Foreign Precedents in Constitutional Adjudication by the Supreme Court of Singapore, 1963-2013

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FOREIGNERS IN BURMA: A FRAMEWORK FOR RESPONSIBLE INVESTMENT

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Abstract: Burma is hailed as a great democratic success story: a once-rogue nation holding elections, releasing political prisoners, and promising human rights reforms. The people elected to Parliament Aung San Suu Kyi, the leader of the democratic movement who was under house arrest for more than twenty years. The world responded with applause and open pocketbooks. In April of 2012, Ban Ki-moon, Secretary General of the United Nations, asked members to lift their sanctions on the formerly “rogue” nation and begin investing. But for a resource-rich country with a long track record of corruption, this flood of foreign investment will likely provide more opportunities for human rights violations and environmental destruction.

Burma’s Parliament recently revised the country’s foreign investment law to provide guidelines for its new investors. Given Burma’s relatively new Constitution and brand new foreign investment law, what will the legal landscape regarding the protection of human rights and the environment look like during this time of transition and economic acceleration? Foreign investors should agree to undertake projects only where impact benefit agreements are successfully negotiated, proceed cautiously in Burma’s historically corrupt oil and gas industry, and engage in non-financial reporting in order to ensure compliance with international human rights and environmental standards.

I. INTRODUCTION

In September of 2012 the Obama administration formally lifted nearly all of the economic sanctions against Burma1 that had been in place since the late 1990s.2 The United States’ move coincided with many other Western countries’ similar easing of trade sanctions against the former pariah nation.3 These changes were in response to the reforms enacted by Burmese President Thein Sein over the previous year.4 After President Thein Sein

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1 Many call the country by its former name, Burma, which the ruling military junta changed to “Myanmar” in 1989. The author will refer to the country as Burma, but will retain the language used by the individual sources when referencing their statements.


was sworn in as leader of a “nominally civilian government,” he enacted a series of democratic reforms. These reforms granted amnesty to political prisoners, allowed peaceful demonstrations, freed Aung San Suu Kyi from house arrest, and recognized her party’s win in the 2012 parliamentary elections.

Foreign investors are anxious to explore development opportunities in this resource-rich country, especially in the oil and gas sector, now that sanctions have been relaxed or altogether eliminated. In 2010–11, Burma’s revenues from natural gas exports exceeded USD 2.5 billion, and were expected to increase to over USD 4.1 billion in 2013. Oil companies consider Burma “under-explored,” and believe there are vast amounts of oil and gas yet to be discovered. An official from China’s North Petro-Chem Corporation (Myanmar) Ltd. called Burma a “sleeping petroleum giant.” One economist notes, “the country has been walled away for fifty years. There are incredible opportunities. That’s why the planes are full, that’s why the hotels are full.”

However, Burma lacks robust infrastructure, especially reliable electricity and stable banking systems, which may ultimately dissuade many foreign investors. In 2012, Burma ranked 129 out of 155 countries on the Logistics Performance scale, which assesses trade- and transportation-related infrastructure. Even residents in commercial districts have limited electricity and constant power cuts. Factories must employ diesel generators to support a constant flow of power. The banking sector is

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8 ARAKAN OIL WATCH, BURMA’S RESOURCE CURSE: THE CASE FOR REVENUE TRANSPARENCY IN THE OIL AND GAS SECTOR 4 (2012). At the time of publication, no information on natural gas exports for 2013 was available.
9 Katakey, supra note 7.
12 Id.
14 Id.
15 Id.
underdeveloped, and until very recently, ran exclusively on cash transactions.\textsuperscript{16}

In response to these concerns, Burma recently revised its foreign investment law (hereinafter “2012 Law”) to attract foreign investors and their capital.\textsuperscript{17} As a result of the 2012 Law and Western countries’ loosening sanctions, Burma will likely face a flood of new capital.\textsuperscript{18} This influx of foreign investment, however, may worsen existing problems. Burma has a long history of corruption and lacks transparency, especially in the oil and gas sectors.\textsuperscript{19} In addition, the government has a tense and fragile relationship with ethnic minority populations, who historically suffered abuse at the hands of extractive companies and the government itself.\textsuperscript{20} This foreign capital may flow into investment projects that utilize forced labor, forced relocation, and result in environmental destruction.\textsuperscript{21}

In an attempt to address these concerns, the 2012 Law requires foreign companies to respect the local environment and labor standards.\textsuperscript{22} However, Burma’s judiciary is hardly equipped with the robust enforcement mechanisms needed to ensure compliance.\textsuperscript{23} The government uses judicial processes to silence dissidents.\textsuperscript{24} The UN Special Rapporteur for Human Rights in Myanmar stated, “[t]here is no independent and impartial judiciary system [in Burma].”\textsuperscript{25}


\textsuperscript{17} Kent, supra note 13.


\textsuperscript{20} ARAKAN OIL WATCH, supra note 8, at 19.

\textsuperscript{21} See infra Part III. B.


\textsuperscript{23} See Dominic Nardi, Discipline-FLOURISHING Constitutional Review: A Legal and Political Analysis of Myanmar’s New Constitutional Tribunal, 12 AUSTL. J. ASIAN LAW 1, 7-8 (2010).

\textsuperscript{24} For example, Zarganar, a famous Burmese comedian who mocked the ruling junta in his routines, was convicted of “public order offenses,” and received a fifty-nine-year sentence. He was placed in solitary confinement for four to five years of his sentence. Kyaw Hsu Mon, Burma Activists Urge Protest Law Reform, THE IRRAWADDY (Nov. 25, 2013), http://www.irrawaddy.org/human-rights/burma-activists-urge-protest-law-reform.html; Laura Barton, Burma’s Top Standup Comic: “We Sacrifice Our Lives for Jokes”, THE GUARDIAN (Mar. 9, 2912), http://www.theguardian.com/culture/2012/mar/09/burma-standup-comic-zarganar?guni=Article: in%20body%20link.

\textsuperscript{25} Nardi, supra note 23, at 8.
In light of this reality, foreign companies may have to go above the requirements of Burmese laws to ensure fair labor standards and safe environmental practices. While it may be tempting to exploit this new frontier, it is in the best interest of foreign companies to follow principles of corporate social responsibility to ensure these protections, for, while they may not be judged in a court of law, they will be judged in the court of public opinion. Companies face significant risk of lawsuits in foreign or international courts—foreign companies have already faced liability for contracting with the military to provide security for their development projects.\(^\text{26}\) The world’s attention is turned toward Burma’s dramatic democratization, and foreign investment projects will be under intense scrutiny. Therefore, socially responsible investment is in the best economic interest of companies.

This comment proceeds by examining the political, social, and economic history of Burma leading up to the recent democratic reforms in Part II. Part III analyzes the substantive changes in the foreign investment law. The 2012 Law makes several substantive changes, including: allowances for longer land grants, longer tax holidays, foreign currency accounts, joint ventures between foreigners and citizens unrestricted by ownership ratio requirements, and guarantees against nationalization.\(^\text{27}\) While these changes may not address the long-term concerns of investors, they will likely entice foreigners to invest in the short-term despite the dangers of political instability and under-developed infrastructure.\(^\text{28}\) This comment argues that the lack of domestic enforcement mechanisms will likely ensure that the 2012 Law’s socially responsible goals remain aspirational.

Part IV outlines recommendations for foreign investors doing business in Burma. This comment recommends that foreign investors comply with the law’s goal of promoting socially responsible investment by proceeding cautiously in Burma’s historically corrupt oil and gas industry, engaging in non-financial reporting, and negotiating impact benefit agreements to ensure that international human rights, labor, and environmental laws are enforced.


\(^{28}\) Economist Questions Burma’s Foreign Investment Law, supra note 11.
II. BACKGROUND

Colonialism, decades of civil conflict, and repressive authoritarian leaders have affected Burma’s economy and inhabitants disastrously. Regional partners have taken a constructivist approach to their relations with the formerly rogue \(^{29}\) nation, while other states have imposed harsh sanctions.\(^{30}\) While discussing the efficacy of the two competing approaches is not the focus of this analysis, understanding the international context in which the 2012 Law was passed is necessary to contemplate the legal problems and pitfalls the country will face in its near future.

This section examines the failed political and economic policies enacted by Burma in the post-colonial era and the tensions between the government and indigenous communities. It goes on to analyze regional and international responses to these crises, and the recent warming of relations between Burma and other nations that set the stage for the 2012 Law.

A. Political and Economic History

In 1886, Burma became a British colony.\(^{31}\) Led by Aung San, Burma negotiated its independence by joining with the Allies to stop the Japanese invasion of Burma in 1945.\(^{32}\) When framers drafted the constitution of post-colonial Burma, ethnic minority autonomy was a divisive issue. For decades a strong ethnic nationalist sentiment had been growing, “based narrowly on the idea of a Buddhist and Burmese-speaking people, one that saw little need to accommodate minority peoples,”\(^{33}\) which currently make up about thirty-one percent of the population.\(^{34}\) Ultimately, the nationalist interests who

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\(^{29}\) See, e.g., Ari B. Weiss, Revolutionary Identities and Competing Legitimacies: Why Pariah States Export Violence 4 (May 11, 2012) (unpublished honors thesis, Southern Illinois University, Carbondale) (on file with University Honors Program at OpenSIUC) (“Rogue state” refers to nations that reject international norms by engaging in activities such as systematic human rights abuse, proliferation of weapons of mass destruction, and supporting terrorism.).

\(^{30}\) Wayne Bert, Burma, China and the U.S.A., 77 PAC. AFF. 263, 277 (2004); Donald K. Emmerson, Crisis and Consensus: America and ASEAN In A New Global Context 13 (paper presented at the international conference sponsored by Chulalongkorn University’s American Studies Program, Institute of Security and International Studies, and Faculty of Political Science, Hua Hin, Thailand, Jan. 8-9, 2009).


\(^{33}\) Id. at 34.

\(^{34}\) The Shan people constitute 9%, the Karen people constitute 7% and historically have resided in the eastern region, the Rhakine people make up approximately 3.5% and reside in western Burma, the Chin constitute 2.5% and have historically lived in western Burma near India, the Mon people make up 2% and
preferred one “Union of Burma” rather than a multi-ethnic state won this debate.\(^{35}\) In 1947, an assembly passed the new constitution, nominally acknowledging the distinct states of the Shan, Kachin, Karen, and Karenni tribes and giving them the option to secede from “unified Burma” ten years later.\(^{36}\)

However, many ethnic minority groups were deeply dissatisfied with this arrangement and protested for independence.\(^{37}\) Adding to these tensions, Aung San, the only leader supported by both the Burmans and the ethnic minority groups, was assassinated, catapulting the newly independent nation into civil war on January 4, 1948.\(^{38}\) In the 1950s, while insurrections were common, Burma progressed democratically by holding nominally fair elections and establishing parliament, a bureaucracy, and an independent judiciary.\(^{39}\) But popular distrust of government institutions led to unrest, and the military positioned itself as the unifying state institution.\(^{40}\) The country operated under a parliamentary democracy until 1962, when a military coup put General Ne Win and the State Law and Order Restoration Council (“SLORC”) in power for the next twenty-six years.\(^{41}\)

Burma experienced huge economic growth during the colonial period, but its economy plummeted in the years following independence: in 1930 the GDP per capita was USD 902, but it dropped to USD 396 in 1950.\(^{42}\) After the British withdrew, the economy collapsed.\(^{43}\) Burma is rich in natural resources, but the government’s mismanagement of its own resources kept the country impoverished.\(^{44}\) Ne Win ordered the nationalization of most industries.\(^{45}\) He also demonetized the kyat in 1987, ordering that the kyat only exist in denominations divisible by his favorite

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\(^{35}\) Holliday, supra note 32, at 39.

\(^{36}\) Id.

\(^{37}\) Id. at 40.

\(^{38}\) See generally Baker, supra note 31, at 63, 68.

\(^{39}\) Holliday, supra note 32, at 43.

\(^{40}\) Id. at 44-45.

\(^{41}\) Sein Win, Sustaining Burma’s Hopes for Freedom, 5 J. Democracy 144, 145 (1994).


\(^{43}\) Id. at 389.

\(^{44}\) INT’L CRISIS GROUP, ASIA REPORT NO. 177, CHINA’S MYANMAR DILEMMA 22 (2009) (stating that Burma’s economic problems “can be linked to a fundamental lack of knowledge and expertise on economic planning and policy.”).

number, nine, leaving only forty-five and ninety kyat bills. 46 Without any forewarning or compensation, seventy-five percent of Burma’s currency was completely devalued, people lost their entire life savings overnight,47 and foreign businesses were forced out. 48 Foreign investors withdrew as a result of Ne Win’s policies. 49 The World Bank notes that net inflows of Foreign Direct Investment in Burma (indicating new investment inflows less disinvestment) fell from USD 780,000 in 1984 to USD -1,540,000 in 1987. 50 These failed economic policies led to social unrest and political upheaval, resulting in mass protests in 1988, when government forces killed an estimated 3,000 people. 51 The military government renamed itself the State Peace and Development Council (“SPDC”), promising democracy in order to regain lost international trust and foreign investment. 52 The Saffron Revolution of 2007 brought the crisis in Burma to international attention again, when the world watched the SPDC violently crush a peaceful protest of Buddhist monks. 53 General distrust of the government and popular unrest increased during this time period and exacerbated ethnic tensions. 54

B. Ethnic Minority Conflicts

“...[I]n ten years all Karen will be dead. If you want to see a Karen, you will have to go to a museum in Rangoon.” Major-General Ket Sein, 1992. 55

Residual animosity between the government and ethnic minority groups stems from the colonial-era conflict centering on the establishment of a “unified Burma” rather than autonomous ethnic states. 56 In response to

46 Id.
48 Id.
52 Crisis in Burma, supra note 51, at 3.
53 Id. at 2.
54 See generally Crisis in Burma, supra note 51.
56 Id.
ethnic groups’ armed insurrections, the government targeted these groups through repression and “insensitive development projects.” The junta conducted a multi-decade campaign against the ethnic groups, utilizing forced displacement, forced labor, and intentional deprivation of healthcare and food. Researchers have documented the military’s practice of systematically entering villages, raping and/or killing villagers they find, burning the village, and then setting landmines for those who may return to recover any belongings or loved ones. Others are forced into relocation camps and used as laborers, porters, and human landmine sweepers for the military.

This “Four Cuts Strategy” was employed by the junta specifically to make room for and quell resistance to development projects like gas pipelines. This practice drew significant criticism from the International Labor Organization (“ILO”), especially given Burma’s ratification of the Forced Labor Convention. The ILO stated that the military, which targets civilians solely on the basis of their ethnicity, is “guilty of an international crime that is also, if committed in a widespread or systematic manner, a crime against humanity.”

Even now, the government continues to violate the cease-fire agreements and has instigated attacks on civilians. Only days after the government signed a cease-fire agreement that was to put an end to the Kachin offensive, the Burma army began burning down houses in the Na Long village in Kachin state. The long-standing ethnic tensions will not likely be resolved overnight, and these are factors that investors should keep

57 Holliday, supra note 32, at 95.
60 Sarkin & Pietschmann, supra note 58, at 8.
62 Sarkin & Pietschmann, supra note 58, at 10.
63 DLA Piper Rudnick Gray Cary, supra note 61, at 35; Crisis in Burma, supra note 51, at 34 (noting the junta destroyed more than 3,000 villages, twice as many as were destroyed in the crisis in Darfur).
64 Sarkin & Pietschmann, supra note 58, at 10.
66 Id.
in mind when developing projects in areas historically inhabited by these marginalized community members.

Poor economic policies led the country to poverty, and political and ethnic oppression resulted in constant unrest and violence. While this much is clear, the international response to Burma’s failed policies has been inconsistent, and states have adopted vastly different approaches to their relations with the nation.

C. Foreign Relations: Regional and Beyond

The events in the late 1980s and early 1990s served as a catalyst for new foreign relation policies in Burma. Regional states tended to adopt a constructive engagement approach toward Burma, while its Western partners responded with sanctions and embargos.

Burma’s neighbors have invested and traded with it for the stated goals of creating an empowered middle class and political base. The Association of Southeast Asian Nations (“ASEAN”) members provided one fourth of all foreign direct investment in Burma in the ten-year period between 1995 and 2005, totaling USD 1.05 billion.

Generally, Western nations responded to Burma’s human rights abuses and the regime’s illegitimacy with mild to harsh isolationist policies. The low point in foreign relations between Burma and many Western nations was the violent suppression of the student uprising in 1988, accompanied by the regime’s refusal to recognize the results of the 1990 election that Aung San Suu Kyi won by a landslide. Instead, she was placed under house arrest along with other prominent members of her party, the National League for Democracy (“NLD”), and she remained there off and on for the next twenty years. In response to these events, the United

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68 Burma sought out a seat at ASEAN and received it in 1997, notably one month after the U.S. imposed harsher sanctions. Bert, supra note 30, at 270-71; id. at 16.
71 Sein Win, supra note 41, at 146-47 (noting the National League for Democracy, or NLD, led by Aung San Suu Kyi, daughter of Aung San, won 82% of the parliamentary seats).
72 Id.
States halted its aid program and military assistance, and then imposed sanctions, which were renewed in 2008.\footnote{73}{David I. Steinberg, The United States and Myanmar: A ‘Boutique Issue’?, 86 INT’L AFF. 175, 181-82 (2010). New rounds of sanctions were imposed in 1997, 2003, and again in 2008.}

Likewise, the European Union imposed an arms embargo in 1990 and at the same time suspended most assistance other than humanitarian aid.\footnote{74}{Novosejt, supra note 67, at 8.} The E.U. also exempted Burma from its “Generalised Scheme of Preference,” thus excluding European markets as opportunities for trade.\footnote{75}{Id. at 9.} The United States and the European Union tightened their sanctions following the Saffron Revolution of 2007.\footnote{76}{CAMERON HILL, PARLIAMENT OF AUSTRALIA, DEPARTMENT OF PARLIAMENTARY SERVICES, BURMA: DOMESTIC REFORMS AND INTERNATIONAL RESPONSES 1 (2012).} Australia also adopted financial sanctions restricting the “transfer of funds or payments to, by the order of, or on behalf of specified Burmese regime figures and supporters” in 2007.\footnote{77}{Id.; Ray Brindal, Australia Removes Economic Sanctions on Myanmar, WALL ST. J. (Apr. 16, 2012), http://online.wsj.com/article/SB10001424052702304299304577346570095628952.htm.}

Scholars argue that isolationist policies disproportionately hurt the country imposing the sanctions because other countries are free to trade with and invest in the sanctioned country.\footnote{78}{Bert, supra note 30, at 277-79.} This played out in Burma as China became Burma’s number one investor, comprising eighty-seven percent of all foreign investment in 2011.\footnote{79}{IAN STOREY, SOUTHEAST ASIA AND THE RISE OF CHINA: THE SEARCH FOR SECURITY 161 (2011).} Scholars and commentators argued that Burma essentially became a “client state” of China.\footnote{80}{STRATEGIC STUD. INST., SHAPING CHINA’S SECURITY ENVIRONMENT: THE ROLE OF THE PEOPLE’S LIBERATION ARMY 298 (Andrew Scobell, Larry M. Wortzel eds., 2006); Bajoria, supra note 70; David Cohen, CHINA’S MYANMAR PROBLEM, THE DIPLOMAT (Jan. 17, 2013), http://thediplomat.com/china-power/chinas-myanmar-problem/.} Burma came to rely on China as its main supplier of intelligence, arms, and financial assistance.\footnote{81}{Bert, supra note 30, at 268-69.} China also offered Burma an unknown amount of debt relief that helped to keep the regime afloat,\footnote{82}{Novosejt, supra note 67, at 22.} and in exchange for this and its continued investment, Burma gave Chinese contractors an advantage in bids for contracts, specifically in the manufacturing, mining, power generation, and oil and gas sectors.\footnote{83}{STOREY, supra note 79, at 161. It should be noted that in the past few years, Burma has made a point of seeking trade partnerships with other major powers to leverage China’s influence. See generally Simon Shuster, Why are Burmese Scientists Studying Missile Technology in Moscow?, TIME (Dec. 7, 2011), http://content.time.com/time/world/article/0,8599,2101404,00.html.}
D. Policy Shifts

Scholars criticize Western responses to Burma’s ongoing human rights abuses as serving only to punish civilian populations and ineffective in curbing human rights abuses or countering China’s large influence in the region.\(^84\) In the interest of offsetting Chinese monopolizing influence in Burma, ASEAN nations have largely welcomed a larger U.S. role in Burma.\(^85\)

In 2010, the Burmese government made unprecedented political changes. It released Aung San Suu Kyi from house arrest, transferred power to a nominally civilian government led by Thein Sein, and granted amnesty to political prisoners.\(^86\) Burma began making democratic reforms to gain the support of Western states.\(^87\) Perhaps the most dramatic evidence of democratic reform was recognition of Aung San Suu Kyi’s election to Parliament in April 2012.\(^88\)

All of these factors—China’s growing influence in the region, lack of desirable results from other isolationist policies, ASEAN’s welcome of more U.S. presence, and small democratic reforms by Burma—recalibrated Western policy. Spurred by criticisms, the Obama administration pivoted on its policy stance toward Burma in the fall of 2009. While not abandoning sanctions altogether, the United States agreed to enter into a dialogue with the regime.\(^89\) The United States pressured Burma to release all political prisoners, urged it to comply with its international agreements, and pushed for the end of human rights violations in the country.\(^90\) Other nations responded in similar fashion.\(^91\)

\(^84\) Bert, supra note 30, at 277. The ASEAN approach has also been criticized for failing to improve the situation. See Emmerson, supra note 30, at 13.

\(^85\) Int’l Crisis Group, supra note 44, at 31.

\(^86\) Timeline, supra note 6.

\(^87\) Bajoria, supra note 70.


\(^89\) Steinberg, supra note 73, at 191.


\(^91\) The E.U. suspended nearly all of its sanctions on Burma in April 2012. Thomas Fuller & Paul Geitner, European Union Suspends Most Myanmar Sanctions, N.Y. Times (Apr. 23, 2012), http://www.nytimes.com/2012/04/24/world/asia/eu-suspends-sanctions-on-myanmar.html?_r=1& (noting the arms embargos would remain in place). The U.K. supported this move but made clear that the relaxation was contingent on Burma maintaining forward democratic progress. Hill, supra note 76, at 7. Japan resumed its development assistance program and began talks to develop a joint special economic zone. Id. at 8. Australia revised its sanctions after the first round of political prisoner releases. Id. at 11.
It is against the backdrop of economic disaster, civil war, political repression, and decades of civil mistrust that Burma now seeks a welcome back on to the international stage. Though the government has signaled reform, the country is still recovering from decades of oppressive rule, remnants of which still linger. With internal conflict and external relations yet to be mended, the situation into which investors will enter is fragile. To incentivize international investment, Burma’s Parliament passed a new investor-friendly foreign investment law. The following section analyzes whether and to what extent the 2012 Law will create a positive investment environment both for foreign companies and Burma’s citizens.

III. FOREIGN INVESTMENT LAW ANALYSIS

President Thein Sein’s political reforms prompted Western nations to ease sanctions, which allowed multinational corporations to invest in this resource-rich country. But most companies held their capital at bay until the 2012 Law passed, which was meant to be friendlier to foreign investors. President Thein Sein reported that foreign investment quintupled from fiscal year 2011/2012 to 2012/2013. After months of debate in Parliament, President Thein Sein approved Myanmar’s new foreign investment law on November 2, 2012.

Section A examines the substantive changes to the investment regime made by the 2012 Law, focusing on tax incentives, relaxed requirements for joint ventures, land grant extensions, and requirements to respect international labor and environmental standards. After an examination of enforcement mechanisms, Section B concludes that the law is deficient in ensuring labor, human rights, and environmental protections in foreign investment projects. These shortcomings premise the recommendations contained in Part IV.

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92 Aung Hla Tun, supra note 27.
93 Burma Sanctions, supra note 4.
94 Szep, supra note 16.
96 Aung Hla Tun, supra note 27; the legislative process surrounding the bill was described as “a tussle involving a government eager to attract foreign investment, tycoons determined to protect their monopolies, and small businesses keen not to be shut out.” Burm a’s Thein Sein: Foreign Investment Bill to be Finalized in ‘Days’, VOICE OF AMERICA (Oct. 21, 2012), http://blogs.voanews.com/breaking-news/2012/10/21/bumas-thein-sein-foreign-investment-bill-to-be-finalized-in-days/ (last visited Mar. 25, 2014); Aung Hla Tun, Myanmar Foreign Investment Bill in Parliament Again, REUTERS (Nov. 1, 2012), http://www.reuters.com/article/2012/11/01/us-myanmar-investment-idUSBRE8A005H20121101.
A. Notable Changes to the 1988 Foreign Investment Law

The 2012 Foreign Investment law repealed the 1988 Foreign Investment Laws of Myanmar (hereinafter “1988 Law”). One of the first sections of the 2012 Law outlines the goals of the revision: to create jobs, encourage competition with foreigners, develop infrastructure and technology, and produce and export minerals. The 2012 Law focuses on environmental conservation and the development of clean and sustainable energy as important principles of foreign investment—principles that were absent in the 1988 version of the law. These changes may reflect a shift in thinking from short-term to long-term development goals and respect for international standards and norms. The following section considers the law’s changes, in light of Burma’s developmental objectives, in a subject-by-subject discussion of permitted types and patterns of investment projects, standards for approving and overseeing projects, financial incentives, and new labor and land provisions.

1. Permitted Investments and Activities

The 1988 Law contained few, if any, prohibitions on investment projects that are harmful to the environment or citizens. It gave full discretionary powers to the government to decide which investment projects were appropriate, with few guidelines.

The 2012 Law contains new restrictions on certain economic activities. It restricts economic activities prejudicial to the traditional cultures and customs of the ethnic nationalities, prejudicial to public health, and prejudicial to the natural resources, environment and biodiversity. It also limits private investment in many sectors, as outlined

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99 See id. at ch. 4 § 8(h)(j)(l).
100 The only discernable guidelines for approving investment projects are found in Chapter VI, which instructs the MIC to consider “facts such as financial credibility, economic justification of the business enterprise and appropriateness of technology.” Foreign Investment Law 1988, supra note 97 at ch. VI § 9.
101 Foreign Investment Law 2012, supra note 98, at ch. 2.
102 Id. at ch. 2 § 4(a).
104 Id. at ch. 2 § 4(c).
in the Myanmar State-owned Economics Enterprises ("SOEE") law, subject only to government-granted exemptions. These sectors include oil and gas, hard minerals, telecommunications, banking and insurance, broadcasting, and air and railway services.

The Foreign Investment Rules and Myanmar Investment Commission Notification, which outline new foreign investment regulations, detail three separate categories of investment and the activities that fall within each of them. Category I activities are presumed to be prohibited by foreign investment projects. These activities include, but are not limited to: digging shallow oil and gas wells up to 1,000 feet, small-scale agriculture, electrical generation under ten megawatts, production of arms and explosives, and exploration and production of jade and gemstones. The Myanmar Investment Commission ("MIC") has the discretionary authority to approve such activities by foreign projects if it benefits the state, its citizens, and specifically the ethnic citizens. The proposals for Category I activities must be approved by local groups, regional administrative bodies, and the central government. Foreign capital must not exceed eighty percent of the joint venture between the foreign investor and a citizen, but there is no limit to foreign capital when the venture is between a foreigner and the state.

Category II activities are those that are only permitted as joint ventures with Burma citizens. These activities include large-scale mining, exploration and production of industrial minerals, certain real estate projects, production and distribution of most food products, and livestock or farming activities carried out on land owned by Burma citizens. As in Category I activities, foreign capital in a joint venture with citizens may not exceed eighty percent.

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105 RAJA BOSE & NICHOLAS WATTS, K&L GATES, MYANMAR’S NEW FOREIGN INVESTMENT LAW (2012).
106 Id.; Foreign Investment Law 2012, supra note 103, at ch. 2 § 4(h)-(j).
108 ALLEN & OVERY LLP, supra note 107, at 3.
109 Id.; JAMES FINCH, DFDL LEGAL & TAX SERVICES, MYANMAR’S NEW FOREIGN INVESTMENT LAW, RULES AND NOTIFICATIONS 3 (2013).
110 ALLEN & OVERY LLP, supra note 107, at 3.
111 FINCH, supra note 109, at 3.
112 ALLEN & OVERY LLP, supra note 107, at 3.
113 Id.
114 Id.
115 Id.
Category III activities are those that are permitted subject only to conditions by the relevant ministry.\textsuperscript{116} Some of these activities include mineral production, electrical production, communication services, and commercial real estate.\textsuperscript{117} There is some overlap between Category II and Category III activities—for example, a foreign entity must undertake some projects jointly with a Burma citizen, subject to conditions prescribed by a government ministry.\textsuperscript{118} Some activities listed in Category III, such as exploration and production of minerals, oil, and natural gas require an Environmental and Social Impact Assessment.\textsuperscript{119} Foreign investors may engage in certain activities, such as coal production, only when undertaken as a joint venture with the state.\textsuperscript{120}

These additional categories of restricted activities reflect the government’s desire to prevent harmful activities that contravene international human rights standards.\textsuperscript{121} Presumably, these expectations are codified for the benefit of potential investors as well as concerned citizens. The 2012 Law, however, allows prohibited activities if approved by the government.\textsuperscript{122} This change gives the government discretion to allow investment projects in any sector, subject to approval by local civilian organizations and the appropriate government agencies.\textsuperscript{123} Discretion, however, opens the door for potential corruption. Corruption is commonplace in Burma, where government officials expect to be paid off by businesses in exchange for licenses and a faster bureaucratic process.\textsuperscript{124} Then again, “[…discretion] can be useful when exercised by competent and

\textsuperscript{116} Id. at 4.
\textsuperscript{117} Id.
\textsuperscript{118} See id. at 3-4.
\textsuperscript{119} Id. at 5.
\textsuperscript{120} Id. at 4.
\textsuperscript{122} Foreign Investment Law 2012, No. 21, ch. 2 § 5 (Myan.), \textit{available at} http://www.burmalibrary.org/docs15/Foreign_Investment_Law-21-2012-en.pdf.
\textsuperscript{123} ALLEN & OVERY LLP, supra note 107, at 3.
experienced decision makers in a transparent process.”

125 Requiring approval by certain civil society groups allows civilians to veto investment projects that may affect their lands or livelihoods. This development is a positive step that works to gain indigenous communities’ input in development decisions, per the requirements laid out in international conventions.126 However, it is unclear whether and how this mechanism will be enforced. Given Burma’s long history of corruption and lack of transparency, it is not clear that this restriction will be effective in practice.

2. **Permitted Patterns of Investment**

Chapter 5 of the 2012 Law outlines the permitted “Patterns of Investment,” which is the successor to the 1988 Law’s “Form of Organization” chapter. Both chapters set forth guidelines under which foreign investments can be formed and carried out.127 Some of the main changes made to attract foreign capital occur in this section. The 1988 law envisioned foreign investment with up to 100% foreign capital as well as joint ventures between foreigners and citizens, which required a minimum of thirty-five percent foreign capital.128 The 2012 Law envisions similar types of investment:

(1) a sole proprietorship wholly owned by a foreign investor supplying 100% foreign capital; (2) a joint venture in the form of either a partnership or limited company with a citizen or government department or organization, in which the amount of foreign capital invested is to be agreed to by the foreign investor and the citizen investor; and (3) operating in a system mutually agreed upon according to a deed of contract.129


126 “1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.” International Labour Organization Indigenous and Tribal Peoples Convention, No. 169 (1998), art 7 (1).


The 2012 Law departs from the 1988 Law in that it does not set a minimum requirement of foreign capital in joint ventures. This difference allows for a more flexible pattern of investment depending on the abilities and needs of foreign investors as well as local partners. The MIC, however, still has final approval of the ratio of foreign to local capital, and a specified amount of foreign capital is still required in certain restricted sectors.

The 2012 Law outlines, for the first time, the duties and responsibilities of investors. It prescribes eleven investor duties, from abiding by the existing domestic laws of Burma to refraining from significantly changing the topography of the land. It outlines seven rights given to investors, such as the right to sell all or part of their shares, and the right to apply to the MIC to settle grievances.

However, investors gain many of these rights only upon approval of the MIC, which leaves a large zone of uncertainty for investors. Wide discretion opens the door for corruption to permeate relationships between investors and members of the MIC during the approval process.

The 1988 Law failed to provide any dispute settlement mechanism, which created an uncertain legal environment for foreign investors. The 2012 Law sets forth available methods for dispute resolution, allowing for disputes to be settled according to the terms of the contract. This development allows investors to add international arbitration clauses in their contracts, which creates a more certain and attractive legal environment than having to litigate disputes under Burmese law.

This set of provisions attempts to set up an attractive environment for potential investors by allowing more flexible patterns of investment. The 2012 Law attempts to level the playing field, drawing in investors by letting them play on their own terms.

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130 Foreign Investment Law 1988, supra note 127, at ch. 14 § 6(a)(ii).
132 Foreign Investment Law 2012, supra note 131, at ch. 8.
133 Id. at chs. 8, 17.
134 Id. at chs. 8, 18.
135 Id.
138 Foreign Investment Law 2012, supra note 136, at ch. 19.
139 Id.; Bissinger, supra note 125.
3. **Activities of the MIC**

The 1988 Law created the MIC, which is responsible for reviewing applications for investment proposals, issuing permits upon approval, responding to complaints lodged by investors, and enforcing the provisions of the law.\(^\text{140}\) The 2012 revisions to the 1988 Law retain the MIC, but alter its composition.\(^\text{141}\) The 2012 Law mandates that non-government servants hold seats on the MIC\(^\text{142}\) in addition to government employees,\(^\text{143}\) and that the Vice President, Secretary, and Joint-Secretaries of the MIC be nominated.\(^\text{144}\) This shift could reflect the Pyidaungsu Government’s desire to improve the MIC’s credibility by bringing in non-government actors to oversee the process of assessing investment projects and enforcing the provisions of the foreign investment law. The non-government members, however, are on the government’s payroll.\(^\text{145}\) Thus, these non-government members may be susceptible to inappropriate government influence.

The addition of non-government actors to the process may limit the potential for corruption in relationships between investors and the MIC, especially given the MIC’s wide latitude to dictate the scope and substance of investment projects.\(^\text{146}\) President Thein Sein has outwardly opposed the systematic use of bribery that exists at every level of government, and this new requirement for the MIC likely is a step in the battle against corruption, imposing another check on accountability against government officials.\(^\text{147}\) Non-government officials, however, are not immune to bribery, and the effectiveness of this accountability check is questionable.\(^\text{148}\)

The 2012 Law sets out new and detailed requirements for the MIC.\(^\text{149}\) Going forward, the MIC is required to make a report of its activities every

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\(^{140}\) Foreign Investment Law 1988, *supra* note 137, at ch. 6.

\(^{141}\) Foreign Investment Law 2012, No. 21, ch. 6 (Myan.), *available at* http://www.burmalibrary.org/docs15/Foreign_Investment_Law-21-2012-en.pdf.

\(^{142}\) *Id.* at ch. 6 § 11(a).


\(^{144}\) Foreign Investment Law 2012, *supra* note 141, at ch. 6 § 11(a)(2) (noting that Chapter 6 does not prescribe the procedure for nomination and election to the MIC).

\(^{145}\) *Id.* at ch. 6 § 11(b).

\(^{146}\) See generally Bissinger, *supra* note 125.

\(^{147}\) Zin Linn, *supra* note 124.


six months.\textsuperscript{150} Additionally, the 2012 Law sets forth time limits under which the MIC must either accept or reject proposals.\textsuperscript{151} The MIC must monitor the mineral resources that are under the contracted land, whether or not they are related to the contracted project or works.\textsuperscript{152} These sections clarify what investors can expect from the MIC and how long they will have to wait for an assessment of their proposals.\textsuperscript{153}

The 2012 Law seems to give investors more rights and privileges, subject to certain conditions.\textsuperscript{154} For example, the prior version of the law gave the MIC the power to “prescribe” the bank used,\textsuperscript{155} while the 2012 Law only gives the MIC the power to reject a proposed bank.\textsuperscript{156} The ability to choose which bank to use is a boon for investors, theoretically allowing flexibility to make financial decisions. The MIC, however, still maintains the power to reject a proposed bank,\textsuperscript{157} highlighting the MIC’s vast discretionary power to dictate investors’ activities.

The 1988 Law did not outline any rights of the MIC to enforce the laws against violating investors. The 2012 Law outlines penalties the MIC may issue to investors who violate laws and regulations.\textsuperscript{158} The MIC may issue a warning, temporarily suspend tax exemption and relief, revoke the permit, or blacklist the investor from obtaining a permit in the future.\textsuperscript{159} This clarification allows the investor to determine what penalties she may face if she fails to uphold the law.

Generally, the 2012 Law outlines more detailed duties and rights of both the investors as well as the MIC. Investors, however, only hold many of these rights subject to the discretionary approval of the MIC. While the changes to the MIC are certainly notable, the 2012 Law provides more dramatic shifts to the financial incentive regime.

\textsuperscript{150} Id. at ch. 7 § 12(d).
\textsuperscript{151} Id. at ch. 9 § 20.
\textsuperscript{152} Id. at ch. 7 § 12(h).
\textsuperscript{153} Id. at ch. 9 § 20.
\textsuperscript{154} See generally Bissinger, supra note 125.
\textsuperscript{156} Foreign Investment Law 2012, No. 21, ch. 7 § 13(f) (Myan.), available at http://www.burmalibrary.org/docs15/Foreign_Investment_Law-21-2012-en.pdf.
\textsuperscript{157} Id.
\textsuperscript{158} Id. at ch. 18.
\textsuperscript{159} Id. at ch. 18 § 42.
4. **Financial Incentives**

The 2012 Law provides more flexibility for investors in their financial dealings. Under the 1988 Law, foreign investors were required to use the state-owned Myanmar Insurance Corporation, but the 2012 Law provides investors the right to use any insurance agency that is allowed to do business in Burma. The Myanmar Insurance Corporation was the sole insurance company for forty years, but in September 2012 Burma announced that it would grant licenses to twelve private domestic insurance companies. Once the sector develops, foreigners can choose insurance providers.

The 1988 Law grants foreign investors tax exemptions for up to three consecutive years in order to encourage investment. The chapter allows for an extension of this tax holiday if the investment is “beneficial” for the state, and an exemption from other payments such as customs duties and export taxes. The 2012 Law extends the tax holiday from three years to five years in an attempt to even further encourage investment. Its exemptions and restrictions are identical to those contained in the 1988 Law; for instance, companies can claim exemptions on only fifty percent of their profits on products produced for export. One of the most important provisions of the 2012 Law is the discretionary power given to the MIC to “prescribe investment activities which are not required for tax exemption and relief.” These select exemptions are important because blanket tax holidays have the potential to undercut much of Burma’s desperately needed tax revenue. The analysis, however, notes that like all other discretionary

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163 Foreign Investment Law 1988, supra note 160, at ch. 10.
165 Foreign Investment Law 2012, supra note 161, at ch. 12 § 27(a); Foreign Investment Law 1988, supra note 160, at ch 10 § 21(a).
168 Bissinger, supra note 125.
powers of the MIC, there is potential for abuse, and a transparent process of assessing which companies are eligible for exemptions is necessary.\footnote{169}

The 1988 Law required foreign investors to open both foreign currency and kyat bank accounts in a bank prescribed by the MIC,\footnote{170} whereas the 2012 Law allows them to use a foreign currency accounts or a kyat accounts.\footnote{171} The 1988 Law imposed the same requirement on foreign citizens employed by “any such economic organization,” while the 2012 Law also allows foreign citizens to choose whether to open a foreign currency or kyat account.\footnote{172} Again, the 2012 Law provides financial incentives for investors by extending blanket tax holidays and offering more choices to foreigner investors regarding their financial dealings.

5. Labor and Land Provisions

The 1988 Law requires foreign investors to hire Burmese citizens for in-country permitted activities, except for experts and technicians (who may be hired from abroad).\footnote{173} The 2012 Law prescribes more detailed requirements. For example, the law requires that all unskilled hires must be citizens,\footnote{174} and that investors provide training and courses for citizen employees.\footnote{175} It also strictly prescribes certain percentages of skilled workers, technicians, and staff who must be Burmese citizens, with requirements increasing over time.\footnote{176} Section 24(a) requires that when hiring skilled workers, investors hire at least twenty-five percent citizen laborers within the first two years of the project, at least fifty percent of citizen laborers within the second two years, and at least seventy-five percent within the following two years.\footnote{177}

\footnote{169}Id.
\footnote{170}Foreign Investment Law 1988, supra note 166, at ch. 14 § 27.
\footnote{171}Foreign Investment Law 2012, supra note 167, at ch. 17 § 40(b).
\footnote{173}Foreign Investment Law 1988, supra note 172, at ch. 9 § 20.
\footnote{174}Foreign Investment Law 2012, No. 21, ch. 11 § 24(c) (Myan.), available at http://www.burmalibrary.org/docs15/Foreign_Investment_Law-21-2012-en.pdf.
\footnote{175}Id. at ch. 11 § 24(b).
\footnote{176}Id. at ch. 11 § 24.
\footnote{177}Id. at ch. 11 § 24(a). One analyst argued that this requirement could be counterproductive by raising the wages of workers who are already in high demand, thus bringing the cost of investment up and deterring investors. Bissinger, supra note 125 (“For example, export oriented investors may locate in other countries if, despite low costs for unskilled labour, managerial and skilled labour wages make Burma internationally uncompetitive. The [MIC] must find a balance with growth in wages and employment opportunities, both skilled and unskilled, and do so in a transparent and predictable way.”).
The 2012 Law also requires that investors pay Burmese citizen-employees the same wages as foreign employees of similar professional levels, and that investors obey labor laws. The requirement that foreign investors obey labor laws is likely intended to guard against the use of forced labor, which is common in Burma’s public works sector. While the possibility of this provision leading to domestic investigations of forced labor is low given the weakness of Burma’s judiciary, it may very well provide further support for ILO investigations into forced labor and violations of international labor law.

The 1988 Law did not contain a provision on land leases. However, according to recently developed common practice, investors may lease land for up to thirty-year terms with two available extensions of five years each. The 2012 Law extends the terms and allows land leases of up to seventy years, up from the prior forty year maximum. Now investors have the right to obtain a land grant for up to fifty years and to extend that initial grant twice, for up to ten years each—a change specifically designed to attract foreign investors. Even longer leases of land are available in rural or less developed areas, subject to the discretion of the MIC. This section is a significant attraction for foreign investors who are not allowed to own land in Burma and because the government has engaged in rampant illegal land seizures for investment projects in the past.

The government extended land grant terms to attract foreign capital by guaranteeing investors more time to get a return on their investment.

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178 Foreign Investment Law 2012, supra note 174, at ch. 11 § 24(f).
179 Id. at ch. 11 § 26(b).
181 See supra Part I.
183 Aung Hla Tun, supra note 27.
184 Foreign Investment Law 2012, supra note 180, at ch. 14 § 32.
185 Id.
187 BOSE & WATTS, supra note 105.
Alternatively, the new requirements for hiring Burmese workers are oriented toward developing a civilian workforce. Reflecting her view that responsible investment has the potential to improve the lives of Burma’s citizens, Aung San Suu Kyi recently urged investors and corporate executives to invest in the country’s human resources and develop small and medium enterprises. The Burmese worker requirement could help to grow employment opportunities, creating a skilled workforce that can support the country’s economy.

B. Shortcomings of the New Foreign Investment Law

The 2012 Law champions environmental protection, respect for international labor standards as outlined by the ILO, and the protection of ethnic nationalities. It lacks detailed enforcement mechanisms, however, which are necessary to protect these interests. The law lacks any clear mechanism for legal remedies available to citizens who are illegally removed from their land to accommodate a foreign investment project, or for the investors themselves in the event that a contract is terminated in violation of the 2012 Law.

Burma’s history of internal adjudication suggests that the country will not honor these commitments. Burma is not a signatory to certain international treaties that protect investors’ rights, such as the Washington Convention or the Energy Charter Treaty. The judicial system in Burma lacks transparent processes and clear rules and is not an ideal forum for foreigners to attempt to enforce their rights. Without a binding

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191 Foreign Investment Law 2012, supra note 186, at chs. 1, 4, 11.
193 See supra Part I.
international treaty, foreign investors will have to utilize Burmese law in settling disputes unless another method is set forth in the contract.\textsuperscript{196}

Scholar and international human rights litigator Terry Collingsworth highlighted some of the difficulties in enforcing human rights norms, noting “[a]nother shortcoming of the contemporary regime is that most human rights instruments focus on the conduct of the governments and assume that they will adequately enforce national criminal and civil laws against private actors.”\textsuperscript{197} There are, however, two implicit problems with this assumption. First, foreign companies have the option to choose under what conditions and under what legal regime disputes involving them will be addressed:\textsuperscript{198}

Multinational corporations seeking to enforce commercial rights enjoy the tremendous advantage of being able to opt out of national legal systems that are corrupt, unreliable, or non-functioning. For example, an oil company forming a joint venture with the government of Burma can require the government to agree that all disputes be resolved using the English legal system, applying the substantive law of England. Meanwhile, Burmese victims of human rights violations perpetrated by the company's security forces would be left without recourse under national law, since it would be futile—if not dangerous—to complain to a government whose military engages routinely in similar abuses.\textsuperscript{199}

The 2012 Law codifies this practice by expressly allowing investors to contract out dispute resolution procedures.\textsuperscript{200}

This difference in treatment highlights the second major problem. When the government itself perpetrates the illegal conduct, and the country lacks a robust and transparent judicial system, citizens face a practical impediment in their ability to seek legal redress.\textsuperscript{201} The Burmese government historically allowed and even expressly engaged in forced labor


\textsuperscript{198} \textit{Id.} at 185.

\textsuperscript{199} \textit{Id.} at 184-85.

\textsuperscript{200} Foreign Investment Law 2012, \textit{supra} note 196, at ch.19.

and relocation,\textsuperscript{202} environmental and agricultural degradation,\textsuperscript{203} and ethnic minority oppression.\textsuperscript{204} A notable example that exemplifies many of the previously mentioned abuses is the Yadana Pipeline. Unocal, a U.S. oil company, and Total, a French oil company, contracted with Burma to build a pipeline that would divert Burma’s oil into Thailand.\textsuperscript{205} Burma provided security to the project.\textsuperscript{206} Various human rights organizations reported that in providing security to the pipeline, the Burmese junta actually forced ethnic citizens to work on the project and to relocate without compensation under threat of imprisonment or execution.\textsuperscript{207}

Currently, the Shwe Gas Project, a project of Daewoo International that would funnel natural gas and oil from the Bay of Bengal into China, raises similar concerns and has stirred mass protests.\textsuperscript{208} Villagers living along the route of the pipeline have reported land confiscation—more land being taken from them than what was sold, speculators coercing villagers to sign contracts they cannot read, and the non-materialization of promised compensation.\textsuperscript{209} There are many allegations of rampant physical and sexual abuse, unsafe working conditions, and predatory recruiting of children attending nearby schools who can be paid half the wage of an adult male.\textsuperscript{210} Villagers also report environmental degradation, such as foreign subcontractor Punj Lloyd allegedly dumping waste into fishing areas, causing a fifty percent decrease in fishing yields.\textsuperscript{211} The Yadana and Shwe pipelines are merely two examples of investment projects that have had disastrous consequences for the environment as well as the lives and well-being of the Burmese people. But this does not have to be Burma’s future. Through their investment projects, foreign businesses have an opportunity to “ensure equitable growth and development” for Burma by focusing on rural development and small enterprises, and practicing transparency.\textsuperscript{212}

\textsuperscript{203} Id. at 324-25.
\textsuperscript{204} Id. at 325-28.
\textsuperscript{206} Id.
\textsuperscript{207} Velasquez, \textit{Unocal in Burma}, supra note 192.
\textsuperscript{209} SHWE GAS MOVEMENT, \textit{DRAWING THE LINE: THE CASE AGAINST CHINA’S SHWE GAS PROJECT, FOR BETTER EX extractive Industries in Burma} 16 (Sept. 2013).
\textsuperscript{210} Id. at 21-23.
\textsuperscript{211} Id. at 26.
\textsuperscript{212} Mahtani, \textit{supra} note 190.
Due to the lack of enforcement mechanisms, the 2012 Law will not likely improve Burmese workers’ rights or protect the environment. Foreign investors, however, should not disregard the law’s aspirational objectives. Indeed, investors who implement environmentally-friendly practices and respect human rights standards will benefit economically by fostering peace on the ground and a positive public image abroad. The following section explores the advantages to foreign investors who respect their obligations under Burmese law and international labor and human rights standards, and provides recommendations to foreign investors on how to respect these obligations in a country with a long history of labor, human rights, and environmental abuse.

IV. RECOMMENDATIONS

In light of the new, friendlier foreign investment law, foreign companies are increasingly attracted to the Burmese market. The 2012 Law protects labor and human rights. Guarantees against environmental destruction are meant to provide rules for responsible foreign investment activities. The author questions, however, whether domestic mechanisms are adequate to ensure compliance with these guarantees, both for foreign companies as well as their domestic business partners. Despite the inadequacy of domestic enforcement mechanisms in Burma, foreigners retain the duty to respect these protections. Although they may not be judged in a Burmese court, they will be judged in a court of public opinion.

The 2011 United Nations Guiding Principles on Business and Human Rights (hereinafter “Guiding Principles”) reflect the duty of states and businesses to protect and respect human rights and to remedy human rights abuse. The Guiding Principles have been endorsed by the U.N. and are

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216 See id. at ch. 4 § 8(h)(j)(l); 2 § 4(b)(c)(d)(e).
217 Senior State Dept. officials admit that while the U.S. companies operating in Burma will be held to “best practices” standards, they will not be enforceable by U.S. law, Hughes & Hunter, supra note 19.
accepted as “the most internationally authoritative statement in this area.”\textsuperscript{219} They frame the responsibility to respect human rights as the responsibility of businesses to “avoid infringing on the rights of others and [to] address adverse impacts with which they are involved.”\textsuperscript{220}

The Guiding Principles recognize the lack of existing remedies for individuals who suffer corporate-related human rights abuse.\textsuperscript{221} As John Ruggie, author of the Guiding Principles, states himself, “. . . beyond labor standards that impose obligations on states, not on companies directly, no globally endorsed rules and tools existed to further realize a right remedy in relation to business.”\textsuperscript{222} The Guiding Principles are, by definition, merely principles that businesses and states should follow in order to respect human rights. Their status as principles reflects the lack of like binding obligations under international law.\textsuperscript{223} The Guiding Principles serve as a foundation to the emerging doctrine of business and human rights, and reflect a growing acceptance among government and businesses that their responsibility to respect human rights extends beyond the letter of the law, whether domestic or international.

In an age where consumers are increasingly apt to boycott products from companies known to violate human rights, fair labor practices, and environmental protections,\textsuperscript{224} promoting corporate social responsibility does not just satisfy a vague ethical obligation, but has concrete effects on a company’s profits. One author notes the link between “practical social values” and “public expectations regarding business conduct,” exemplified by the fact that poor press regarding a company’s respect for human rights or the environment “can undo hundreds of millions of dollars’ worth of marketing.”\textsuperscript{225} In the mid-1990’s, successful consumer boycotts resulted in major American companies Reebok and Levi Strauss pulling out of Burma, and helped contribute to the imposition of U.S. sanctions.\textsuperscript{226}

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\begin{itemize}
\item \textsuperscript{220} Guiding Principles, supra note 218, at 13.
\item \textsuperscript{221} John Gerard Ruggie, Global Governance and ‘New Governance Theory’: Lessons from Business and Human Rights, 20 GLOBAL GOVERNANCE 5, 13 (2014).
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id. at 44 (“Yet the term responsibility, as opposed to duty or obligation, is intended to indicate that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic law.”).
\item \textsuperscript{225} Id. at 99.
\item \textsuperscript{226} Novosejt, supra note 67, at 17.
\end{itemize}
companies should not underestimate the power of consumers to demand responsible business practices.

A company can face liability for violating human rights norms as laid out in international law in international courts or in domestic courts through extra-territorial jurisdiction. For instance, the litigants in *Doe v. Unocal* used the Alien Tort Statute in a U.S. court\(^{227}\) to sue the U.S. oil company Unocal for its complicity in atrocities such as forced relocation, forced labor, murder, and rape committed by the Burmese army during the Yadana pipeline project in Burma.\(^{228}\) After years of litigation, Unocal finally settled out of court with the Burmese citizens for an undisclosed amount.\(^{229}\) The settlement is estimated to be in the multi-million dollar range, while Unocal’s legal fees were likely over USD 25 million.\(^{230}\) In 2005, the French oil company Total settled with Burmese villagers and paid out EUR 5.2 million in compensation for their use of forced relocation in their investment project.\(^{231}\) Though courtroom doors have begun to close, litigants still attempt to bring cases like this before domestic and international judiciaries through statutes such as the Alien Tort Statute in the United States or in the Spanish National Court,\(^ {232}\) which has recognized “universal jurisdiction” over human rights abuses that occur abroad.\(^{233}\)

Foreign businesses should respect international standards of fair labor, environmental protection, and human rights even without codification in Burmese law. This obligation does not make the 2012 Law and the

\(^{227}\) However, the U.S. Supreme Court recently limited the ability of plaintiffs to sue under the Alien Tort Statute for violations of international law committed extraterritorially in *Kiobel v. Royal Dutch Petroleum Co. et al.*, 133 S. Ct. 1659 (2013).

\(^{228}\) EARTHRIGHTS INT’L, supra note 205.

\(^{229}\) Id.


\(^{231}\) Novosejt, supra note 67, at 31.


\(^{233}\) See *Doe v. Unocal Corp.*, supra note 26; *John Doe v. Exxon Mobil*, No. 09-7125, 2011 D.C. Cir. (holding that companies are liable under the ATS); *Sinaltrainal v. Coca-Cola*, No. 01-03208-CIV (S.D. Fla. filed July 21, 2001); *Villeda Aldana v. Fresh Del Monte Produce*, No. 1-3399-CIV (S.D. Fla. filed Aug. 30, 2001).
protections and guarantees outlined in it superfluous, as it provides specific and concrete obligations to investors.\footnote{234 See Foreign Investment Law 2012, No. 21, chs. 4 § 8(h)(i)(l); 2 § 4 (Myan.), available at http://www.burmalibrary.org/docs15/Foreign_Investment_Law-21-2012-en.pdf.}

In light of the previous considerations, foreign companies investing in Burma should set up mechanisms to ensure compliance with both domestic and international labor, environmental, and human rights standards whenever conducting business in Burma, a country with a lurid history of corruption and abuses. Specifically, foreign investors should: 1) agree to undertake projects only where impact benefit agreements are successfully negotiated; 2) proceed cautiously in Burma’s historically corrupt oil and gas industry; and 3) engage in non-financial reporting in order to ensure compliance with international human rights and environmental standards.

A. Recommendation 1: Foreign Investors Should Agree to Undertake Projects Only Where Impact Benefit Agreements are Successfully Negotiated

Impact Benefit Agreements (“IBAs”) are voluntarily negotiated agreements between an affected local community and the private company that owns a project on or near land inhabited by the community.\footnote{235 Jason Prno, Benjamin Bradshaw & Dianne Lapierre, Impact and Benefit Agreements: Are They Working? 1 (Paper presented at the Canadian Institute of Mining, Metallurgy and Petroleum Annual Conference, Vancouver, British Columbia, May 11, 2010) at 3.} These agreements are usually negotiated with little government involvement.\footnote{236 Id.} IBAs serve the indigenous community by recognizing their presence and authority; it serves the company by fostering local support for projects that would otherwise be met with resistance.\footnote{237 Id.} Points of discussion usually center around “recognition of rights; royalty-type payments; opportunities for employment and training; opportunities for community economic development; and additional environmental and cultural protection measures.”\footnote{238 Id.} Foreign investors involved in development projects in Burma can respect indigenous communities’ rights through constructive dialogue and agreeing to terms that are beneficial to both parties.

The IBA model is consistent with international conventions and guidelines outlining the rights of indigenous communities, particularly as they pertain to extractive industry projects. These obligations are outlined most robustly in the UN Declaration on the Rights of Indigenous Peoples
(“UNDRIP”) and in the International Finance Corporation’s Performance Standard 7, which details the requirement of Free Prior Informed Consent (“FPIC”).239 An increasing number of extractive industry companies are adopting the FPIC standard in their practices.240 Of the twenty-eight oil and mining companies surveyed in one report, five employed FPIC standards, up from only two in a 2009 Oxfam report.241 Notably, nearly all of these companies have faced allegations of serious human rights abuses at their project sites in the past, and two have been the subject of Alien Tort Statute litigation in the United States over their alleged violations of international law.242 These companies now employ progressive policies requiring full negotiation and cooperation with affected communities prior to project construction in order to ensure they receive “social license” to continue.243

IBAs have been utilized successfully in Canada to deliver benefits to indigenous communities affected by mining projects.244 Similar to Burma, Canada has sizable indigenous populations that inhabit lands on or near extractive industry projects.245 Canada has a robust Environmental Assessment (“EA”) requirement whereby companies must consult with and accommodate affected communities, to which IBAs merely add.246 No such robust procedural requirements exist in Burma; for that reason, the need for

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239 U.N. Declaration on the Rights of Indigenous Peoples, supra note 121; “FPIC . . . will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.” Performance Standard 7: Indigenous Peoples 3 INT’L FIN. CORP., WORLD BANK GROUP (Jan. 1, 2012), http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845fa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES.

240 “Oil, gas and mining companies have started adopting FPIC in their own policies and standards. For the private sector, it’s a bottom-line issue and it also promotes responsible spending. When communities become unhappy and begin protesting against a particular project by blocking roads or shutting down production facilities, projects become riskier.” Free, Prior and Informed Consent: Protecting Communities, MINING, PEOPLE & THE ENV’T, http://www.mpe-magazine.com/reports/free,-prior-and-informed-consent-Protecting-communities (last visited Mar. 25, 2014).

241 Id.


243 Free, Prior and Informed Consent, supra note 240.

244 Prno, Bradshaw & Lapierre, supra note 235.

245 Id. at 3 (noting there are 1200 Aboriginal communities that live within 200 km of mines and exploration properties).

IBAs in Burma is even more acute. Canadian companies have gone beyond the requirements of the EAs and chosen to voluntarily negotiate IBAs because they recognize the importance of gaining “social license,” or community support, for their projects. Companies engaged in extractive industry projects in Burma will find, as Canadian companies have, that it is actually in their best interests to surpass the bare requirements of the law.

Researchers analyzed fourteen IBAs negotiated by diamond mining companies in Canada and assessed whether they met four general goals: building positive relationships between the companies and Aboriginal communities; delivering benefits to the Aboriginal community; building capacity in the Aboriginal community; and ensuring follow-up to the environmental assessment process. Between 1989 and 2007, there were positive trends in income, employment and education rates, and business opportunities within Aboriginal communities that had IBAs with mining companies at rates that exceeded growth in the entire Northwest Territories. Despite these positive trends, affected communities perceived some shortcomings of IBAs, most notably: job training was limited to blue collar mining positions; benefits received by the community were trinkets and beads compared to the company’s monetary profits; the confidentiality of IBAs prevented communities from knowing whether they received their due; not all segments of the community were meaningfully included in the IBA negotiation; and environmental impacts of the projects were not mitigated. Foreign companies in Burma should take these critiques into account when negotiating their IBAs.

IBAs are uniquely positioned to provide benefits to both indigenous communities and foreign businesses in Burma. First, IBAs are negotiated solely between the community and the business, entirely outside the regulatory framework or purview of the state. Though the concept of “a private company . . . lay[ing] claim to recognition of aboriginal rights

247 As these recommendations are directed toward companies investing in Burma rather than the Burmese government, the author chooses to focus on IBAs, which are within the purview of private companies, rather than EAs, which are state-mandated requirements issued and overseen by state agencies and over which private companies have no authority.

248 Wright, supra note 246, at 63.

249 Prno, Bradshaw & Lapiere, supra note 235, at 3.

250 While access to resource income can benefit a community by increasing its autonomy and improve living conditions, misuse of resource income can create dependency and contribute to the “resource curse.” See Wright, supra note 246, at 52.

251 Id. at 8.

252 Prno, Bradshaw & Lapiere, supra note 235, at 4-5.

through an unlegislated confidential agreement” has the potential to be problematic, contractual recognition of indigenous rights and interests could be an improvement to the situation of indigenous communities in Burma. In light of the Burmese government’s violent suppression and exploitation of indigenous communities, especially for the purpose of promoting extractive industry projects, IBAs may provide affected communities with the recognition and autonomy they would otherwise be without if left to the state. Secondly, IBAs that include authentic profit-sharing terms and allow full participation by affected communities within the negotiation process could develop local human capacity and resources that, until now, have never been meaningfully engaged by private companies.

Historically, development projects have forced indigenous communities off their land, with violence if necessary. The government and companies have not sought affected communities’ input and have not acknowledged their complaints—this has led to protests en masse against investment projects. An IBA negotiation model could foster relationships of trust between affected communities and private companies, decreasing the incidents of conflict surrounding projects and leading to positive economic, educational, and social trends.

B. Recommendation 2: Foreign Investors Should Proceed Cautiously in Burma’s Historically Corrupt Oil and Gas Industry

Transparency International ranked Burma as the world’s third most corrupt country in 2011 on their Corruption Perceptions Index. Perhaps more than any other sector in Burma, the oil and gas sector has historically suffered from corruption and a lack of transparent practices. In 1996, an analyst from The Nation alleged that the state-run Myanmar Oil and Gas

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254 Id.
255 See supra Part II. B.
258 See generally Prno, Bradshaw & Lapierre, supra note 235.
259 Transparency International is a NGO that issues annual reports indexing levels of corruption in countries. TRANSPARENCY INTERNATIONAL, Corruption Perceptions Index 2013, http://cpi.transparency.org/cpi2013/ (last visited Mar. 26, 2014).
261 ARAKAN OIL WATCH, supra note 8, at 11-12.
Enterprise ("MOGE") "is the main channel for laundering the revenues of heroin produced and exported under the control of the Burmese army." In the same year, eighty percent of the foreign direct investment in Burma was centralized in the oil and gas sector alone. The requirement that foreign investors in the oil and gas sector must partner with MOGE exposes investors to continuing complicity in this corrupt sector.

With much of the resource-rich land lying in territory historically inhabited by indigenous groups, these groups are often forcibly relocated by the government and subjected to violent conflict because of extractive industry projects. The Organization for Economic Cooperation and Development ("OECD") notes that one of the unique problems faced by foreign investors in the extractive resources industry is the inability to insulate themselves from local conflict surrounding their operations. Investors must hire security forces to protect their employees. The Burmese army has provided security forces to past projects such as the Yadana pipeline, where the army committed serious human rights abuses against the community along the path of the pipeline. Thus, investors in the oil and gas industry risk abusing indigenous populations through forced relocation and violence while supporting corrupt government entities, which runs afoul of an investor’s obligations under international law, Burmese law, and most likely, the company’s home country’s laws.

Despite this risk, companies can take steps to proactively reduce their negative impacts on local populations and the environment, and reduce their interaction with corrupt institutions. The OECD report notes that many companies find that diffusing local conflict is in the best interest of their

263 Novosejt, supra note 67, at 15.
268 See id. at 11, ¶ 21.
269 Id. at 11.
270 Id. at 12.
projects’ stability.\textsuperscript{271} One way a company could do this is by encouraging revenue sharing agreements between the state and the local communities affected by the projects.\textsuperscript{272}

The 2012 Law does not target anti-corruption efforts in the oil and gas sector.\textsuperscript{273} A few of the provisions aspire to minimize the role of state institutions in investment projects.\textsuperscript{274} The 2012 Law also bans total foreign ownership of projects in the natural resource sector, meaning that any foreign businesses in the extraction sector will likely be forming joint ventures with the MOGE.\textsuperscript{275} Some analysts suggest that bringing foreign investment to Burma may decrease corruption because foreign companies will be subject to their countries’ own anti-corruption bills, thus raising the standard for business dealings there.\textsuperscript{276} Foreign investors have independent obligations not to engage in corruption stemming from sources like the U.S. Foreign Corrupt Practices Act and U.K. Bribery Act.\textsuperscript{277} Companies should therefore be aware of the risk of corruption and work hard to reduce it.

Since the 2012 Law does not attack political corruption, foreign investors in the extraction and natural resource sectors should proceed cautiously, being aware of the historical corruption rampant in MOGE.\textsuperscript{278} Foreign investors should be especially careful in subcontracting out security forces, making sure to communicate standards for acceptable practices, such as using non-lethal force, reporting any use of force, and providing medical aid to injured persons.\textsuperscript{279} Investors should also consider options for diffusing local conflict beforehand by encouraging resource sharing between MOGE and the local communities and engaging in projects that will benefit

\textsuperscript{271} Id.
\textsuperscript{272} Id. at 11.
\textsuperscript{273} Burma also recently formed a nine-member anti-corruption committee. See Zin Linn, Burma’s Corruption committee: Real Change or Another False Dawn?, ASIANCORRESPONDENT.COM (Jan. 10, 2013), http://asiancorrespondent.com/95146/can-burma-defeat-corruption-after-forming-of-anti-corruption-committee/.
\textsuperscript{274} For instance, Chapter 6 requires non-government persons to serve on the MIC that oversees foreign investment projects. See Foreign Investment Law 2012, No. 21, ch. 6 (Myan.), available at http://www.burmalibrary.org/docs15/Foreign_Investment_Law-21-2012-en.pdf.
\textsuperscript{275} Burma: Amended Foreign Investment Law Published, supra note 164.
\textsuperscript{276} Kuo, supra note 260.
\textsuperscript{278} ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, supra note 267, at 10-12.
\textsuperscript{279} See VOlUNTARY PRINCIPLES ON SECURITY &HUMAN RIGHTS, What are the Voluntary Principles?, http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/
the local communities, such as providing social services like hospitals and developing clean drinking water systems.\footnote{Organisation for Economic Co-operation and Development, supra note 267, at 27.}

C. Recommendation 3: Foreign Investors Should Engage in Non-Financial Reporting to Ensure that International Labor Laws and Environmental Protection Standards are Enforced

Provisions of the 2012 Law aim to ensure compliance with international labor standards and guard against forced labor, consistent with the Guiding Principles and relevant international treaties.\footnote{Guiding Principles, supra note 218; International Labour Organization Forced Labour Convention, No. 29 (June 28, 1930); International Labour Organization Convention on the Worst Forms of Child Labour, No. 182 (June 17, 1999).} The 2012 Law requires foreign companies to train employees, pay them the same wage as foreign employees of the same skill level, and obey relevant labor laws.\footnote{Foreign Investment Law 2012, No. 21, ch. 11 (Myan.), available at http://www.burmalibrary.org/docs15/Foreign_Investment_Law-21-2012-en.pdf.} The ILO provides a few mechanisms by which local citizens can file complaints of these types of abuses.\footnote{International Labour Organization, Forced Labour Complaint Mechanism, http://www.ilo.org/yangon/complaints/lang--en/index.htm (last visited Mar. 25, 2014); Abuses, Land Grabs, supra note 189.} Since the complaint mechanism was established in 2007, it has received 749 complaints as of June 2011, and the number is dramatically increasing as more citizens become aware of the mechanism.\footnote{Forced Labor Complaints, supra note 182.} However, the ILO notes that as of February 2011 there were five individuals who remained in prison as a result of submitting a complaint, a sign that many people may be hesitant to report violations for fear of retaliation by the government.\footnote{Id.} The IHRB report notes that one of the major concerns of the 2012 Law is that the surge of investors will be tempted to engage in illegal land-seizures.\footnote{Institute for Human Rights and Business, Responsible Investment in Myanmar: The Human Rights Dimension 12 (Occasional Paper Series, No. 1, Sept. 2012).} An ILO report says that, while new laws attempt to guard against this possibility by requiring people to register their land with the government, many people in rural areas are unaware of these requirements, and thus are unable to avail themselves of these protections.\footnote{Id.}

In light of these concerns, it is questionable whether the government will properly enforce such labor standards. Foreign investors should support
government efforts to inform the citizen population of their land rights and availability of complaint mechanisms, especially in rural areas of Burma. This proactive approach complies with the international standard of free prior informed consent. Advocates fear that the increasing numbers of investment projects will accelerate the practice of land grabbing; companies must ensure that their land contracts do not engender coercion or force and with the assurance that citizens have been informed of their rights and have given over free, prior informed consent.

Human rights organizations and civil society groups continue to press governments to require more robust reporting. For example, the U.S. Department of State now requires any U.S. individual or entity that enters into a new agreement with MOGE to notify the Department of State, and any U.S. individual or entity that invests more than USD 500,000 in Burma to provide annual reports detailing their human rights, worker rights, anti-corruption, and environmental policies and procedures, as well as any arrangements with security service providers, property acquisitions, and any payments over USD 10,000 made to the government of Burma. As of May 2014, eight companies submitted reports on their investment in Burma pursuant to these requirements. Human rights organizations critique the reporting requirements for not going far enough. Hercules Offshore, an oil and gas company, complied with the requirements though it omitted the names of their local business partners, thus preventing the public from overseeing investment activities and impeding the purpose of the public reporting requirement. Other companies failed to disclose due diligence information, claiming certain privileges as a “passive” investor or as one without full operational control over the investment. Even in the absence

288 Id.
289 Id.
293 EARTHRIGHTS INT’L, FIRST MYANMAR INVESTMENT DISCLOSURES PRESENT OPPORTUNITIES AND CHALLENGES, supra note 290.
294 Id.
295 Id.
of government-sponsored reporting requirements, companies can and should publish such due diligence reports to the public.

Companies operating in Burma should utilize non-financial reporting, a corporate social responsibility marker whereby companies publicize their compliance with the law. Dr. Onyeka Osuji, an expert on corporate social responsibility (“CSR”), notes that non-financial reporting has become more important, as more businesses recognize the impact of CSR on profits. By providing the public with information detailing the particular company’s activities in Burma, non-financial reporting can assure the public that companies take CSR seriously. A report might include how the company limits its environmental impact, trains its citizen employees, ensures that its laborers are not being coercively employed, and provides social services and benefits to the rural communities where their projects are located. Since these are self-made reports, credibility is an issue. Osuji notes Kasky v. Nike, where Nike paid the Fair Labor Association USD 1.5 million after it was discovered that Nike’s report that it was paying its workers “on average double the minimum wage” was false. While companies may be tempted to fudge the numbers, the price of doing so is steep. Consider non-financial reporting a means of corporate advertising, for “poor press regarding a company’s respect for human rights or the environment ‘can undo hundreds of millions of dollars worth of marketing.’”

V. CONCLUSION

Burma’s new foreign investment bill serves as a welcome mat to foreign investors, ushering them in and unlocking the country’s vast resources. The 2012 Law will surely entice companies with its tax holidays, longer land leases, and more flexible joint partnership procedures. It may even placate investors’ consciences with its aspirational goals of promoting responsible investment in accordance with international human rights, fair
labor, and environmental standards.\textsuperscript{303} The law, however, does not provide sufficient mechanisms to ensure these protections are enforced.

Foreign companies should recognize their duty to respect domestic as well as international standards not only out of fear of legal consequences, but out of recognition that their profits will ultimately feel the weight of their decisions in Burma. Consumers care about corporate social responsibility and will be especially attuned to these issues in Burma, as the world watches to see whether its democratic reforms are permanent. Through negotiating IBAs, foreign investors can build trust with indigenous communities and bypass problematic state interference in their attempt to pursue responsible corporate policies and practices. Foreign investors should invest cautiously in the oil and gas sector; encourage revenue sharing between the state and local communities; and diffuse conflict on the ground through providing social services. By engaging in non-financial reporting, companies will model transparency and assure the world that the mistakes of the past are not repeated.

If foreign investors take steps to ensure these protections, maybe they can do more than just avoid a financial loss—perhaps they can play a pivotal role in bringing a country out of economic ruin and placing it back on the map as a flourishing society in all respects.

\textsuperscript{303} These international standards are codified by convention, and include The Universal Declaration of Human Rights, U.N. Declaration on the Rights of Indigenous Peoples, ILO Forced Labour Convention, ILO Convention on the Worst Forms of Child Labour, and ILO Indigenous and Tribal Peoples Convention, \textit{supra} note 121.