed species, irrespective of where and how the seizure was made.

CITES was drafted in 1963 at a meeting of members of IUCN (The World Conservation Union). Although CITES is legally binding on the Parties it does not take the place of national laws. Rather it provides a framework to be respected by each Party, which has to adopt its own domestic legislation to ensure that the Convention is implemented at the national level.

Myanmar joined CITES in July 1997, and the Convention entered into force in the country on 11 September 1997. In 2011, Myanmar chaired the 5<sup>th</sup> annual meeting of ASEAN-Wildlife Enforcement Networks.

### *Signs of Progress*

There are initial signs of a growing public understanding of issues relating to conservation. For example, markets in Yangon (Bogyoke and Shwe Dagon) agreed to end the sales of ivory and other wildlife products across the country as of April 2018. Yangon City Development Committee also pledged to work towards an “IWT- free Yangon”.<sup>94</sup>

Law enforcement officials are being trained to identify and seize wildlife products that are obtained through illegal means.

The most recent law, the Conservation of Biodiversity and Protected Areas Law (2018), addressed the concern over local communities being affected by the environmental discussions and plans, adding a new category of protected area called “Community Protected Area” which requires the Forest Department under MONREC to provide technical coordination and support for management of the said area.

Generally, there are three categories of protection for wildlife in Myanmar defined under the Forest Department Notification NO. 583/94.<sup>95</sup> They are as follows:

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<sup>94</sup> WWF. Website: [www.wwf.org.mm](http://www.wwf.org.mm)

<sup>95</sup> Forest Department (1994). Forest Department Notification No. 583/94(1994)

- Category 1: Completely protected wildlife<sup>96</sup> which is a category of endangered species as announced by the Ministry of Forestry from time to time.  
Includes 39 species of mammals, 50 species of birds, and 9 species of reptiles and amphibians.
- Category 2: Normally protected wildlife<sup>97</sup> which is a category of endangered species as announced by the Ministry of Forestry from time to time.  
Includes 12 species of mammals, 43 species of birds, and 6 species of reptiles and amphibians.
- Category 3: Seasonally protected wildlife<sup>98</sup> (from 15 June to 30 September) which is a category of endangered species as announced by the Ministry of Forestry from time to time.  
Includes 2 species of mammals, 13 species of birds.

NB. The Ministry of Forestry decides when to place an animal in one of these categories.

The most recent law is the Conservation of Biodiversity and Protected Areas Law which repealed the Protection of Wildlife and Conservation of Natural Areas of Law (1994).

## **(B) National and Regional Collaboration**

Myanmar has always been mindful of protecting its own natural resources, biodiversity and environment. Through Myanmar National Wildlife Law Enforcement Task Force has been quite active in protecting its biodiversity in the country, the challenge lies in enforcement of illegal poaching, in particular of protected species since they are in high demand within the region, especially from China.

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<sup>96</sup> Article 2(u) Conservation of Biodiversity and Protected Areas Law (2018)

<sup>97</sup> Article 2(v) Conservation of Biodiversity and Protected Areas Law (2018)

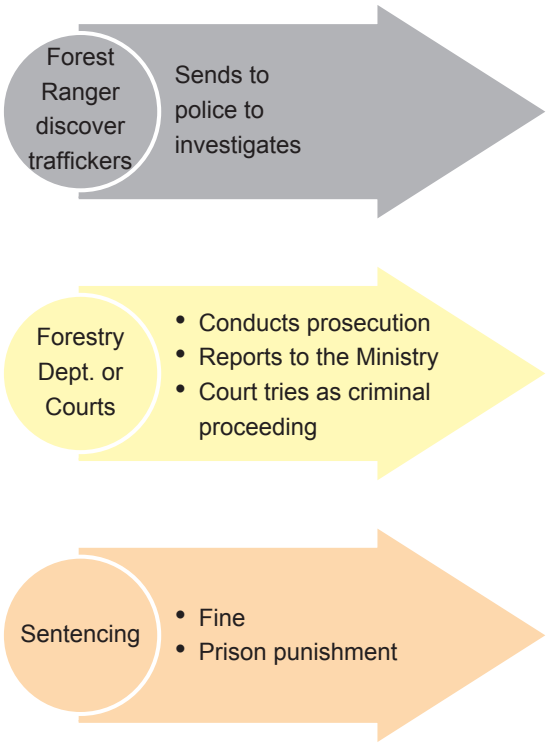
<sup>98</sup> Article 2(w) Conservation of Biodiversity and Protected Areas Law (2018)



This challenge is not unique to Myanmar as its neighbouring countries also face difficulty in enforcement against smuggling of items from endangered species such as rhinoceros horns and elephant ivory. The porous borders and lack of enforcement combined with command of a high market value for these endangered and rare species are too tempting for the poachers. This has made it difficult for the regional authorities to enforce the protection of their endangered species.

### Legal Enforcement

The Supreme Court of the Union of Myanmar provides the means by which illegal traffickers of flora and fauna are charged under the current Myanmar legal system.



## Chargeable Offences

Under PWPAL, (Art. 36), the act of killing, hunting or wounding a protected wildlife species, or removing, collecting or destroying in any manner any protected wild plant within a designated area without permission is an offence under Myanmar law and carries punishment by imprisonment for a term which may extend to 5 years or a fine of up to 30,000 Kyats, or both.<sup>99</sup>

Under PWPAL, (Art. 37), the act of killing, hunting, possessing, selling, transporting, wounding or exporting a completely protected wildlife species without the recommendation of the Director General, carries punishment by imprisonment for a term which may extend to 7 years or a fine of up to 50,000 Kyats, or both.

## Practical Results

There was a total of 143 recorded cases countrywide of illegal flora and fauna trafficking from 2010 to 2013. During the same time period, there were 41 wild elephant carcass reports.

Criminal cases on flora actually prosecuted in Myanmar courts under the Protection of Wild Life and Protected Areas Laws (1994) between 2000 and 2014 amounted to 294. Of these prosecutions, 38% resulted in imprisonment, 53% in fines, and 53% in confiscations. 18% of the cases are still pending before the courts.

During the same period, for fauna, a total of 247 cases were brought before the Myanmar courts of which 61.5% resulted in imprisonment, 44.5% in fines, and 43% in confiscations. 13% of the cases are still pending before the courts.<sup>100</sup>

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<sup>99</sup> Amendments have been made on the penalty for extracting or destroying any kind of wild plants by the Conservation of Biodiversity and Protected Areas Law 2018 which increases the fine of 30,000 Kyats to a fine of up to 1,000,000 Kyats or up to 5 years of imprisonment (See Paragraph 40)

<sup>100</sup> Office of the Supreme Court of Myanmar

Fiscal Year	Cases(Total)	Seized Items
2008 - 2009	34	Turtles and tortoises, Elephant carcass, Elephant tusks, Elephant skin, Sambar horns, Sambar skin, Goral skin, Snakes, Birds, Gekkos and Pangolin scales
2009 - 2010	31	Turtles and tortoises, Bear, Bear claws, Elephant tusks, Elephant skin, Tiger teeth, Sambar skin, Sambar horns, Snakes, Birds, Pangolin scales, Pangolin, Orchids, Handmade guns and gunpowder
2010 - 2011	30	Turtles and tortoises, Elephant tusks, Elephant skin, Pangolin skin, Pangolin, Tiger teeth, Sambar skin, Sambar horns, Snakes, Birds, Marbled cat skin, Civet skin, Python scales, Golden cat skin and taxidermy, Golden cat, Gaur horn, Clouded leopard skin, Birds, Gekko, Goral skull, Goral horn
2011 - 2012	21	Elephants, Elephant tusks, Elephant skin, Turtle and tortoises, Pangolin scales, Birds, Sambar horns, Goral horns, Snakes, Bear bones, Bears, Hog deer teeth, Goral teeth, Bear teeth, Handmade guns
2012 - 2013	59	Elephants, Elephant tusks, Elephant skin, Turtle and tortoises, Pangolin scales, Birds, Sambar horns, Goral horns, Snakes, Bear bones, Bears, Hog deer teeth, Goral teeth, Bear teeth, Handmade guns, Orchids

From the Supreme Court statistics above, it is evident that the legal system of Myanmar has, to its credit, been active in pursuing the illegal traffickers of Myanmar's flora and fauna. The proportion of unlawful poaching and trafficking activities remaining undocumented and therefore outside the purview of law enforcement are a matter for conjecture. The table gives an idea of the range of items seized between 2008 and 2013.<sup>101</sup>

## **Conclusion**

It is evident that there are many legal provisions in force to defend Myanmar's flora and fauna from predatory activities. There are also a number of ministries that play a part in safeguarding Myanmar's natural environment from illegal trafficking activities. While the accountability of various ministries to protect Myanmar's environment is admirable, the degree to which responsibilities are decentralized merits further review. There is scope for reform of the mechanisms available to enforce laws on illegal trafficking of flora and fauna in Myanmar. The laws tend to be drafted in overly generic terms, while financial penalties for breaking the law are often lenient. The profitability of illegal trafficking largely exceeds the legal penalties. These are areas that the government could concentrate on in modernization efforts. Some of these needs may already be met by the National Biodiversity Strategies and Action Plans (NBSAPs) adopted in 2011 and revised in 2015. They include a 2015 – 2030 strategy plan to build the capacity of law enforcement authorities to enforce wildlife trafficking regulations. Time will tell if they are successful.

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<sup>101</sup> Ibid

## **Further Sources:**

Ministry of Natural Resources and Environmental Conservation -

<http://monrec.gov.mm/>

Supreme Court of the Union of Myanmar -

<http://www.unionsupremecourt.gov.mm/>

Flora & Fauna International (FFI) -

<https://www.fauna-flora.org/countries/myanmar>

World Wide Fund for Nature (WWF) -

<https://www.worldwildlife.org/>

Myanmar Responsible Business (MCRB) -

<https://myanmar-responsiblebusiness.org/>

# Myanmar's Legal Framework for Air and Water Pollution Control

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Myanmar has established a fairly robust system of laws, regulations and guidelines for the control and prevention of air and water pollution. This system begins with the 2008 Constitution, and is implemented through the laws and regulations that were adopted pursuant to the duty placed on the Pyidaungsu Hluttaw (Hluttaw) in the Constitution to “protect and conserve [the] natural environment.”<sup>102</sup> In 2012 the Hluttaw passed the Environmental Conservation Law (ECL) in order to implement this duty.<sup>103</sup> Subsequent to the passage of the ECL, Myanmar’s Ministry of Natural Resources and Environmental Conservation (MONREC) issued several rules and regulations designed to control pollution and conserve the environment. As will be seen, the Hluttaw has also adopted several other laws with important provisions relating to pollution control.

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<sup>102</sup> Constitution of the Republic of the Union of Myanmar, Sec. 45 (2008).

<sup>103</sup> Environmental Conservation Law, No. 9/2012 (2012).

## **The Environmental Conservation Law and the Framework for Pollution Control**

Myanmar's Environmental Conservation Law does not contain substantive standards with regard to environmental protection – rather, its main objective is to establish the overall framework that the government must follow to adopt and implement measures to protect and conserve the natural environment. Notably, the ECL contains rather broad definitions of the terms “pollution” and “pollutant.” Pollution is defined as:

*“...any direct or indirect alteration, effect of the physical, thermal, chemical or biological properties of any part of the environment including land, water and atmosphere by discharging, emitting or depositing environmental hazardous substances, pollutants or wastes so as to affect beneficial use of environment, or to affect public health, safety or welfare, or animals and plants or to contravene any condition, limitation or prohibition contained in the prior permission issued under this Law”.<sup>104</sup>*

The ECL defines “pollutant” as any “...solid, liquid, or vapor which directly or indirectly alters the quality so as to affect beneficial use of any segment or element of the environment or is hazardous or potentially hazardous to health or causes pollution”.<sup>105</sup> By defining these terms so broadly, the Hluttaw granted the government broad discretion and decision-making authority to determine which air and water pollutants to regulate. Subsequent to the granting of this authority through the ECL, MONREC developed and issued the Environmental Conservation Rules,<sup>106</sup> the Environmental Impact Assessment Procedure,<sup>107</sup> and the Environmental Quality (Emissions) Guidelines.<sup>108</sup> These will be explained in further detail below.

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<sup>104</sup> Environmental Conservation Law, Sec. 2(e).

<sup>105</sup> Environmental Conservation Law, Sec. 2(g).

<sup>106</sup> Environmental Conservation Rules, No. 50/2014 (2014).

<sup>107</sup> Environmental Impact Assessment Procedure, No. 616/2015 (2015).

<sup>108</sup> Environmental Quality (Emissions) Guidelines (2015).

The government body with primary responsibility for implementing the ECL is MONREC. The ECL also establishes and defines the functions of two other bodies with important roles with regard to pollution functions: the Environmental Conservation Committee (Committee)<sup>109</sup> and the Environmental Conservation Department (ECD).<sup>110</sup> The Committee is essentially an advisory body that provides advice and approvals to MONREC and ECD on various issues, and the ECD is a Department formed under MONREC that is charged with carrying out various specific tasks under the guidance of MONREC.<sup>111</sup>

MONREC's main duties with respect to pollution prevention and control are laid out in Section 7 of the ECL. Section 7(d) obligates MONREC to develop "environmental quality standards including standards on emissions, effluents, solid wastes, production procedures, process and products for [the] conservation and enhancement of environmental quality." Relatedly, Section 7(j) directs MONREC to "prescribe the terms and conditions related to effluent treatment in industrial estates and other necessary places and buildings and emissions of machines, vehicles and mechanisms." Such terms and conditions may include requiring a project or activity that causes pollution to "compensate for environmental impact".<sup>112</sup> As explained below, these standards and conditions are applied to projects and activities primarily through Myanmar's environmental impact assessment system, which MONREC has a duty to establish under Section 7(m) of the ECL.

Section 7(c) obligates MONREC to "lay down and carry out" monitoring programs for the purpose of pollution control. This duty is defined with greater detail in Section 13 of the ECL, which directs MONREC, under the guidance of the Committee, to maintain a "comprehensive monitoring system" on various pollution issues. These include, but are not limited to, the use of agro-chemicals; handling of pollutants and hazardous wastes in industry; handling of wastes in the mineral and gems extractives sector; and construction and development. Under the terms

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<sup>109</sup> Environmental Conservation Law, Sec. 4.

<sup>110</sup> Environmental Conservation Law, Sec. 2(s).

<sup>111</sup> See Environmental Conservation Rules, Sec. 23(b).

<sup>112</sup> Environmental Conservation Law, Section 7(o).



of the Environmental Conservation Rules, all of the measures and programs mentioned above for controlling and reducing pollution in the environment are supposed to be approved by the Committee.<sup>113</sup>

In addition to establishing the functions and duties of MONREC, the Committee and ECD, the ECL also places affirmative duties on persons and business that cause point sources of pollution. Under Section 14 of the ECL, “a person causing a point source of pollution shall treat, emit, discharge and deposit the substances which cause pollution in the environment in accord with the stipulated environmental quality standards”. Under Section 15, “the owner or occupier of any business, material or place which causes a point source of pollution shall install or use an on-site facility or controlling equipment in order to monitor, control, manage, reduce or eliminate environmental pollution. If it is impracticable, it shall be arranged to dispose the wastes in accord with environmentally sound methods”. In addition to the ECL, the Myanmar Investment Law requires that investors “abide by applicable laws, rules, procedures and best standards practiced internationally for this investment so as not to cause damage, pollution, and loss to the natural and social environment...”<sup>114</sup>

The two Sections of the ECL identified above raise some important issues and questions. The first issue is that these two Section only address “point sources” of pollution. Although the term “point source” is not defined anywhere in Myanmar’s environmental legal framework, it is normally used in reference to water pollution, and is generally understood to refer to discrete and identifiable sources of water pollution, such as wastewater discharge pipes.<sup>115</sup> In contrast, non-point source water pollution is generally understood as pollution that results from “land runoff, precipitation, atmospheric deposition, drainage, seepage or hydrologic

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<sup>113</sup> Environmental Conservation Rules, Sec. 16(a).

<sup>114</sup> Myanmar Investment Law, No. 40/2016 (2016), Sec. 65(g).

<sup>115</sup> For example, the United States Clean Water Act defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” United States Clean Water Act, Section 505.

modification”.<sup>116</sup> Examples of non-point source water pollution include chemicals used in agricultural and residential areas and “sediment from improperly managed construction sites, crop and forest lands, and eroding streambanks”.<sup>117</sup> Due to the nature of non-point source water pollution, it is notoriously difficult to identify and regulate. Although the ECL itself does not explicitly address the issue of non-point source water pollution, MONREC has taken steps to do so by requiring traditional non-point sources such as agricultural operations undergo environmental impact assessment<sup>118</sup> and apply industry-specific pollution standards under the National Environmental Quality (Emissions) Guidelines (NEQG).<sup>119</sup>

The second issue has to do with Section 15 of the ECL, which states that if it is “impracticable” to install on-site pollution control equipment for a given point source of pollution, then “it shall be arranged to dispose the wastes in accord with environmentally sound methods”. This provision raises questions regarding exactly how to determine whether installing pollution control is “impracticable”, and also how to determine valid “environmentally sound methods” for pollution and waste disposal. Making such determinations requires fact-based, case-by-case analyses that necessarily involve substantial time and resources on the part of a regulatory body such as the ECD. This issue is reflected in other areas of Myanmar’s environmental framework. For example, Section 3 of the NEQG states that “application of these Guidelines to existing facilities may involve the establishment of site-specific targets, with an appropriate timetable for achieving them”. Although MONREC and the ECD have made considerable progress in recent years to strengthen their capacity for regulating environmental pollution, it may be some time before they are able to adequately implement provisions such as these.

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<sup>116</sup> “Basic Information about Nonpoint Source (NPS) Pollution,” United States Environmental Protection Agency. *Available at* <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution>.

<sup>117</sup> *Ibid*

<sup>118</sup> *See, e.g.*, Environmental Impact Assessment Procedure (2015), Annex 1.

<sup>119</sup> National Environmental Quality (Emissions) Guidelines (2015), Annex 1(2.2).

## **Applying Pollution Control Requirements through the Environmental Impact Assessment System**

As mentioned, Myanmar's environmental pollution standards are applied to projects and activities primarily through Myanmar's environmental impact assessment system. The Environmental Impact Assessment Procedure (EIA Procedure), adopted by MONREC in 2015, broadly applies to any project or activity in Myanmar that has the potential to cause adverse environmental impacts.<sup>120</sup> Simply put, EIA is a process to predict and analyze the potential environmental impacts of a project or activity and identify appropriate measures to mitigate or eliminate such impacts. The first step in Myanmar's EIA procedure is the submission of a screening application by the project proponent. The ECD will determine the appropriate level of review based on this application. Projects that are smaller in size or scope that have lower potential environmental impacts will be required to conduct an Initial Environmental Examination (IEE), and larger projects with a high degree of potential impacts will be required to conduct a full Environmental Impact Assessment.<sup>121</sup> Both IEE and EIA type projects are required to develop an Environmental Management Plan (EMP) that describes the mitigation measures that will be applied to reduce or eliminate environmental impacts, including air and water pollution.<sup>122</sup> Additionally, both IEE and EIA reports must identify the relevant pollution standards adopted by the government that are applicable to the project.<sup>123</sup>

Upon completion of the IEE or EIA Report, the project proponent will submit the report to the ECD for review and approval. For EIA-type projects, prior to approval the ECD must also submit the report to the EIA Report Review body for "comments and recommendations".<sup>124</sup> Under the terms of the EIA Procedure, when the EIA Report Review Body is asked to review an EIA Report, it must produce an EIA

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<sup>120</sup> Environmental Impact Assessment Procedure (2105), Sec. 3.

<sup>121</sup> EIA Procedure, Sec. 23.

<sup>122</sup> EIA Procedure, Secs. 36 and 63.

<sup>123</sup> EIA Procedure, Secs. 36(h), 59 and 63.

<sup>124</sup> EIA Procedure, Sec. 67(a).

Review Report that assesses, among other things, whether the EIA Report has adequately identified and addressed all applicable environmental and pollution control requirements.<sup>125</sup> If the ECD finds that the IEE or EIA Report meets all relevant procedural and substantive requirements, the ECD will approve the report and develop and issue an Environmental Compliance Certificate (ECC) for the project.

### **The Environmental Compliance Certificate and National Environmental Quality Guidelines**

The ECC is a document that has legal effect and that contains all of the legally binding requirements that apply to the project or activity for which the ECC is being issued. The EIA Procedure grants the Ministry discretion to include a variety of conditions relating to air and water pollution in a project's ECC.<sup>126</sup> For example, the Ministry may impose conditions for emissions, including: "(i) emissions not allowed, (ii) Emission Limit Values in terms of types, substances, loads, concentrations, rates, timing, duration, frequency, seasons, and Project phase, (iii) Emission points, (iv) form and media, (v) recipients, (vi) contribution to Environmental Quality Standards, and (vii) statistical methods for determining compliance".<sup>127</sup> The Ministry may also impose conditions specifically related to pollution prevention, including conditions on the "effectiveness of production or construction methods or waste storage and treatment facilities to prevent or... minimize the risk of pollution"<sup>128</sup> and conditions on the "control and maintenance of pollution prevention/minimization measures".<sup>129</sup> Finally, the Ministry may include requirements in the ECC that the project owner pay charges or fees for pollutant emissions that would serve as contributions to the Ministry's Environmental Management Fund.<sup>130</sup>

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<sup>125</sup> EIA Procedure, Sec. 16.

<sup>126</sup> See, EIA Procedure, Sec. 91.

<sup>127</sup> EIA Procedure, Sec. 91(d).

<sup>128</sup> EIA Procedure, Sec. 91(d).

<sup>129</sup> EIA Procedure, Sec. 91(k).

<sup>130</sup> EIA Procedure, Sec. 91(p).

In setting limits for the emissions of air and water pollutants, both the project's Environmental Management Plan (EMP) and the project's ECC must include and apply both the general and the industry-specific emissions standards contained in the Annex to the NEQG.<sup>131</sup> The NEQG state that the emissions limits contained therein are "generally considered to be achievable in new facilities by existing technology at reasonable costs".<sup>132</sup> However, for projects that already existed at the time of adoption of the NEQG, the Ministry has the discretion to apply "less stringent levels or measures than provided for in these Guidelines...as appropriate".<sup>133</sup> The NEQG contain a comprehensive list of industry-specific standards in Section 2 of the Guidelines, including to standards for the energy sector, the agriculture and livestock sectors, and manufacturing, among others. These sectors are further broken down by specific project type. For example, a thermal power project, which includes "combustion processes fueled by gaseous, liquid, and solid fuels and biomass and designed to deliver electrical or mechanical power, steam, heat or any combination of these," must apply both the general emissions standards in Section 1 of the NEQG Annex, as well as the industry-specific standards for thermal power projects contained in Section 2.1.1 of the NEQG Annex.

## **Monitoring, Reporting and Penalties**

Once the pollution standards are established in the ECC by application of the applicable general and industry specific guidelines in the NEQG, the project proponent is obligated to engage in "continuous, proactive and comprehensive" monitoring of all adverse impacts associated with the operation of the project, as well as compliance with the pollution standards in the ECC.<sup>134</sup> The project proponent is also required to notify MONREC of any violations of the ECC's pollution standards in two ways. First, the proponent must notify MONREC of any violations in writing within seven days of becoming aware of the violation.<sup>135</sup> However, if the violation "would have a serious impact or where the urgent

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<sup>131</sup> National Environmental Quality (Emission) Guideline, Sec. 6.

<sup>132</sup> National Environmental Quality (Emission) Guideline, Sec. 3.

<sup>133</sup> National Environmental Quality (Emissions) Guideline, Sec. 11.

<sup>134</sup> EIA Procedure, Sec. 106; *see also* National Environmental Quality (Emissions) Guideline, Sec. 12.

<sup>135</sup> EIA Procedure, Sec. 107.

attention of the Ministry is or may be required,” the project proponent must notify MONREC within 24 hours.<sup>136</sup> Second, the project proponent must submit monitoring reports to MONREC at least every six months, or more frequently if MONREC requires.<sup>137</sup> Among other things, the monitoring reports submitted to MONREC must include all “monitoring data of environmental parameters and conditions as committed in the EMP or otherwise required”,<sup>138</sup> and also must include documentation of compliance, as well as non-compliance with the conditions set forth in the EMP and ECC.<sup>139</sup> As noted earlier, the project’s EMP, as well as the ECC, must include and apply all of the relevant general and industry specific pollution standards in the NEQG.

Finally, in addition to the project proponent’s obligations to conduct self-monitoring and report to MONREC on instances of non-compliance with pollution standards, MONREC is also authorized to monitor and inspect projects “in order to control and determine compliance by the Project with all applicable environmental... requirements”.<sup>140</sup> If MONREC determines after inspection that the project is not in compliance with any of the conditions set forth in the ECC, including pollution emissions standards, MONREC is authorized to require the project proponent to “undertake remedial measures,” pay fines, or both. If fines or penalties are assessed against a project proponent, they are paid “in addition to any costs of remediation, clean up, and compensation that may be incurred by the Ministry”.<sup>141</sup> Furthermore, the payment of penalties by the project proponent for violations of pollution standards does not relieve the proponent of liability for claims brought by third parties for damages that resulted from that violation.<sup>142</sup> Annex 3 to the EIA Procedure contains a detailed schedule for different types of violations and their associated penalty amounts.

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<sup>136</sup> EIA Procedure, Sec. 107.

<sup>137</sup> EIA Procedure, Sec. 108.

<sup>138</sup> EIA Procedure, Sec. 109(f).

<sup>139</sup> EIA Procedure, Sec. 109(a) and (d); see also National Environmental Quality (Emissions) Guideline, Sec. 12.

<sup>140</sup> EIA Procedure, Sec. 111.

<sup>141</sup> EIA Procedure, Sec. 127.

<sup>142</sup> EIA Procedure, Sec. 128.

## Dealing with Transboundary Pollution

One final issue to address is that of transboundary environmental pollution. Air and water pollution are not confined by international borders. Since Myanmar shares borders with five countries (Bangladesh, India, China, Lao PDR and Thailand), it is important to consider Myanmar's obligations under international law with respect to transboundary air and water pollution and other environmental impacts. Myanmar's own domestic law does not really address the issue. In fact, "transboundary impacts" are only referred to once in Myanmar's environmental legal framework in Article 28 of the EIA Procedure as one of many factors that the ECD may consider in making a screening determination as to the level of review that a proposed project must undergo.

However, customary international law places a clear duty on Myanmar (and all countries) to prevent and reduce transboundary environmental pollution and to cooperate with neighboring countries through notification and consultation when activities occurring within its own jurisdiction may cause transboundary impacts. The origins of these duties are usually traced back to the Trail Smelter Arbitration, which involved a dispute between the United States and Canada concerning the operation of a smelter that processed lead and zinc ore and was located in British Columbia close to the US border.<sup>143</sup> The arbitration body in that case concluded in 1941 that "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein..."<sup>144</sup> Since that time, this principle has evolved into a clear set of international obligations through state practice, multilateral environmental agreements, and international judicial decisions, and are perhaps most clearly expressed in the 1992 Rio Declaration on Environmental and Development. Under Principle 2 of the Rio Declaration, states have a "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national

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<sup>143</sup> 35 AJIL (1941) 684.

<sup>144</sup> 35 AJIL (1941) 716.

jurisdiction”. Principle 18 requires states such as Myanmar to notify other states of any disasters or emergencies that could produce environmental impacts on those states. And finally, Principle 19 requires states to “provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith”.

## **Conclusion**

As can be seen, Myanmar has established a fairly robust and straight-forward system for the prevention and control of air and water pollution. As economic growth and development continue to increase rapidly in Myanmar, the effective implementation of this system will become integral to ensuring that this development occurs in a sustainable manner and in accordance with Myanmar’s National Sustainable Development Plan (2018-2030) and the National Environmental Policy.





# Participatory Mechanisms in Myanmar for Environmental Impact Assessment

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## Summary

This chapter will look at the key provisions in the laws that provide for opportunities for participation by civil society in environmental and natural resources decisions. The most significant opportunities exist in the context of the Environmental Impact Assessment (EIA) Process for projects. This provides for consultation with communities that may be impacted by the project.

## Introduction

Myanmar has a number of laws and procedures that provide for public participation in environmental matters. This Chapter looks at some of the major legal provisions and also how members of the public and civil society can participate in decisions that will impact on natural resources management and environmental issues in general. It must be remembered that community participation is still a new concept for Myanmar government.

Myanmar now has a comprehensive and good practice system of environmental and social safeguards. Since the adoption of the Environmental Impact Assessment Procedures 2015, there has been a process by which major projects are subject to environmental and social impact assessment. However the process is still new and suffering from many capacity weaknesses. These weaknesses are both in the capacity of the responsible government entities in Myanmar to be able to effectively discharge their obligations under the EIA Procedures as well as in the ability of the private sector EIA consultants to managed complex and difficult projects.

Since 2012, with the adoption of the Environmental Conservation Law 2012, the Myanmar government has developed a comprehensive system of laws and regulations for major projects, including the Investment Law 2016 and the Special Economic Zone Law 2014. As these are relatively new laws there are still challenges with implementation and enforcement.

Although there are many opportunities for the community and civil society to active participate in the EIA system in Myanmar, it is still a new system and only slowly being implemented. This means that there is limited capacity for project-affected people (PAP) to exercise their rights under the EIA Procedure. In order for there to be effective public participation there needs to be support and capacity development for PAP and civil society to be meaningfully engaged in the public participation process.

## **General Constitutional Provisions**

The Constitution of the Republic of the Union on Myanmar (“the Constitution”) was adopted by referendum in 2008. The Constitution provides for a number of provisions that are relevant to protection of the environment safeguard systems. Every citizen has the duty to assist the Union in environmental conservation and the protection of cultural heritage. This can be used to promote the right of the people to participate in environmental matters.

## **Constitution of Myanmar 2008**

### 37. The Union:

- (a) is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union;
- (b) shall enact necessary law to supervise extraction and utilization of State owned natural resources by economic forces;
- (c) shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law.

### 45. The Union shall protect and conserve natural environment

390. Every citizen has the duty to assist the Union in carrying out the following matters:

- (a) preservation and safeguarding of cultural heritage;
- (b) environmental conservation;
- (c) striving for development of human resources;
- (d) protection and preservation of public property

## **Environmental Laws**

### **Environmental Protection Law 2012**

The Ministry of Natural Resources and Environment Conservation (MONREC), formerly known as MOECA, is the Ministry with the authority and responsibility for the implementation of Environmental Impact Assessment (EIA). Under the Environmental Conservation Law 2012 (ECL 2012) and the Environmental Conservation Rules 2014 (EC Rules 2014), the Ministry developed the Environmental Impact Assessment Procedure 2015 (EIA Procedure).

MONREC has also developed Draft Guidelines on Public Participation in EIA. These Draft Guidelines have not yet been adopted by MONREC.

The Environmental Conservation Law 2012 provides the overview on environmental protection in Myanmar. The objectives of the Environmental Conservation Law 2012 include:

Section 3.

The objectives of this Law are as follows:

- (a) To implement the Myanmar National Environment Policy;
- (c) To promote a good and clean environment... for the benefit of both present and future generations;

.....

- (e) To manage prevention of degradation of natural resources and to enable the sustainable use;

.....

### **Investment Law 2016 and Investment Rules 2017**

The Foreign Investment Law 2012 and its subordinate Foreign Investment Rules 2014 (FI Rules 2014) implemented the government's approach to foreign investment, which includes promoting sustainable economic development by encouraging foreign investments in Myanmar. Investors must carry out their activities in a way not to cause environmental pollution or damage in accordance with existing laws. Article 34 of the FI Rules 2014 provides that investment proposals for capital-intensive investment projects designated by the Myanmar Investment Commission (MIC), which need an assessment of their environmental and social impact, must have EIA or Social Impact Assessment (SIA) report attached. This is then referred to MONREC for initial assessment and review. This has been replaced by the Investment Law 2016<sup>145</sup> and the Investment Rules 2017.<sup>146</sup>

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<sup>145</sup> The Pyidaungsu Hluttaw Law No. 40/2016, The 2<sup>nd</sup>, Waning of Thadingyut, 1378 M.E. (18<sup>th</sup> October, 2016)

<sup>146</sup> Ministry of Planning and Finance Notification No. 35 / 2017 The 3<sup>rd</sup> Waxing of Tagu, 1378 M.E. (30<sup>th</sup> March, 2017)

There are a number of notifications issued by the MIC. Notification No. 15 /2017 is a list of activities that are restricted and investment activities that are not allowed to be carried out by foreigners or foreign companies.<sup>147</sup>

The Investment Law is administered by the MIC and grants permits for businesses to operate under the investment law regime. Under s.36 investment activities likely to have a significant impact on the environment or society are required to conduct environmental impact assessment. This would seem to indicate that investment activities should include consultation and participation in accordance with the EIA Procedures 2015.

3. The objectives of this Law are as follow:

- (a) to develop responsible investments *which do not cause harm to the natural environment and the social environment* for the interest of the Union and its citizens;
- (b) to protect the investors and their investments in accordance with the law;
- (c) to create job opportunities for the people;
- (d) to develop human resources;
- (e) to develop highly efficient productivity, service, and trading sectors;
- (f) to develop technology, agriculture, livestock and industrial sectors;
- (g) to develop various professional fields including infrastructure around the Union;
- (h) to enable the citizens to be able to work alongside with the international community; and
- (i) to develop businesses and investments that meet international standardsg

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<sup>147</sup> This is attached as Annexure 1.

Chapter XVI also provides for the responsibilities of the investor. In particular s.65 (g) requires that the Investor “shall abide by the applicable laws, rules, procedures and best standards practiced internationally for this investment so as not to cause damage, pollution, and loss to the natural and social environment and not to cause damage to cultural heritage”.

There is also a provision that imposes a liability for effective compensation for loss incurred to the victim, if “there is damage to the natural environment and socioeconomic losses caused by logging or extraction of natural resources which are not related to the scope of the permissible investment, except from carrying out the activities required to conduct investment in a Permit or an Endorsement”.<sup>148</sup>

The Investment Law 2017 also clarifies that the grant of an investment permit does not exempt an investor from the requirement to comply with the EIA Procedure 2015.

71. In conducting their investment activities, the investor shall carry out health assessments, cultural heritage impact assessments, environmental impact assessments and social impact assessments according to the type of investment activities in accordance with the relevant laws, rules, regulations and procedures.

The Investment Rules 2017 provides for the application and interpretation of the Investment Law 2016. The Investment Rules identifies those investments that will have a large potential impact on the environment or the community. This may also include projects that are likely to cause resettlement for over 100 people. There are no specific requirements for consultation under the Investment Rules.

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<sup>148</sup> Investment Law, s.65(o).

5. For the purpose of section 36(c) of the Law, an Investment is taken to have a large potential impact on the environment and the local community if:

- (a) it has been or is likely to be classified as an EIA Type Project;
- (b) the Investment is located under a designated protected or reserved area or major biodiversity area under the laws in force including the Environmental Conservation Law or areas selected and specified to support the eco system and cultural and natural heritage, cultural commemoration and unspoilt natural areas; or
- (c) it includes rights to occupy or use land which:
  - (1) has been or is likely to be acquired through expropriation, compulsory acquisition procedure or by agreement in advance of such expropriation or compulsory acquisition procedure in accordance with the laws of the Union and will either cause the relocation of at least 100 individuals permanently residing on such land or comprise an area of more than 100 acres;
  - (2) comprises an area of more than 100 acres and would be likely to cause involuntary restrictions on land use and access to natural resources to any person having a legal right to such land use or access;
  - (3) comprises an area of more than 100 acres and which is the subject of a pre-existing bona fide claim or dispute by a person regarding rights to occupy or use such land in a way which would conflict with the proposed Investment; or
  - (4) would otherwise adversely impact the legal right of at least 100 individuals occupying such land to continue to occupy such land.



## SEZ Law 2014 and Rules 2014

Special Economic Zones (SEZs) are governed under the Special Economic Zone Law 2014 (the SEZ Law), which authorizes the Government to establish SEZs. Chapter VIII identifies the types of investment that can be carried out in SEZ areas.<sup>149</sup>

The SEZ Law does explicitly refer to the Environmental Conservation Law, but only to uphold that law's provisions:

35. The investor shall not only abide by the environmental standards described in the Myanmar Environmental Conservation Law and international standards, but also carry out them in accordance with the existing laws in order not to have undesirable health and social impact.

This requirement would appear to explicitly require the SEZ and the SEZ Management Committee to comply with the Environmental Conservation Law 2012.

The SEZ Law restates the provision of the SEZ Law 2011 that requires adherence to all other regulatory requirements:

85. The developer or investor, his employees, technicians, staff and their family members residing in the Special Economic Zone shall also abide by other existing laws of the Union of Myanmar in addition to the provisions of this Law.

This means that any project in SEZ would also need to follow the public participation provisions under the EIA Procedure 2015.

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<sup>149</sup> SEZ Law Article 29.

## **International Principles that may apply in Myanmar**

### **United Nations Declaration on the Rights of Indigenous Peoples**

Myanmar was one of 144 states that endorsed the United Nations Declaration on the Rights of Indigenous Peoples in September 2007. Effective implementation of this human rights instrument would significantly improve the situation for indigenous people in Myanmar and throughout the world. Article 32 is about Indigenous Peoples right to Free and Prior Informed Consent (FPIC):

“States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain Free and Prior Informed Consent prior to approval of any project affecting their land or territories”.

Article 10 about forcible relocation of indigenous people, and the need for FPIC and Article 26 about land rights are also relevant articles for indigenous peoples in Myanmar.

This has not yet been incorporated into Myanmar law. The EIA Procedure 2015 (referred to below) includes provisions for the application of procedures issued by relevant Ministries. However as of 2017, no procedures for involuntary resettlement have been adopted.

7. Projects that involve Involuntary Resettlement or which may potentially have an Adverse Impact on Indigenous People shall comply with specific procedures separately issued by the responsible ministries. Prior to the issuance of such specific procedures, all such Projects shall adhere to international good practice (as accepted by international financial institutions including the World Bank Group and Asian Development Bank) on Involuntary Resettlement and Indigenous Peoples.

Usually this would also require these proposals to follow international standards when it comes to consultation with affect people and communities. At present there are no Myanmar procedures.

## **Legal Arrangements for Participation under Myanmar Law**

### **Environmental Impact Assessment**

The primary mechanism for the approval of infrastructure programs is the EIA system in Myanmar. Section 15 of the EIA Procedure 2015 establishes that MONREC is the exclusive authority for the review and assessment of any Initial Environment Evaluation (IEE), Environmental Impact Assessment (EIA) and Environmental Management Plan (EMP) in Myanmar.

The EIA Procedure 2015 establishes the procedures for EIA and IEE in Myanmar (see Figure 1). The EIA Procedure 2015 provides a standard process for EIA.

- Screening
- Selection and check of the EIA expert
- Scoping
- EIA Investigation
- EIA Report
- EIA Review process
- ECC Issued or Project rejected

The EIA Procedure 2015 further provides that EIA consultants must be registered with MONREC. No EIA or IEE may be conducted unless the consultant or firm is registered. MONREC has established a temporary system for registration of EIA Experts.

The Environmental Conservation Rules 2014 provide further definitions for EIA and IEE:

**Environmental Impact Assessment** means the process of systematic study whether or not there are potentials or impact processes that may cause on the physical, human, biological and socioeconomic environment which is required as part of the decision-making process on the proposed project, business, service or activity;

**Initial Environmental Examination** means the initial process which studies whether or not potential impacts of a project or business or activity is significant, whether or not it is necessary to carry out environmental impact assessment and whether or not it is necessary to prepare and submit other stipulated documents;

The EIA Procedure 2015 also define key terms that are used in the EIA and IEE process, this includes a definition of Project Affected Persons who need to be consulted during the EIA process:

**Project Affected Person or PAP** means a natural person, legal entity, or organization that is, or is likely to be, directly or indirectly affected by a Project or a proposed Project, including without limitation effects in the nature of legal expropriation of land or real property, changes of land category, and impacts on the ecological and environmental systems in the settlement areas of such person, entity or organization.

## Procedure for EIA

The EIA Procedure 2015 includes a screening Annex to provide guidance for the types of listing those projects required to carry out either an EIA or IEE.

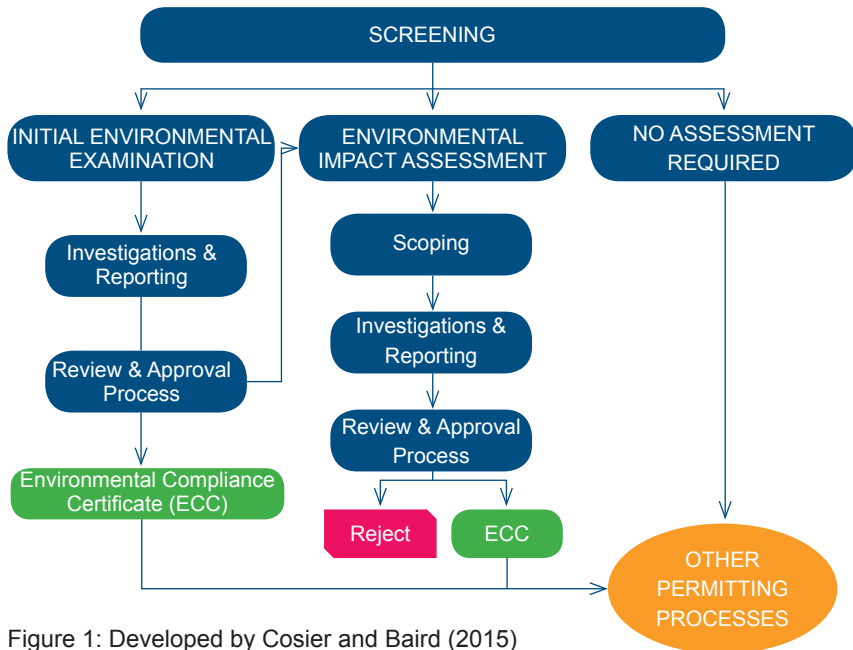


Figure 1: Developed by Cosier and Baird (2015)

### Screening

Screening is the first step in the EIA or IEE process. The Project Proponent will submit an application to MONREC to determine the level of assessment that is required using the Annex I list of projects (Article 23). There is no requirement for consultation at the screening stage.

### Scoping

Only EIA projects must undergo scoping.<sup>150</sup> Following the screening determination that an EIA is required, the Project Proponent and its EIA Consultant must develop a draft Terms of Reference for the EIA for the Proposed Project.

<sup>150</sup> EIA Procedure Article 47.

Scoping requires both an initial study of the proposed project and the possible environmental and social constraints as well as beginning the process of public consultation with PAP and other stakeholders.

Scoping is designed to:

- (a) define the study area, area of influence, time boundaries, Project phases, and potential stakeholders;
- (b) start the process of understanding the applicable regulations and standards, and their context for Project design and completion of the EIA;
- (c) make a provisional identification of Environmental Impacts, focusing in particular on the environmental, social and health issues that need to be addressed in subsequent EIA studies;
- (d) provide an indication of the depth and breadth of the subsequent EIA investigations including what baseline data and information are required, what further studies and investigations must be carried out, and how such data collection, studies and investigations shall be undertaken;
- (e) provide an opportunity for consultants, relevant authorities, project developers, and interested and affected parties to express their views and concerns regarding the proposal before an EIA proceeds;
- (f) enable an efficient and comprehensive assessment process that saves time, resources, and costs and avoids delays; and
- (g) identify potentially affected communities and other stakeholders with an interest in the Project. (Article 49).

In Myanmar, public participation is mandatory at the scoping stage to both release relevant information and consult interested stakeholders.

50. As part of the Scoping, the Project Proponent shall ensure that the following public consultation and participation process is carried out:

- (a) disclose information about the proposed Project to the public and civil society through posting on the Project or Project Proponent's website(s) and local media, including by means of the prominent posting of legible sign boards and advertising boards at the Project site which are visible to the public; and
- (b) arrange the required complement of consultation meetings as advised by the Ministry, with local communities, potential PAPs, local authorities, community based organizations, and civil society, and provide appropriate and timely explanations in press conferences and media interviews.

The Scoping Report must be prepared in accordance with any guidelines issued by the Ministry and shall include draft ToR for the EIA Report in accordance with Article 51.

### *EIA Report Preparation*

Once the Scoping Report and ToR have been approved by MONREC, the Project Proponent is then able to commence the EIA investigation and the preparation of the EIA and the EMP. This must include an assessment of alternatives<sup>151</sup> and must be in accordance with the approved ToR.<sup>152</sup> The EIA is to be comprehensive as indicated in Articles 56 and 57. It must also address the relevant national and international standards. Myanmar adopted National Environmental Quality Standards in 2015. These must be addressed in accordance with the EIA Procedure 2015.

Public Participation and consultation with PAP and Stakeholders forms an integral part of the EIA process in Myanmar.

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<sup>151</sup> EIA Procedure Article 48

<sup>152</sup> EIA Procedure Article 55

61. As part of the EIA investigations, the Project Proponent shall undertake the following consultation process:

- (a) timely disclosure of all relevant information about the proposed Project and its likely Adverse Impacts to the public and civil society through local and national media, the website(s) of the Project or Project Proponent, at public places such as libraries and community halls, and on sign boards at the Project site visible to the public, and provide appropriate and timely explanations in press conferences and media interviews;
- (b) arrange consultation meetings at national, regional, state, Nay Pyi Taw Union Territory and local levels, with PAPs, authorities, community based organizations and civil society;
- (c) consultations with concerned government organizations including the Ministry, the concerned sector ministry, regional government authorities and others; and
- (d) field visits for the Ministry and concerned government organizations.

The EIA Procedure 2015 provides a detailed table of contents for an EIA report, which further outlines the topics and issues to be addressed in the EIA.<sup>153</sup>

Once the EIA report is prepared and submitted, there is a need for disclosure of the EIA Report and the EMP. The EIA Report must also comply with the table of contents in Article 63. MONREC may arrange public consultation meetings and the EIA Review Report Body will examine the EIA Report, and EMP and either recommend the Project be approved, amended or rejected. The Minister makes the final decision. If approved, MONREC will then issue an ECC for the Project.

The Project Proponent is liable for monitoring and compliance with the EIA, EMP and ECC. There is no requirement for the Project Proponent to establish any community consultative committee or grievance mechanism for PAP.

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<sup>153</sup> EIA Procedure Article 63



## Public Participation

Under the EIA Procedure 2015, the Project Proponent shall conduct public consultation processes at both the scoping (for EIA) and investigation steps (both EIA and IEE). The ECD of MONREC has developed a draft Guideline on Public Participation that provides greater details of the process to be followed for public consultation. However at that time, the Draft Guideline is still under consideration and has not been adopted for use by EIA consultants.

13. The Project Proponent shall:

- (a) arrange for appropriate public consultation through all phases of the IEE and EIA process as required by Articles 34, 50, and 61, and
- (b) disclose to the public in a timely manner all relevant Project-related information in accordance with this Procedure except that which may relate to National Security concerns as informed by the Ministry.

Consultation and information disclosure about the project is required at the Scoping Stage. During Scoping, the Proponent must ensure that the public participation includes the following:<sup>154</sup>

- (a) disclose information about the proposed Project to the public and civil society through posting on the Project or Project Proponent's website(s) and local media, including by means of the prominent posting of legible sign boards and advertising boards at the Project site which are visible to the public; and
- (b) arrange the required complement of consultation meetings as advised by the Ministry, with local communities, potential PAPs, local authorities, community based organizations, and civil society, and provide appropriate and timely explanations in press conferences and media interviews.

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<sup>154</sup> EIA Procedure Article 50

During the EIA preparation phase, which occurs after the TOR have been finalized with MONREC, the Project Proponent or EIA Consultant must undertake information disclosure and public participation. Under the EIA Procedure 2015, the EIA 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”.<sup>155</sup>

Article 61 requires that as part of the EIA investigation the Project Proponent shall undertake the following consultation process:

- (a) timely disclosure of all relevant information about the proposed Project and its likely Adverse Impacts to the public and civil society through local and national media, the website of the Project Proponent, at public places such as libraries and community halls and sign boards at the Project site visible to the public;
- (b) arrange consultation meetings at national, state and local level with PAPs, authorities, community based organizations, and civil society;
- (c) consultations with concerned government organizations including MOECAAF, the concerned sector ministry, regional government authorities, and others; and
- (d) field visits for the MOECAAF and concerned government organizations.<sup>156</sup>

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<sup>155</sup> EIA Procedure Article 60

<sup>156</sup> None of the details are clarified in the draft EIA Procedure 2015.

This will need to be subject to further guidelines.

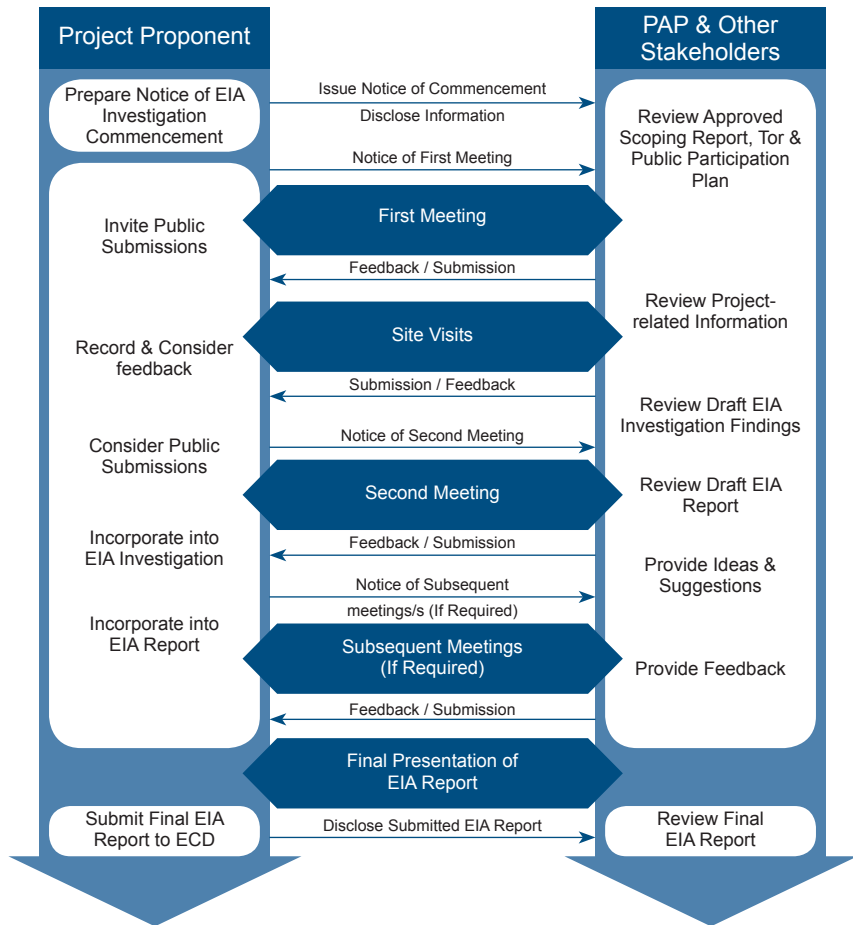


Figure 1: Public participation during EIA Report Preparation<sup>157</sup>

Public concerns should also be taken into account in assessing impacts, designing mitigation measures, and selecting monitoring parameters. The EIA Report must include a section on the public consultation process, including the results of public consultations and negotiations with the affected populations on the environmental and social issues.

<sup>157</sup> Taken from Draft Guidelines on Public Participation in EIA

## *Assessment and Review of EIA*

The EIA Procedure 2015 also establishes an EIA Report Review Body. The Body is responsible for the review and assessment of EIA and making recommendations as to whether to recommend that the EIA should be approved. The EIA Report Review Committee undertakes the review of the EIA Report and may also recommend conditions to be attached to the Environmental Compliance Certificate (ECC) that is issued by the Ministry.

All IEE and EMPs are reviewed by the ECD. The ECD prepares the ECC for approval by the Ministry.

According to the EIA Procedure, and further explained in the Draft Guidelines on Public Participation, ECD is required to provide some degree on public participation during the review and assessment phase of the EIA report. In accordance with article 67 of the EIA Procedure, ECD is responsible for coordinating the review of submitted EIAs, including the public participation processes intended to inform the decision on the EIA. The Proponent is required to pay for this further public participation.<sup>158</sup>

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<sup>158</sup> EIA Procedure Article 69.

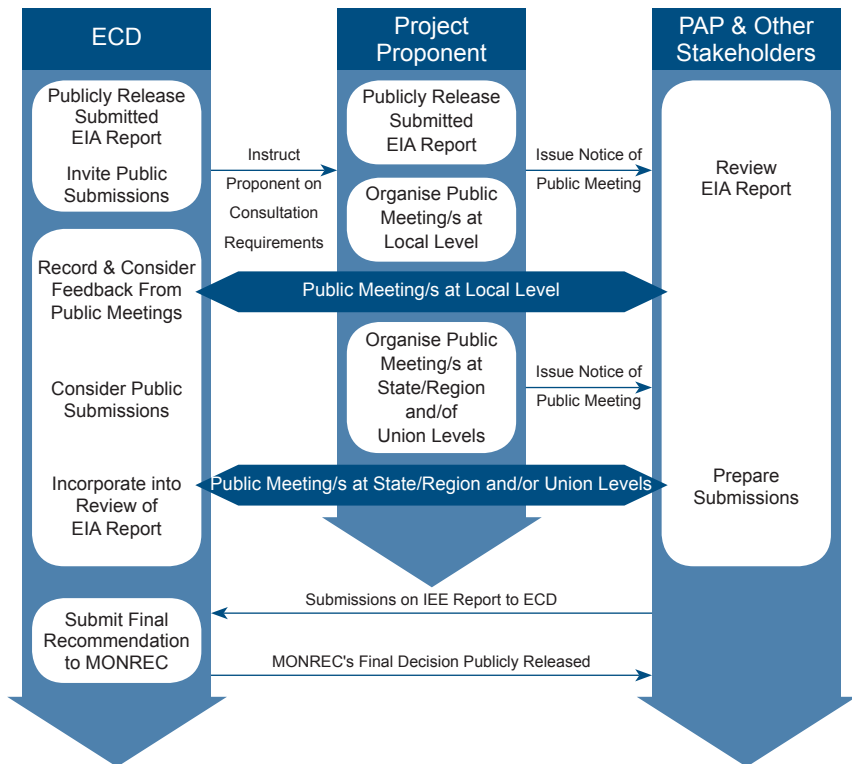


Figure 2: Public participation during EIA Report review<sup>159</sup>

### Approval and Issuing of Environmental Compliance Certificate

Following the review of the EIA by the EIA Report Review Body, the Ministry is to consider a report by the ECD and determine whether to approve or reject the EIA.<sup>16</sup> The process is similar in the case of EMPs and IEE Reports except that there is no requirement for the EIA Report Review Body to consider the EMP or IEE. This is carried out by ECD in accordance with Articles 39 and 40.

<sup>159</sup> Taken from Draft Guidelines on Public Participation in EIA

The Ministry will issue an Environmental Compliance Certificate together with attached conditions. The Ministry may prescribe conditions to be attached to the ECC. Such conditions should include a Grievance Mechanism and a community consultative committee for long term developments. Both of these approaches will help promote participation in the monitoring of the project.

### **Monitoring and Enforcement**

Under Article 87, the proponent is required to commence the implementation of the project strictly in accordance with the conditions attached to the ECC, including the EMP. The EIA Procedure places a heavy reliance on self-reporting. Articles 106-108 provide that the proponent is to conduct self monitoring during all stages of the project in accordance with applicable laws, the EIA Rules, the EIA Procedures 2015, standards, the ECC and the EMP, and that the proponent is to notify MONREC of any breaches of its obligations. Within 10 days of a monitoring report being completed, it is required to be made publically available on the Project's website, at public meeting places and Project offices, and any person is able to request a digital copy of the report.<sup>160</sup> The reporting requirements are enforceable conditions of the ECC and the EMP.

These requirements, together with any community consultation committee and grievance mechanism established by the project proponent will also provide opportunities for continuous community involvement.

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<sup>160</sup> EIA Procedure Article 110

## Review of Public Participation in EIA

Stage IEE/EIA	Opportunity for participation
Screening	None
Scoping	Consultations with local Project Affected Persons
Report Preparation	Consultations, Access to EIA Information, Submissions to EIA consultants
ECD Review and Assessment	Submissions to ECD, Public Meetings
ECC Approval	None but there is an appeal process under the EIA Procedure.
Monitoring and Compliance	The ECC should provide for a Grievance Mechanism for complaints at local level. PAP can always complain to ECD.

### Limits on Public Participation

The opportunities for public participation are new in Myanmar and may conflict with the interests of government or business. This can create conflict and protest. While it can be argued that under s.390 of the Constitution of Myanmar, every citizen has a duty to protect the environment and natural resources, this duty may be limited by laws on defamation, unlawful assembly, internet distribution of material and trespass. So, it is important for all citizens and community groups and civil society organizations to be aware of the limitations to public participation to avoid any potential civil or criminal charges.

Some key limitations to be aware of:

- Defamation
- Unlawful Gatherings
- Trespass

## Defamation

Defamation is covered under section 499 of the Penal Code 1861. It covers words, either spoken or intended to be read in papers, submissions, petition, letters of objection submitted to the Government and post on the internet or Facebook. You can defame people and politicians as well as companies and associations. It would include banners and signs held up at rallies and meetings. For a good discussion on defamation see the Rule of Law Handbook for Journalists in Myanmar 2017, Copyright by Konrad-Adenauer Stiftung Ltd., Myanmar and United Nations Development Programme (p.81).

## Unlawful Gatherings

Often public participation includes organizing a meeting, a conference or a rally. In many cases this will need the approval of the local township Chief of Township Police or the approval from the General Administration Department. The Peaceful Demonstration and Gathering Act 2012 requires prior permission for a peaceful procession, which may also specify the date, time and route of the event. Failure to comply with the terms of the permission is an offence.

## Trespass

There are strict rules against trespassing on private land and government land without permission or approval from the relevant authorities. Section 441 of the Penal Code defines criminal trespass which includes entering on property to “commit an offence or to intimidate, insult or annoy any person in possession of such property.” It is also an offence if you have lawfully entered the property but then “unlawfully remain” on the property “to intimidate, insult or annoy any person.” So if asked to leave it is always better to comply rather than potential commit a criminal trespass.



