



Responsible Investment in Myanmar: The Human Rights Dimension

Occasional Paper Series
Paper Number 1

SEPTEMBER 2012



Institute for
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Shaping Policy • Advancing Practice • Strengthening Accountability

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About this Paper

This is the first in a series of Occasional Papers by the Institute for Human Rights and Business (IHRB). Papers in this series will provide independent analysis and policy recommendations concerning timely subjects on the business and human rights agenda from the perspectives of IHRB staff members and research fellows.

This paper was prepared by IHRB Policy Director, Salil Tripathi with input from IHRB's South East Asia Programme Manager, Donna Guest.

Over the past year in particular, IHRB has been studying Myanmar's re-emergence in the global economy and believes political changes in the country represent an important opportunity in the area of business and human rights. IHRB staff members have visited Myanmar, most recently in July 2012 at the invitation of the British Government to present a round-table on business and human rights with Myanmar government and opposition leaders, as well as local and international business representatives.

In collaboration with the Danish Institute for Human Rights, IHRB is working with local and international partners to establish a responsible investment resource centre in Myanmar and will be developing a number of activities aimed at fostering trade and investment in the country consistent with the United Nations (UN) Guiding Principles on Business and Human Rights and other international corporate responsibility standards. The resource centre will be open to all actors: local business, international business, government, parliamentarians, investors, civil society, trade unions and communities. From September 2012 a local co-ordinator is in place, based at the British Council in Yangon, to establish the resource centre and also to organize a series of thematic workshops on many of the issues discussed in this paper.

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Introduction

FOR NEARLY A QUARTER CENTURY, Myanmar, the resource-rich south-east Asian country formerly known as Burma¹, has been mostly off-limits for investors from Europe, the United States, Australia, and a few other countries whose governments had imposed economic sanctions because of the country's poor human rights record.² With rapid political changes in the country in the past year, that is about to change.

In recent months, the leader of the National League of Democracy Party (NLD), Aung San Suu Kyi, who had been imprisoned for 15 of the past 23 years (much of it under house arrest), has been able to travel abroad freely. In April 2012, she led her party to a sweeping victory, winning almost all seats in the parliamentary by-elections. She visited neighbouring Thailand in May followed by a June visit to Europe where she received the Nobel Peace Prize, which she had been awarded in 1991 but had been unable to accept in person, because she was a political detainee at that time. In September she is scheduled to visit the United States.

In recognition of the political and economic reform process initiated by the government of Myanmar, the European Union and the United States (US) have suspended most economic sanctions (retaining the arms embargo) and are watching political developments in the country carefully, although rolling back US sanctions is not straight forward³, as they comprise numerous laws, orders, and declarations passed at different times.

Next year, Myanmar will host a major regional sporting event as well as a regional summit of the World Economic Forum, and in 2014, it assumes the chair of the Association of South-east Asian Nations⁴ (ASEAN). With parliamentary elections scheduled for 2015, businesses have begun making plans to make major investments in Myanmar, a country often called the last frontier of Asia.

Myanmar's leadership – both the government and the opposition – have called for new investments to be responsible and ethical.

1 Burma's name was changed to Myanmar in 1989 by the military government. The opposition NLD continues to call it Burma. Proponents of Myanmar say it is a more inclusive name, and Burma has colonial connotations. It also implies that Burma is made up of Burmans, or Bamars, as the majority community is known. The country is an ethnic melting pot, with many other communities, including the Chin, Karen, Kachin, Shan, Mon, and Karenni, among others. Some governments, such as the United Kingdom, continue to call the country Burma; Myanmar is the officially registered name at the United Nations. For the purpose of this report, the text refers to Myanmar when addressing the period after the name was officially changed, and Burma, when referring to the time before the legal change.

2 For a detailed account of Myanmar's human rights record, see the latest report of the UN Special Rapporteur on Myanmar <http://daccess-dds-nu.un.org/doc/UNDOC/GEN/G12/116/04/PDF/G1211604.pdf?OpenElement>. Further information about allegations of forced labour is available at the website of the International Labour Organisation, and can be found here: <http://www.ilo.org/yangon/info/meetingdocs/lang--en/index.htm>. Human rights groups have also documented the human rights situation in Myanmar, which can be found here: Human Rights Watch (<http://www.hrw.org/world-report-2012/world-report-2012-burma>) and Amnesty International (<http://www.amnesty.org/en/region/myanmar/report-2012>)

3 Licences for new investments (exceeding \$500,000) by American entities include strict requirements that the investors report annually to the US Government on a range of issues, including human rights.

4 The regional grouping was formed in 1967 and today includes Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

Among the concerns they have identified include protection of workers' rights, the environment, and respect for human rights. Myanmar's President, Thein Sein, under whose leadership path-breaking political reform has occurred, has made several noteworthy speeches recently, calling upon businesses to operate in a responsible manner.⁵

Last year, he suspended work⁶ on a controversial dam project, which would have generated electricity primarily for export to China, because of opposition from local communities and potential environmental impacts.

In her speeches⁷ in Europe, Aung San Suu Kyi has called for investments that are responsible, democracy- and human rights-friendly, environmentally responsible, and respectful of labour rights. She has also warned investors that they should not enter into business relationships with local businesses compromised by their close ties with the military or with businessmen who may be political actors.

Following the parliamentary by-elections in April, the United Nations (UN) Global Compact launched its activities in Myanmar, admitting 14 companies and the Myanmar Chamber of Commerce as participants in the world's largest voluntary corporate citizenship initiative.

The International Labour Organisation has readmitted Myanmar as a member. The World Bank is opening an office, although it cannot extend loans to Myanmar until US sanctions are fully revoked. Aid and development agencies and non-governmental organisations are exploring the issues facing the country to ensure that existing and new investments are responsible. This burst of activities points to the need for close coordination, broad consultation, and for local capacity building.

Investors looking for guidance on responsible business practices for operating in such contexts do not have to look far. In 2011, the UN Human Rights Council unanimously adopted Guiding Principles on Business and Human Rights, the final product of the six-year mandate of UN Special Representative John Ruggie. The UN Guiding Principles affirm the duty of all states to protect against human rights abuses, the responsibility of all companies to respect human rights, and where protection gaps exist, the need to ensure access to effective remedies.

This paper offers an analysis of the current political and economic situation in Myanmar, identifies a number of risks companies currently operating and considering investment in the country face, and raises questions that businesses should address so that investments are consistent with the corporate responsibility to respect human rights as affirmed in the UN Guiding Principles.

5 In June he spoke about the need for worker protection and minimum wage by businesses (<http://www.mizzima.com/business/7389-thein-sein-calls-for-a-minimum-wage-and-worker-protection.html>) and stressed the importance of protecting the environment (<http://online.wsj.com/article/SB10001424052702303703004577475801843797044.html>)

6 See "Government backs down following widespread public protest over dam project at Myitsone" in *Myanmar Times*, Oct 3-9, 2011: <http://www.mmtimes.com/2011/news/595/news59501.html>

7 See, for example, her speech in Geneva (<http://www.reuters.com/article/2012/06/14/us-myanmar-swiss-suukyi-idUSBRE85C1NA20120614>) and the United Kingdom (<http://www.scotsman.com/the-scotsman/politics/aung-san-suu-kyi-would-welcome-ethical-uk-investment-in-burma-1-2360900>)

The Path to Democracy

IN APRIL 2012, Myanmar held parliamentary by-elections to fill 45 seats vacated by representatives elected from those seats who were required to resign their seats upon assuming ministerial office, as per Myanmar's 2008 constitution. The NLD had boycotted the 2010 elections because many of its leaders were still in jail and because it disagreed with several key features of the 2008 constitution. But it participated in the 2012 by-elections due to the changed political conditions in the country.

The NLD won 43 of the 45 seats, including four in the country's new capital, Naypyitaw, polling nearly 66% of the popular vote. This was the NLD's first electoral test since 1990, when it contested parliamentary elections and won 392 of the 492 seats (and 52.5% of the popular vote), even though Aung San Suu Kyi was under house arrest at the time. Despite its victory in 1990, the NLD was not allowed to form a government. The military regime ignored the results, and years later annulled the election. In the intervening period, besides Aung San Suu Kyi, hundreds of the party's supporters, including its entire leadership, were imprisoned for many years. Many more hundreds were arrested.

The NLD's victory in April 2012 shows that Aung San Suu Kyi remains hugely popular, and if parliamentary elections were to be held now, the party would likely win easily. But as things stand, the NLD has less than 8% of the 664 seats in the bicameral parliament, a quarter of which are reserved for the military.

NLD leaders will have to be skilful in their negotiations with the government to enact the constitutional changes they say are necessary to make the parliament more representative of the people than is currently the case. Political analysts suggest the government may not be willing to disrupt the status quo by making substantial changes to the constitution.

It should be noted that the government drafted and promulgated the new constitution, and the NLD and many other parties mostly boycotted the process. The constitution has attracted criticism from human rights groups and the constitutional process⁸ has been controversial.

Burma gained independence from Britain in 1948, and Bogyoke (General) Aung San⁹ who founded the Burmese Army, was expected to be the first president. But he and his key advisers were assassinated a few months before independence. Mystery still surrounds who led the conspiracy and why. The military prosecuted a former prime minister and a few British officers, and executed the former premier. Civilian governments unable to exert influence or control over the entire territory followed, until a military coup deposed a civilian government in 1962.

Since the mid-1960s, while the Burmese economy declined, the neighbouring countries of Thailand, Malaysia, Singapore, Indonesia, and the Philippines had begun to prosper. The economy has stagnated in the past 50 years, and in the

⁸ See *The limits of reform in Myanmar*, Lintner, Bertil (*Asia Times*, Jan 18, 2012) <http://www.atimes.com/atimes/Southeast Asia/NA18Ae03.html>

⁹The father of Aung San Suu Kyi.

1980s the government asked the UN to give the country “least-developed” status to qualify for concessional finance. In 1989, the generals renamed the country, calling it Myanmar. The government also sought foreign investment to revive the economy.

After the military refused to recognise the results of elections in 1990, western nations imposed sanctions, which slowed Myanmar’s economy significantly, but did not cripple it. A recent Amnesty International delegation to the country was told: “Sanctions did not cause Myanmar’s economic decline, but are hindering its economic recovery.”¹⁰ While lack of funding from the World Bank and the IMF due to US sanctions has prevented large aid inflows, it should be noted that under Paris Club rules, Myanmar would have to clear its arrears before qualifying for fresh loans. There has neither been a request from the government of Myanmar nor an inclination among most donor countries to offer such concessions.

Myanmar’s economy functions at high cost, and is dominated by a few large firms, which resemble oligopolies. Many of these firms represent specific multinational corporations, which directly cannot, or have chosen not to establish their own operations in Myanmar.

Foreign companies from China, South Korea, Taiwan, Thailand, Malaysia, and Singapore have invested millions of dollars in Myanmar over the past two decades. Myanmar’s business infrastructure is antiquated, and the country suffers from common constraints of command economies such as high costs and shortages of critical components, which hampers production. Its weak banking, legal, and administrative infrastructure adds further costs.

After sanctions were imposed, western governments permitted their companies already operating in Myanmar to continue their activities. *Total* of France, *Premier Oil* of the UK (which bought the Myanmar interests of the American company *Texaco* in 1997), and *Unocal*¹¹ (which was later bought by *Chevron* in 2005, and *Chevron* had independently bought *Texaco*’s worldwide business in 2000) of the US, were among the significant western oil companies operating in the country.

Since 1989, the government has initiated a series of steps amounting to limited economic reforms, including opening the country to foreign investments. China and other neighbouring countries have invested. In 1997, Myanmar joined ASEAN, in spite of criticism from some in the international community, who said it would make it difficult for the leaders of those countries to meet ASEAN delegations if Myanmar was part of the grouping. Over the past 20 years, Myanmar says it has received foreign investment of \$20 billion. According to the UN Conference on Trade and Development (UNCTAD), the actual inflow over this period is actually closer to \$756 million.¹²

While the ostracism of Myanmar’s political elite has been comprehensive in the West, over the years, some diplomats, local businessmen, and a few civil society activists (including former NLD members, most notably Ma Thanegi¹³) have argued that sanctions have harmed the poor. In particular, they point out curbs on textile

10 In its account of its recent mission to Myanmar, (<http://www.amnesty.org/en/library/asset/ASA16/003/2012/en/62cc4319-a779-4c9e-93c8-0a3945203411/asa160032012en.pdf>) Amnesty International says countries should take a critical look at their current policies in Myanmar because a viable economy is one of the necessary, if not sufficient conditions to promote and protect economic, social, and cultural rights.

11 Chevron acquired Texaco in 2000 three years after Texaco left Myanmar. Chevron also acquired Unocal in 2005. It has since continued to operate Unocal’s joint venture in Myanmar.

12 <http://thediplomat.com/asean-beat/2011/08/31/behind-burmas-rising-fdi/>

exports, which the US government imposed in 2003, resulted in the closing of many garment factories, leading to tens of thousands of job losses¹⁴.

Myanmar's vast port sites present a picture of inactivity these days. In the past two decades, some European businesses have had to leave Myanmar because of activist pressure in their home countries, as was the case with Heineken Breweries¹⁵ and Triumph¹⁶, the manufacturer of undergarments. Tourism companies avoided marketing holiday visits to the country, because until recently the NLD opposed commercial transactions with businesses closely linked with the government. Many other companies have publicly said they are waiting for the NLD to give them a go-ahead.

This places the NLD in a peculiar position, since it does not govern the country. It has no power to make legislation, and NLD officials say the legislative process is not transparent and they do not have full access to information about proposed changes¹⁷. The NLD is an opposition party, and its relations with the ruling Union Solidarity Development Party (USDP) could pose challenges.

But public support for the NLD by world leaders, and the importance given to its leadership's views on specific investment projects have created the impression among some Myanmar government officials that the NLD is acting in concert with external powers and undermining the economy. In her recent speeches in Europe and elsewhere, Aung San Suu Kyi has welcomed responsible investment that respects workers' rights, which does not harm the environment, and which is supportive of democracy and human rights.

Besides the dilemma of sanctions, there are other issues that affect Myanmar, including human rights concerns and ethnic conflict. Between 1989 and 2011, the State Law and Order Restoration Council (or SLORC, as the military regime described itself, and later changed to the State Peace and Development Council, or SPDC) imposed severe restrictions on civil liberties. Thousands were jailed and many were tortured; the military fought battles with insurgency movements¹⁸ representing the Karen, Kachin, Chin, Shan, Karenni and other ethnic minority groups; and the government cut off some contact with the outside world.

13 <http://asiapacific.anu.edu.au/newmandala/2008/03/02/interview-with-burmas-ma-thanegi/>

14 The Myanmar Garment Manufacturers' Association claimed some 85,000 jobs, an overwhelming majority of them being young women, were lost after the US strengthened sanctions in 2003. See <http://www.mmtimes.com/2011/news/562/news56202.html>

15 <http://www.nytimes.com/1996/07/11/business/heineken-quits-its-burmese-venture.html>

16 <http://www.burmacampaign.org.uk/index.php/news-and-reports/news-stories/Campaigners-force-Triumph-Internationals-withdrawal-from-Burma/3>

17 See *Irrawaddy* July 3, 2012.

18 Myanmar's government has now entered into ceasefire agreements with all but one ethnic minority armed political groups. The government has recently begun dialogue with the Kachin group, after a 17-year ceasefire agreement broke down in June 2011 and fighting resumed. Some of the conflicts lasted decades. Burma's borders were created out of British-ruled territory east of India, and many groups resented the level of authority the Burmese-majority community exerted over minorities. While the NLD has not had experience in governing, Aung San Suu Kyi has pointed out that some ethnic groups have acted in concert with the NLD in boycotting elections, and in participating in political activities when the NLD has chosen to do so. The NLD draws its confidence from the Panglong Agreement, which Gen Aung San signed with three ethnic groups before his death, and the spirit of that document will guide the NLD's policies on the ethnic issue.

The 17-year ceasefire between the Kachin Independence Organization (KIO) and the military broke down in June 2011, and fighting continued, displacing nearly 75,000 people. Preliminary talks have now begun between the government and the KIO, and if a ceasefire agreement is signed, it will mean all ethnic insurgencies have signed some form of truce with the military. But since the April elections, the Rohingya¹⁹ issue has resurfaced, and thousands of displaced Rohingyas are seeking refuge in neighbouring Bangladesh, due to ethnic conflict²⁰ in the Rakhine (formerly Arakan) province.

Years of isolation have made it harder for the government to interact with the international community. Partly self-imposed, and partly due to sanctions, Myanmar's government has several leaders who have never travelled abroad, not even within Asia. So suspicious had the government become of foreigners, that it initially refused assistance from UN agencies and western governments in the aftermath of Cyclone Nargis²¹, which devastated the Irrawaddy delta in 2008. In 2005 the government decided to shift the capital to Naypyitaw, a new city in central Myanmar, for reasons, which were never made fully clear. Much of the new capital is now built.

Current political changes have gained momentum since March 2011, when Gen Than Shwe, who had led the country for 19 years, stepped aside, making way for President Thein Sein. The political scenario changed quickly as the President began releasing political prisoners and censorship has been relaxed.²² Thein Sein is widely respected as a quiet, unassuming man committed to the path of reforms. Political observers say he and Aung San Suu Kyi have reached an understanding and trust each other.

Building on that trust is one of the fundamental challenges Myanmar faces today. Beyond party politics, building trust between ethnic Burmans and other ethnic groups is of enormous importance.

19 Rohingyas are Muslim and speak a dialect also spoken in Southeastern Bangladesh. They do not have citizenship rights in Myanmar, and their conflict with the Myanmar state is an old one. In June 2012, violence flared up in the Rakhine State between the Rakhine community, which is Buddhist, and the Muslim Rohingya community. Under the 1982 Citizenship Law, Rohingyas are denied citizenship and are *de jure* stateless. Since 1978 hundreds of thousands have fled from extreme repression from the military, primarily into neighbouring Bangladesh, but also to other countries. Abuses by the army included forced labour, forced relocation, and severe restrictions on freedom of movement and marriage.

20 See *The Government Could Have Stopped This: Sectarian Violence and Ensuing Abuses in Burma's Arakan State* (Human Rights Watch, 2012) <http://www.hrw.org/node/109214>.

21 See *Everything is Broken* by Emma Larkin. Penguin 2010.

22 Censorship is being relaxed, and new publications are permitted. In late August Myanmar removed media censorship on private publications (<http://uk.reuters.com/article/2012/08/20/uk-myanmar-censorship-idUKBRE87J0Q820120820>) although it is uncertain what its impact will be because of the prevailing culture of self-censorship (<http://www.thejakartapost.com/news/2012/08/22/no-media-freedom-yet-only-self-censorship-myanmar.html>). The Internet remains slow, but that will change in due course, with new investments. At the same time, political prisoners are, in effect, being released on parole. Since May 2011, over 650 political prisoners have been released. Absurdly long prison terms had been handed out to dissidents now released, such as the comedian Zarganar and the former student activist Min Ko Naing. Others jailed have included monks, civil society leaders, politicians, cartoonists, bloggers, stand-up comedians, writers, and artists.

MOVING FORWARD

Myanmar has entered uncharted territory. What accounts for the changes unfolding in the country today?

Need for international recognition: President Thein Sein has explained the rationale for reforms by highlighting the need to address poverty in the country. Some suggest the government wants international recognition. It was keen to enter ASEAN and waited several years before it was allowed to do so in 1997. The elections of 2010, the release of over 650 political prisoners, and the by-elections all indicate the government is serious.

Growing international attention on Myanmar is also prompting change. In 2013, the country will host the biennial South-east Asian Games, which brings together athletes from the 10 ASEAN states and Timor Leste. The same year, Myanmar will host the East Asia Summit of the World Economic Forum. In 2014, Myanmar will chair ASEAN, and it may also host several summits as part of the grouping's dialogue partnership with major powers. All these events will bring many foreign athletes, journalists, dignitaries and delegates to Myanmar, requiring the construction of new hotels, better infrastructure and basic economic reforms.

Economic imperatives: Actual inflows of foreign investment remain low. The economy has many built-in inefficiencies and redundancies. It takes several months before a business can be set up, be it a shop or a factory. Foreign companies are mystified by the plethora of laws, regulations and various levels of hierarchy they must negotiate.²³

According to Transparency International, Myanmar ranks 180th out of 182 countries in its most recent corruption perception index. The International Finance Corporation's project to measure business-friendliness of various countries does not even evaluate Myanmar. There are no major foreign banks in the country. Some local businesses are alleged to have links with the narcotics trade. Banks in Myanmar do not have modern facilities such as automated teller machines, credit cards, computerised processing, or even cheque payment. Most payments are in cash, irrespective of the size of the amount. The official exchange rate used to be six kyat to one US dollar, and now a managed float rate is in place, at 874 kyat to the dollar in mid-August. Until recently, there were four additional rates, including a *hundi*²⁴ rate, a rate for imports, a rate for exports, and another for financial transactions.

In terms of other basic infrastructure, land-based telephone services in the country rarely work reliably. Cellular coverage is spotty and expensive. Until about two years ago, merely obtaining a SIM card could cost thousands of dollars. Power outages are common. Myanmar produces oil, but it has petroleum shortages, since most domestically produced oil is exported. Aid workers have seen cars drawn by horses in rural Myanmar.

²³ See *Don't Count Burma's Chickens Yet* – Turnell, Sean; *The Wall Street Journal* June 14, 2012 (<http://online.wsj.com/article/SB10001424052702303822204577465881226401976.html>)

²⁴ *Hundi* is negotiable instrument, bill of exchange, or promissory note of India and used wherever Indian financiers operated, and used especially in the internal finance of trade.

Economic revival is clearly important for Myanmar. Outwardly, Yangon appears to be a typical South-east Asian city at the cusp of a major change: somewhat charming and quaint with its tree-lined roads and an absence of high-rise buildings. Its bazaars are busy with outdoor hawker stalls full of families sitting on stools eating noodles. Monks are commonly seen crossing roads in a disciplined file while relaxed couples walk by the lake.

But the imposition of sanctions has created an artificial economy, which has been a bonanza for well-connected local businesses. Many products, like a four-wheel drive vehicle – necessary for travel in rural Myanmar – cost twice as much as in neighbouring Vietnam or Thailand. Repairs are impossible, as no major manufacturer has service stations in the country.

Moreover, widespread poverty in Myanmar cannot be understated, something the President has said publicly his government will address. Of the 187 countries the United Nations Development Programme evaluated in its Human Development Index for 2011, Myanmar ranked 149th.²⁵

Balancing Chinese influence: Myanmar's decision to balance its relationship with China²⁶ on the one hand and western governments on the other is seen as another key factor driving current government actions. An internal report²⁷ dating back to 2004, apparently published by the country's Defence Service Academy, suggests the current military leadership has old grievances with the Chinese. That report argues that the country's reliance on China as a diplomatic ally and economic patron has created "a national emergency" that threatens Myanmar's independence.

The dossier stresses that Myanmar should normalise relations with the West after a new Parliament is in place so that the regime can be made more acceptable to the outside world. Distancing from China is part of that package. Western governments have been aware of these changes.²⁸

It should be noted that Myanmar's outwardly friendly relations with China are relatively recent, dating from after China began to open its own economy in 1979. With its coastal provinces booming, China sought to spread growth more evenly. For goods made in Yunnan in South-west China, the province bordering Myanmar, a journey to the port in Shanghai would take several days; exporting goods made in Yunnan out of Myanmar's ports is a more efficient option.

China therefore began cultivating Myanmar, with an eye on its resources. Today, Chinese companies have won major concessions to exploit Myanmar's natural resources, including minerals and timber, and construction has begun on the \$29 billion Shwe pipeline, which will carry oil and gas to China through central and northern Myanmar. (Two Indian companies—ONGC Videsh and GAIL—are partners in the project.) Chinese products are widely available in Myanmar.

25 <http://hdrstats.undp.org/en/countries/profiles/MMR.html>

26 See *China Behind Myanmar's Course Shift*. Lintner, Bertil; Asia Times, Oct 19, 2011
<http://www.atimes.com/atimes/Southeast Asia/MJ19Ae03.html>

27 See *The Master Plan for Myanmar* Lintner, Bertil; Asia Times, Feb 10, 2012
<http://www.atimes.com/atimes/Southeast Asia/NB10Ae01.html>

28 See the work of the Asia Society's Task Force on US Policy towards Burma/Myanmar, in particular the report *Advancing Myanmar's Transition*
(http://asiasociety.org/files/pdf/120216_us_policy_myanmar_report.pdf).

Shopping centres have brands like Cora (fashion) and Wai Yan (electronics), while Chinese-made Chery QQ3 mini cars are on the roads.

One critical test of Sino-Myanmar relations is the fate of the Myitsone dam in the conflict-ridden Kachin State. Burmese and Chinese companies were building the large hydroelectric project, but it became highly controversial because it would likely cause massive flooding in upper Myanmar, and the electricity generated was primarily meant for export to Yunnan, with only limited supply in energy-starved Myanmar. In a country where dissent is rarely expressed in public, many villagers have been protesting against the dam since 2001. In September last year, President Thein Sein wrote in a letter to parliament:

*As our government is elected by the people, it is to respect the people's will. We have the responsibility to address public concerns in all seriousness. So construction of Myitsone dam will be suspended...*²⁹

The decision stunned many, including environmentalists—who applauded the government—as well as the Chinese government, which sought an explanation for Myanmar's intentions. The controversy over Myitsone builds on long years of resentment many in the country have harboured towards the Chinese. Traders complain that Chinese investors don't hire local people but bring workers from China by the thousands. Moreover, the Myitsone dam is on the Irrawaddy River, seen by the Burmese people as a symbol of its culture and spiritual and national identity. As Myanmar opens to the west, it is inevitable that China will watch its moves closely. Early indications are that China is concerned about the steps Myanmar has taken, with its official media criticising democracy³⁰ and questioning the relaxation of censorship.³¹

Concern over devastation: Cyclone Nargis, Myanmar's worst natural disaster in history, which devastated parts of the country in April-May 2008 is seen as another factor in the changes taking place in the country. In the delta and surrounding areas at least 130,000 people were killed and many hundreds of thousands struggled to survive without adequate food, water, or shelter. Rebuilding infrastructure required significant resources. The rapid, spontaneous and organized assistance provided by Burmese civil society – including monks, churches, ad hoc groups – said much about the compassion and resourcefulness of the Burmese people. Some reports suggest³² the devastation influenced Thein Sein, who was already predisposed towards reforms, to do more.

Other political imperatives: A final factor which helps explain ongoing change is the nature of internal dynamics in Myanmar's politics. While its leaders have frequently made remarks indicating that every reform they have initiated is part of "a roadmap" they had unveiled, critics disagree and dismiss those efforts. But many steps the government has taken were outlined in public announcements, and

29 President Thein Sein said this in a letter to the Parliament in September 2011.
<http://www.bbc.co.uk/news/world-asia-pacific-15121801>

30 See *Democracy no Panacea for Myanmar's Woes* Gang, Ding in *Global Times*, June 20, 2012
<http://www.globaltimes.cn/content/716192.shtml>

31 See *China State Media at Odds over Myanmar Censorship Move* Lin, Lilian in *The Wall Street Journal*, Aug 22, 2012 <http://blogs.wsj.com/searealtime/2012/08/22/china-state-media-at-odds-over-myanmar-censorship-move/>

32 See *A Most Unlikely Liberator in Myanmar*. (Fuller, Tom, *The New York Times*, March 14, 2012).
<http://www.nytimes.com/2012/03/15/world/asia/a-most-unlikely-liberator-in-myanmar.html?pagewanted=all>

those imperatives have certainly contributed to the current reforms. Viewed in this light, some of the recent changes in the country are less surprising.

It seems plausible that a combination of these motives – rebuilding the country, improving the economy, gaining international respectability, establishing a new relationship geopolitically - with the west and with China - and working towards internal political imperatives — explains why Myanmar has undertaken reform steps at this time.

It is difficult to assess Myanmar's future path in the years leading up to 2015 and beyond. Three distinct scenarios of what might happen in the near future are most often discussed:

- In the *optimistic scenario*, reforms continue at an even pace; the NLD and USDP work amicably in parliament and outside; international events Myanmar is due to host pass uneventfully; the military agrees to an arrangement of a significantly reduced role in return for immunity from future prosecution over its past conduct; and free and fair general elections are held in 2015 without incident.
- In the more *realistic scenario*, reforms falter because foreign investment is slow on the uptake, prolonging Myanmar's economic crisis; the NLD and USDP have a difficult, confrontational relationship; ethnic groups become restive and violence returns; the Rohingya crisis worsens; the military refuses to make concessions; elections are held in 2015, but aren't free or fair.
- In the *worst-case scenario*, reforms stop due to unforeseen events, which may include leadership change; break down in cease-fire agreements; consolidation of military positions; restrictions imposed on NLD and its leaders; and postponement or suspension of 2015 elections.

It is impossible to predict which of these outcomes will occur, but it is in the interest of all that every effort is made to ensure the ultimate outcome resemble the first, optimistic scenario. Many dangers lie ahead. The status quo serves only the interests of hard-liners within the government, businessmen likely to lose influence and monopoly, and politicians fearing future prosecution.

Analysts have attempted to draw parallels with the South African transition, to explore if Myanmar can follow a similar path. While acknowledging the many differences between South Africa and Myanmar, there are some commonalities. The events of the past few months in Myanmar could be considered the equivalent of the release of Nelson Mandela from prison, and the beginning of negotiations leading to constitutional reforms in South Africa, but not to the end of apartheid itself. (Mandela was released from prison in 1990; South Africa held a referendum among white voters in 1991, asking them if President de Klerk should continue the reforms. The first elections took place only in 1994).

One working assumption among experts in the region is that Myanmar's leaders seek a conclusion similar to the Indonesian model. The democratic transition of post-Suharto Indonesia, in which the army would loosen its control of the parliament gradually and slowly, to make way for democracy, has been suggested as an Asian alternative. (The current President of Indonesia, Susilo Bambang Yudoyono, is a former army officer.) The Indonesian army continues to exert some influence politically and economically in the country, but its former dominance is substantially diminished. Myanmar's situation is unique and different, but it can be understood why the military would prefer an Indonesian scenario.

The NLD has serious issues to address as well and needs to articulate positions on critical issues facing the country, including with respect to overcoming ethnic divisions.³³ The party will have to develop policies on a whole range of issues, including on economic reform. Its leadership has few young leaders, and those who have stayed with the party during the hard times have legitimate aspirations for political power.

At the same time, the NLD is reaching out to a younger generation of professionals, some of them hitherto apolitical, who may be driven by ambition to join the party and who may have political aspirations of their own. Balancing the two will be among the many questions the NLD will have to face.

This is a perpetual challenge for movements struggling to establish democracy. The African National Congress experienced it, comprising as it did those who had struggled against apartheid from abroad; those who fought from within; and those who went to jail.

Political change, however rapid, may not yield immediate economic benefits. Past experience in Vietnam, Cambodia and South Africa has shown that while opening to the outside world leads to an initial boost in trade, serious investment takes time, because investors wait for uncertainties to diminish.

³³ See *Aung San Suu Kyi Must Transition Too*, (Nehru, Vikram *The Wall Street Journal* June 20, 2012). (<http://online.wsj.com/article/SB10001424052702304898704577477991620165070.html>).

Investment Challenges

Businesses considering investment in Myanmar will face many challenges. Large projects in particular may lead to significant human rights abuses unless effective due diligence is ensured at all levels.³⁴ In this section, human rights related impacts associated with a select number of critical issues are outlined.

Land: Companies investing in Myanmar will need access to land. Whether their business is to set up a retail store, build a port, erect power lines or cellular telecommunication towers, construct factories, design golf courses, create tourism complexes, or establish export processing zones, investors will need to acquire or use land. Human rights groups fear this will accelerate the trend seen in some countries of so-called land grabs.³⁵

Forced eviction of communities is one human rights risk that is frequently associated with land acquisition and use. While new land laws have been promulgated, under which people have to register their land with the state, civil society groups contend that small farmers, farmers in ethnic areas or in remote areas, may not know of the proposed changes, and companies or well-connected individuals may end up acquiring such plots, whether or not they have identified legal or customary owners. Once the new owners acquire legal title, they can seek access to land, and may turn to security forces to ensure access, which may resort to using force to evict people, leading to human rights violations.

Companies investing in Myanmar will find it difficult to establish who owns land or has customary usage rights, who should be consulted, and how to obtain free, prior informed consent (FPIC). Under international standards, indigenous communities have the right to FPIC, but many companies recognize that it is good practice to seek informed consent of all affected parties and vulnerable groups before seeking to use or acquire land. In Myanmar's case, the process may be further complicated by local community worries about the consequences of speaking freely to outsiders. Historically, the government and dominant businesses have often used coercion and paid inadequate compensation to people who have been evicted from land they have owned or used, and such compensation is insufficient to maintain a basic standard of living. Communities, therefore, may be reluctant to be open about their concerns in consultation processes.

Foreign and domestic businesses investing in Myanmar will have to make additional efforts to guarantee they obtain consent for use of land through a fully consultative process and without force. They will have to use their influence with security forces to ensure they refrain from abuses against communities. There is real concern among Burmese activist groups that economic reforms will lead to violations of marginalized and vulnerable groups' rights, in the form of land

³⁴ <http://www.earthrights.org/sites/default/files/documents/the-burma-china-pipelines.pdf>

³⁵ <http://www.humanrights.asia/news/alrc-news/human-rights-council/hrc20/ALRC-CWS-20-03-2012>

grabs.³⁶ For example, farmers have complained about commercial land grabs³⁷, which have prompted the government to consider changing laws.

With the anticipated increase in the level of economic activity over the coming years, in view of planned sporting events, the ASEAN summit, and other major developments, as well as potential foreign investment in export processing zones and tourism complexes, how companies use or acquire land will be an area of high risk.

Labour: Over the years, courts in the United States have agreed to hear cases filed under the Alien Tort Claims Act against companies in only a few instances. One such case dealt with Unocal in Myanmar, over allegations that the company used forced labour in constructing a major pipeline. The company settled the case with the litigants without admitting wrongdoing before it came to trial, and the case was withdrawn.³⁸ There had been similar litigation involving Total in Belgium.³⁹

There are two aspects to labour rights in Myanmar that must be considered – the law and the practice. Myanmar until recently did not allow independent trade unions, and workers' rights have been violated routinely in factories operated by mainly Asian investors.⁴⁰ A new labour law is now in place, which has been widely praised⁴¹. Despite the new law, workers are frequently required to work far longer than the number of hours permitted legally; their wages are low; and women workers have been harassed sexually; discrimination is rampant on ethnic grounds. Employees receive few benefits, and no due process is followed while terminating employment.⁴² In recent months, the government has said it will allow unions, and workers at some factories have begun demanding recognition of their unions, as well as citing from the core conventions of the International Labour Organisation.⁴³

The problem of forced labour in Myanmar is a related challenge for companies. Myanmar has a tradition of community labour for public works. But this form of work is far different from forced labour, where the army has made people work against their will as porters or on construction projects. Such practices were more common in the 1990s, but haven't disappeared completely.

³⁶ <http://www.irrawaddy.org/archives/4239>

³⁷ <http://landportal.info/feed-item/burmese-government-land-grab-farmers-without-rights>

³⁸ See <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnocallawsuitreBurma> and <http://www.earthrights.org/legal/doe-v-unocal-case-history>

³⁹ <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TotallawsuitinBelgiumreBurma>. See also Total's response: http://burma.total.com/en/controverse/p_4_1.htm

⁴⁰ <http://www.burmapartnership.org/tag/labor-rights/>

⁴¹ <http://www.mizzima.com/business/6744-new-labour-law-goes-into-effect-in-burma.html>

⁴² <http://www.cleanclothes.org/campaigns-list/828-general-information-on-labor-rights-abuses-in-burma>

⁴³ <http://www.irrawaddy.org/archives/6745>

Companies will have to undertake enhanced human rights due diligence⁴⁴ to ensure the rights of workers they and their suppliers hire are protected, and that no one is forced to work against his or her will.

Capital: Myanmar's banking system is antiquated. The few banks operating in the country do not have strong correspondent links with international banking networks. Hotels continue to process their payments in foreign currency in neighbouring centres like Singapore or Bangkok. Visitors have little choice but to carry large amounts of cash, usually in crisp currency notes of US dollars, and transactions are settled with the exchange of enormous sacks of cash. No businesses accept credit or debit cards. Money laundering⁴⁵ is an old and recurring issue with some banks operating in Myanmar. Recent reforms suggest that standards might improve⁴⁶ but risks of exposure to banks that have links with illicit trade in the past remain.

Companies will have to undertake enhanced due diligence of banks and other financial intermediaries as they operate in Myanmar. This means not only checking the financial soundness and liquidity of banks and financial intermediaries, but their business practices, including their current and previous relationships with clients who may be facing sanctions.

Business relationships: The government plays a large role in Myanmar's economy. The biggest company – government-owned Myanmar Oil and Gas Enterprises (MOGE) – has collaborations with major oil companies, but its accounts are opaque. The new US licensing conditions require US companies that enter into partnership with MOGE to report their activities. Other large companies are run by businessmen close to the government or by former government officials. Some businesses have been accused of complicity in abuses committed by the armed forces. Other business leaders are so close to the government that some are denied visas to travel by several governments, including the United States⁴⁷ and the European Union⁴⁸, and the overseas assets of several businessmen have been frozen.⁴⁹ Owners of some local businesses have had Interpol warrants⁵⁰ pending against them.

As a result of political developments in the past year the EU and the US have suspended some sanctions, and some individuals, including businessmen, are no longer on the prohibited list. But companies will have to be extremely careful in

44 Former UN Special Representative for Business and Human Rights, John Ruggie, introduced the concept of human rights due diligence for business, as part of the "Protect-Respect-Remedy" framework, which sets out that states have an obligation to protect human rights, business has an independent responsibility to respect human rights, and where gaps exist, there should be effective remedies. It is through the due diligence process that companies can anticipate what the adverse impacts of their activities are likely to be, develop mitigation strategies, and establish effective grievance mechanisms. (For a detailed explanation, see: <http://www.hks.harvard.edu/news-events/publications/insight/markets/john-ruggie>).

45 <http://www.ibiblio.org/obl/docs/LIOB10-pgutter.htm>

46 <http://www.reuters.com/article/2012/04/02/us-myanmar-banks-idUSBRE83107F20120402>

47 <http://www.fas.org/sgp/crs/row/R41336.pdf>

48 http://www.hm-treasury.gov.uk/fin_sanctions_burma.htm#eu

49 <http://www.sanctionswiki.org/Myanmar>

50 <http://www.fas.org/sgp/crs/row/RL34225.pdf>

selecting potential partners. Almost all companies currently operating in Myanmar have some relationship with the government, and local laws may require foreign companies to have local partnerships. But investors should scrutinize potential partners, and avoid forming business relationships with partners against whom there are sanctions, or who face credible allegations of human rights abuses.

Discrimination: Ethnic discrimination is widely prevalent in many parts of Myanmar, and ethnic minorities comprise one third of the population. This discrimination is at the heart of concerns of ethnic groups fighting for autonomy or independence. Businesses operating in areas where ethnic minorities predominate will have to be cautious about issues of discrimination when they award contracts, recruit staff, or develop policies that benefit communities. Ethnic minority groups that have previously been discriminated against may be marginalized, or, in some cases, they might demand favourable terms, which may place other communities at a disadvantage. The latter communities are also vulnerable and live in poverty. If companies appear to prefer one community over another, they will run the risk of sowing seeds of antagonism and fomenting future conflict.

Companies will have to develop a clear understanding of the ethnic dimensions in Myanmar and be sensitive to the potential of exacerbating conflict through their presence.

Corruption: According to the corruption perception index, of the 182 countries ranked, Myanmar⁵¹ appears at 180, above only North Korea and Somalia. Businesses not well connected politically have suffered at the hands of the government.⁵² The legal regime has its roots in the colonial period and international law firms consider the legal infrastructure unreliable.⁵³ Revenue transparency will be of utmost importance. It is encouraging to note that the government is keen to learn about the Extractive Industries Transparency Initiative.

Companies investing in Myanmar will have to insist on adhering to international standards, using as examples the US Foreign Corrupt Practices Act, the UK Bribery Act, and the OECD Guidelines against Corruption and insist on not contributing to corruption.

51 <https://docs.google.com/spreadsheet/ccc?key=0AonYZs4MzlZbdERaRzgxUcwYXVRZFpaR3ZrekREb2c&authkey=C1retNoB&hl=en&authkey=C1retNoB#gid=2>

52 Consider the Mandalay Beer case. http://www2.irrawaddy.org/article.php?art_id=2456&Submit=Submit

53 <http://www.herbertsmith.com/NR/rdonlyres/52B84CB9-D4C7-4CFF-AE9E-0FBFD121179E/25617/0425Myanmargroupupdate.htm>

Getting it Right

As the international community has begun suspending or relaxing restrictions and sanctions it had imposed on Myanmar, several governments have placed some expectations on their companies. In their statement while suspending sanctions on 23 April 2012, foreign ministers of the European Union referred to the UN Guiding Principles on Business and Human Rights as an appropriate standard to inform business conduct in Myanmar. The EU statement welcomed European companies exploring trade and investment opportunities in Myanmar, while “promoting the practice of the highest standards of integrity and corporate social responsibility,” including the UN Guiding Principles.⁵⁴

Furthermore, the United States Government now requires US companies investing more than \$500,000 in Myanmar to report publicly on their human rights policies and procedures in line with the UN Guiding Principles on Business and Human Rights.⁵⁵ There are also more specific requirements for companies in the oil and gas, and financial sectors.

Businesses exploring investment opportunities in Myanmar will therefore need to familiarise themselves with what the UN Guiding Principles entail, and develop policies, practices, and procedures that are consistent with those principles. Many businesses considering new investments in Myanmar have expressed support for the country’s development goals and announced plans to encourage entrepreneurship locally, and operate in a responsible manner. Towards that end, businesses are likely to make use of existing tools, which have aided in investment processes in different contexts in other countries.

To address the problems raised over land acquisition, businesses have access to a range of guidance, which should be consulted carefully. These include the Performance Standards of the International Finance Corporation⁵⁶, the recently adopted Voluntary Guidelines for land tenure⁵⁷ from the UN Food and Agriculture Organisation; the guidelines⁵⁸ for evictions in the context of development from the UN Special Rapporteur on adequate housing; the core principles for land acquisition and leases from the UN Special Rapporteur on the right to food⁵⁹, and so on.

54 The EU statement can be found here:

http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/129703.pdf

55 <http://www.humanrights.gov/wp-content/uploads/2012/07/Burma-Responsible-Investment-Reporting-Reqs.pdf>

56 The full text and accompanying documents of the Performance Standards and Guidance Notes can be found here:

http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability+Sustainability+Framework/Sustainability+Framework+-+2012/Performance+Standards+and+Guidance+Notes+2012/

57 The Guidelines can be found here: www.fao.org/nr/tenure/voluntary-guidelines/en/

58 http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf

59 <http://www.oecd.org/site/swacmali2010/44031283.pdf>

Likewise, in establishing relationships with security forces, businesses should draw on the Voluntary Principles for Security and Human Rights⁶⁰ in the extractive sector. In dealing with issues related to labour rights, businesses would benefit by studying initiatives such as the ILO's Better Work Programme, and guidance from initiatives related to ethical trading and fair labour. In identifying banks or businesses to work with, companies will consult the current lists of individuals against whom there are specific sanctions such as asset freezes or travel bans, prepared by governments that have imposed sanctions. In dealing with corruption, companies will turn to laws in their own jurisdiction. And in working to eliminate discrimination, companies should learn from affirmative action policies practised elsewhere.

While each of these tools and frameworks offers useful guidance, including specific advice, no single set of tools can be sufficient to prevent abuses from occurring. By relying only on tools developed for specific contexts, companies run the risk of implementing their policies in a piecemeal manner, exposing them to further risks. To address this concern, companies should recognise the importance of a comprehensive approach to implementing their responsibility to respect human rights.

The UN Guiding Principles on Business and Human Rights, developed after six years of intensive consultations with businesses, civil society groups, and governments, offer a comprehensive framework to shape responsible business conduct in Myanmar. The UN Human Rights Council adopted the Principles unanimously in 2011. They offer an innovative and comprehensive framework in the present environment. In addition to reaffirming existing state obligations, the UN Guiding Principles make clear that all companies bear an independent responsibility to respect human rights.

This notion of corporate "respect" for human rights goes beyond "respect" in the way in which the concept is understood in the state based human rights lexicon.⁶¹ Corporate respect for human rights in the UN Guiding Principles stresses the importance of avoiding actions that infringe on the protection of rights. Doing so requires several positive, affirmative steps, including undertaking human rights due diligence. This involves companies conducting risk and impact assessments, taking corrective steps to ensure they will not be contributing to, or benefiting from abuses, and operating in ways that uphold human rights, as well as setting internal management processes and targets with incentives to ensure compliance, combined with processes to track and monitor performance. Undertaking these steps with respect to investment in Myanmar won't be easy, but it is necessary.

Companies based in countries that have imposed sanctions on Myanmar are increasingly familiar with the due diligence steps set out in the UN Guiding Principles.⁶² Additional specific guidance regarding what companies must not do

60 www.voluntaryprinciples.org

61 See *Setting Boundaries: Clarifying the Scope and Content of the Corporate Responsibility to Respect Human Rights*. (Institute for Human Rights and Business, Dec 2009).
http://www.ihrb.org/pdf/Setting_Boundaries-Clarifying_Scope_and_Content_of_Corporate_Responsibility_to_Respect_Human_Rights.pdf

62 *The State of Play of Human Right Due Diligence: Anticipating the Next Five Years* (Institute for Human Rights and Business, 2011)
http://www.ihrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf

in weak governance zones⁶³ and on how companies can operate in ways that respect human rights even in such areas is also of importance in this context.⁶⁴

UN Guiding Principle 7 stresses the key role governments must play as well:

Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

- (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
- (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
- (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
- (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

It should be stressed that the UN Guiding Principles apply to all companies regardless of their size, sector, operational context, ownership, and structure.

The Guiding Principles make clear that companies should have a policy commitment to respect human rights; a human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts; and processes to enable the remediation of any adverse impacts they cause or to which they contribute.⁶⁵ Careful reading of the UN Guiding Principles will show that implementing them is not a box-ticking exercise, but requires serious commitment on the part of governments as well as significant management time and effective allocation of responsibilities within companies. The Guiding Principles encompass current legal requirements, prevailing best practices, and societal expectations of businesses.

The challenges facing Myanmar are formidable. The country has been affected by many years of armed conflict and human rights abuses have been widespread. A new leadership is taking gradual steps towards helping Myanmar make a successful transition to democracy. In the NLD the country has an opposition party that has acted responsibly and whose leader exemplifies non-violent and peaceful

63 www.redflags.info

64 See *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries* (Institute for Human Rights and Business, 2011) http://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf

65 *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, Remedy" Framework* (A/HRC/17/31) http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

struggles for democratic change. The NLD has placed human rights at the centre of its economic policies. Myanmar therefore offers a golden opportunity to make responsible business investment a common practice for all.

It is clear that the road ahead will be uneven. Much will depend on how the government acts to avoid the resource curse that many countries with abundant natural resources have faced. Foreign investors – potential and existing – have an internationally recognized responsibility to act in an accountable and transparent manner. Myanmar's long-suffering people deserve no less.



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