

Term of Reference for Beneficial Ownership and Contract Transparency Legal Review

Introduction

The Extractive Industries Transparency Initiative (EITI) is a global standard that promotes transparency and accountability in the oil, gas, pearl, gems and jade, mining, forestry and hydropower industries.

EITI implementation has two core components: Companies in the applicable extractive industries disclose information about their operations, including payments to the government, and the government discloses its receipts and other relevant information on the industry. The figures are reconciled by an Independent Administrator (IA), and published annually alongside other information about the extractive industries in accordance with EITI Standards.

A multi-stakeholder group (MSG) with representatives from government, companies and civil society is responsible for overseeing the process, communicating the findings of the EITI reporting and promoting the integration of EITI into broader transparency efforts in that country.

The EITI Standard encourages MSGs to explore innovative approaches to extending EITI implementation to increase the comprehensiveness of EITI reporting and public understanding of the extractives sector more broadly, including its impact on the national economy, employment and state revenue. It urges high standards of transparency and accountability in public life, government operations and business. The requirements for implementing countries are set out in the [EITI Standard](#). Additional information is available via www.eiti.org

Myanmar Extractive Industries Transparency Initiatives (MEITI)

The Myanmar Extractive Industries Transparency Initiative (MEITI) was established by Presidential Decree 99/2012 in December 2012. The Myanmar MSG was established in January 2014, consisting of 21 members: six representatives from government, six private sector representatives, and nine civil society representatives. Myanmar was granted ‘EITI Candidate’ country status by the EITI Board in July 2014, and successfully submitted its first MEITI report in January 2016.

Following elections in November 2015, a new government took office in Myanmar on April 1, 2016, resulting in changes to the management and functioning of Myanmar’s EITI process. On December 19, 2016, a new MEITI Leading Committee was formed. The Union Minister for Planning and Finance was appointed as the Chair, and Renaissance Institute was designated as the MEITI National Coordinator. On January 17, 2017, the Minister of Planning and Finance signed a Grant Agreement with the World Bank for funding to cover implementation of the MEITI Work Plan from 2017 to 2019. A new MEITI Multi-Stakeholder Group (MSG) was established on March 23, 2017, comprising of seven Government representatives, seven private sector representatives and nine CSO representatives.

Governance changes to the EITI process following Myanmar’s 2015 election led to delays in EITI implementation. The Myanmar government applied to the EITI International Board for an extension to the deadline for the 2nd report and on Myanmar’s first EITI validation process. It was granted an extension and the 2nd and 3rd reports were submitted on schedule in March 2018. The 4th and 5th MEITI reports for oil, gas and mining were also timely submitted on March 31, 2019 and 2020 as scheduled. Moreover, Myanmar EITI forestry sector report covering financial year 2014-15 and 2015-16 financial years also completed in January 2019. The 3rd and 4th forestry sector MEITI report for financial year 2016-17 and 2017-18 were recently produced in March, 2020.

In October 16, 2019, Myanmar was recognized by the EITI international Board as a country with meaningful progress in implementing 2016 standard. To fulfil the Validation committee’s recommendation, there are 12 Corrective Actions with nine meaningful and three inadequate status. Progress in addressing these corrective actions will be assessed in a second Validation starting on 16 April 2021.

What MEITI Reports Talked about Beneficial Ownership

The disclosure requirement for Beneficial Ownership was requested to identify the meaning of BO and PEP in the 2nd and 3rd Reports and implemented in the 4th report. However, the fourth MEITI reconciliation report’s recommended action was to review Beneficial Ownership of companies, including determination of whether BO rests with offshore entities or individuals and a determination of whether such ownership is legal. Again, in the 5th report, the following are recommendation to implement.

- **7.1.1. Availability of B.O information:** recommendation for MSG to invite the various stakeholders in the extractive sector in order to collect the information regarding the B.O of the companies included in the scope.
- **7.1.4. Including mandatory BO disclosure in the process of awarding, and transferring extractive license in Myanmar:** recommendation to MOEE and MONREC to consider including the disclosure of BO data among the required disclosures for the application to extractive license in Myanmar. Therefore, any applicants who wishes to obtain an extractive license will be required to disclose his Beneficial Owner. This disclosure must be compliant with the definition of BO as approved by the MSG. The same requirement must be applicable for the transfer and disposal of extractive licenses in Myanmar.

What MSG and All Agencies Recommend About Contract Transparency in MEITI Reports

On 28 February 2019, the global EITI Board agreed in principle to proposed changes to the EITI Requirements, including:

- Contract transparency and disclosure: Disclosure of new contracts between the state and the companies, with mandatory disclosure of contracts signed or amended after 1 January 2021.
- Strengthening disclosure requirements regarding state participation, transactions related to state-owned enterprises and quasi-fiscal expenditures. - Mainstreaming transparency: Encourage systematic public disclosure of extractive data instead of reliance on EITI Reporting for comprehensive disclosure of extractive data.

Journey of Beneficial Ownership (BO) in Myanmar

The EITI Board agreed in February 2013 that following a period of testing and learning, the EITI should, in the future, require disclosure of beneficial ownership in extractive companies operating in implementing countries.

With the adoption of the 2016 EITI Standard (Requirement 2.5) as of 1 January 2020, it is required that all implementing countries request, and companies publicly disclose, beneficial ownership information. This applies to corporate entity(ies) that apply for or hold a participating interest in an exploration or production oil, gas or mining license or contract and should include the identity(ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted. In addition, any politically exposed persons who are beneficial owners must be identified. It is recommended that the beneficial ownership information is made available through public registers. In order to ensure that the necessary

preparatory steps and reforms are undertaken, implementing countries were required to agree and publish roadmaps for their beneficial ownership disclosures by 1 January 2017. Further details about EITI Requirement 2.5 on beneficial ownership are available from <https://eiti.org/node/4922#r2-5>

The Myanmar EITI Multi-Stakeholder Group submitted a Beneficial Ownership Roadmap according to the deadline and a consulting firm, Adam Smith International (ASI), was hired from December 2017 to June 2018 to develop the Roadmap into a detailed workplan, advise and support the MSG on institutional and implementational arrangements for BO, and conduct a pilot project to gather beneficial ownership data on extractive industries in Myanmar. The ASI Final Report included the following recommendations:

Enshrining BO requirements in law: Feedback from Myanmar’s private sector, as well as international experience, suggests that the most sustainable way of implementing Requirement 2.5 is by enshrining it in the national legal framework. A Presidential decree outlining the EITI requirement and sanctions and incentives for companies, would likely be sufficient to encourage higher response rates among the private sector and produce evidence of significant progress during the first phase. In the longer term, Myanmar needs to adopt an approach to introducing BO as a legal requirement, which is both technically sound and politically feasible. Some countries have opted for amendments to company legislation, others have introduced stand-alone laws (e.g. BO Registrar in Guernsey, or EITI laws), still others have decided to amend sector (mining and/or oil and gas) legislation. To guide this process further, it would be useful for Myanmar’s MSG to secure legal support for BO reform and wider EITI work.

On **the June 30, 2018, a Beneficial Ownership Task Force was formed by Decree No. Order (60 / 2018)** from the Union Minister’s Office of Planning and Finance. The Task Force comprises 13 members, which has nine Government (representing from the MEITI National Coordination Office, Director from Department of Mine, MOGE, DICA, The Attorney General Office, the office of Auditor General (OAG), Central Bank of Myanmar, the Anti-corruption Commission and the Financial Information Unit), two private sector and two civil society representatives, is chaired by U Soe Win, the MEITI National Coordinator and is responsible for approval and implementation of the BO Work Plan. The Terms of Reference of the BO Task Force is attached in annex.

2 October 2019 Presidential Notification¹ confirmed the mandate of the BO Task Force to make decisions regarding ownership disclosures and empowers the Directorate of Investment and Company Administration (DICA) as an implementation agency. The Notification also paves the way for several companies and state-owned enterprises operating in Myanmar’s Oil and Gas production and transportation, mineral, pearl, jade and coloured gemstone industries to disclose their beneficial owners by January 1, 2020.

BO workshop was held in March 2017 and drafted the road map for implementation. In addition, it will benefit the national procurement and public infrastructure projects, should the government mainstream the BO practices in procurement. So far, Myanmar has been achieved the requirements of 2020 for BO reporting according to the approved BO Work Plan. In January 2020, all the companies from the 4th reports are required to disclose their BO information.

¹ https://myanmareiti.org/sites/myanmareiti.org/files/publication_docs/notification_bo.pdf

After January, 2020

Following a review of the Myanmar legislative framework, the BO definition and reporting requirements will be enshrined in an appropriate legal instrument, and a long-term data gathering, verification and publishing mechanism will be established to enable Myanmar to ensure compliance with EITI Standard 2.5.

Myanmar had addressed the EITI requirement. The requirement has been to reveal the beneficial ownership by making this mandatory before 1st of January, 2020 and please see in this link² for detail information. Currently, the BO website development is under the phase two with amendment based on the BO report³ recommendations by the consultant, Charlotte Boyer and 2019 EITI standard. The negotiation with the service provider is on-going for contract under the closely guidance of representatives from BO Task Force and technical support group (NRGI, International Secretariat, Nathan and NCS). In the meantime, the second phase activity for legal review will start parallelly together with the new website development.

Contract Transparency Process in Myanmar

In accordance with 2019 EITI standard, contract disclosure will be a requirement for all countries implementing EITI. Therefore, the prescription regarding the contract disclosure is that implementing countries are to disclose contracts from oil & gas, mining, gemstones and pearls by January, 2021.

To document the government’s policy on disclosure of contracts and licenses that govern the exploration and exploitation of oil, gas and minerals is one of the requirements including a description of whether legislation or government policy addresses the issue of disclosure of contracts and licenses. On the other hand, it needs to make sure whether it requires or prohibits disclosure of contracts and licenses. If there is no existing legislation, an explanation of where the government policy is embodied should be included, and the multi-stakeholder group should document its discussion on what constitutes government policy on contract disclosures. Any reforms relevant to the disclosure of contracts and licenses planned or underway should be documented. Furthermore, an overview of which contracts and licenses are need to be publicly accessible. In addition to that, implementing countries should provide a list of all active contracts and licenses, indicating which are publicly available and which are not.

For all published contracts and licenses, it should include a reference or link to the location where the contract or license is published. If a contract or license is not published, the legal or practical barriers should be documented and explained. If there are deviation from legislation or government policy requirements concerning the disclosure of contracts and licenses, an explanation should be provided.

To facilitate implementation of contract transparency process, MEITI and NRGI held the Contract Transparency Workshop on December 16, 2019. This workshop brought together over 60 participants from various government departments, civil society organizations and private sectors (oil & gas, mining).

MSG has approved the workplan for implementation of contract disclosure and a presidential decree enabling contract disclosure is being drafted to overcome legal barriers, such as confidentiality clauses containing in contracts barricading the fully disclosure of contracts.

² <https://bo.dica.gov.mm/>

³ <https://myanmareiti.org/en/publication/review-first-meiti-beneficial-ownership-disclosure>

Objectives of the Study

To conduct a review of the existing legislative framework that link to disclosure of BO information and contract transparency of companies in Myanmar, recommend ways to enshrine in law BO requirements only for the extractive sector, as a potentially necessary intermediary step and specific changes (e.g changes in legislation, changes in government systems and data-bases etc.) to ensure the long-term sustainability and consistent implementation of BO disclosure reporting in Myanmar. Moreover, the legal framework for data access, PEP reporting of asset disclosure and company’s reporting obligation will be assessed.

To conduct a diagnosis review on restriction to disclose the contracts which was described in the existing legislative framework in Myanmar and to strengthen the legal and policy environment to reduce the restriction for contract transparency.

Scope of Work

Under the guidance of the MSG and BO Taskforce and with support from the National Coordination Secretariat, the consultant shall

1) Conduct desk research to review:

- a) All existing legislation and legal documents (including laws and regulations, Standard PSCs and JV contracts) related to Beneficial Ownership and Contract Transparency in Myanmar (President Decrees, Directives, Notifications, laws and policies are listed in Annex 1) document and analyze all relevant legal clauses that refer to Beneficial Ownership and Contract Transparency covered within the scope of MEITI (oil and gas, jade and gems, mining, pearl, forestry, and hydropower) and identify:
 1. Inconsistencies between the laws and implementation of BO under the EITI Standard, including legal barriers to BO disclosures
 2. Gaps and de facto practices that could be addressed in the legislation and other policy instruments to facilitate BO and contract disclosure implementation
 3. any inconsistencies between the laws themselves
 4. Recommendations for addressing identified gaps and inconsistencies
- b) How other countries have enacted legal requirements to support the successful implementation of Beneficial Ownership and contract disclosure in particular; (guidance note⁴ on legal approaches to BO in EITI countries) and the applicability of these practices to Myanmar:
- c) Legislative processes in Myanmar since 2010 to understand the feasibility, challenges and opportunities, of enacting BO legislation in Myanmar.
- d) To see if it could/should include how BO laws/regulations could be properly enforced (e.g. what are the proper sanctions for non-compliance?); recommendations on rules for updating information, and rules for ensuring public access.

⁴ https://eiti.org/files/documents/legal_approaches_to_beneficial_ownership_transparency_in_eiti_countries.pdf

2). To review all the following documents;

- a) previously published analyses of the register and current issues with the legal framework for BO in Myanmar and
- b). material published by international groups on emerging standards for BO publication e.g. FATF guidance and Open Ownership initiative

3) Conduct consultations with MEITI stakeholders (MSG members, BO taskforce members, government, parliamentarians, CSOs, private sector development partners, and the EITI international Secretariat) on how to best address the long-term legal institutionalization of BO in Myanmar.

4) Based on the desk research and consultations, weigh the options and develop recommendations on the most effective way to address the short/immediate action, the mid-term and long term and sustainable legal institutionalization of BO in Myanmar which:

- Identifies the most effective instrument(s) and provide short-term solutions to enshrine BO requirements in the extractive sector in law and long-term sustainability (BO Law, amendments to Anti-money laundering law or Anti-corruption Law etc.)
- Permanently establishes the institutions required for BO implementation
- Includes draft text for new laws or legal amendments.
- Takes into consideration the long-term goal of mainstreaming BO reporting within government systems (systematic disclosure)
- Assessment of how BO laws/regulations could be properly enforced, e.g what are the proper sanctions for non-compliance?
- Recommendations on rules for updating information, and rules for ensuring public access.
- draft legal provisions for BO disclosure which could be a stand- alone law or could be added as amendments to existing sectoral laws

5) Provide recommendations for how the MSG’s agreements on BO definition, level of detail, threshold, reporting obligations for PEP could be embodied in the regulations.

6) Review and provide opinion on all relevant laws, policies, regulations, and licenses related to the development of the terminal in the proposed site. Highlight restrictions / limitations under any laws, regulations or policies to disclose contracts from extractive sectors.

7) Consult with MEITI stakeholders (MSG members, government, Bill committee from parliament, Natural resource and environmental conservation committee from parliament, CSOs, private sector, development partners and EITI International Secretariat) on how to reduce or overcome the restrictions and limitations under law, regulations and policies in order not to cause any delay the contract transparency process.

Schedule and Deliverables

No.	Deliverables	Anticipated Days
1	Inception report detailing the findings of the desk research described above.	20 days
2	Report on findings of consultations	10 days
3	Workshop for MSG and Task Force members	5 days

4	Final report on recommendations for legislative reform, including draft text for recommended legal instrument(s)	10 days
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The consultant will report in English.

Anticipated Duration of Contract

It is anticipated that the contract will require a total of approximately 45 days over the duration of 3 months.

Required Qualifications and Experience

- A master’s degree in law and at least 5 years’ experience in the legal field.
- Experience conducting legislative reviews, and drafting legislation.
- Experience and knowledge of extractive industries and/or tax and financial legislation, particularly in Beneficial Ownership.
- Fluency in Myanmar and English and familiarity with the Myanmar legislative framework.
- Knowledge of EITI, Beneficial Ownership, and experience conducting legal consultations would be an advantage.

Submission of Proposal

The consultant shall submit financial proposal with cover letter, CV and responsibilities of team not later than **17:00 PM, 5 August 2020** to following email address;

MEITI - National Coordination Secretariat,
 13-A, Mya Yadanar Street, 16 Ward, Yankin Township, Yangon, Myanmar,
communication@myanmareiti.org

Annex I: List of Policy and Legislation related to Extract Industries

Tax, Anti-corruption and Financial Legislation

1. The Income Tax Law, 1974 and amendments (Rules and Regulations)
2. The Law Amending the Income Tax Law, 2011, 2014 and 2016
3. The Anti-Corruption Law, 2013 and amendments
4. The Anti-Money Laundry Law, 2014
5. Myanmar Companies Act and Subsidiary Legislation, 1914
6. Myanmar Companies Rules, 1940
7. Myanmar Companies 18 Detailed Report Regulations, 1957
8. The Myanmar Companies Law, 2017
9. Special Companies Act, 1950
10. The Commercial Tax Law, 1990 and 2015 and amendments (Regulations)
11. The Foreign Exchange Management Law, 2012 and amendments
12. The Myanmar Central Bank Law, 2013 and amendments
13. The State-Owned Enterprise Law, 1989 and amendments
14. The Myanmar Investment Law, 2016 and amendments
15. Myanmar Official Secret Act, 1923 and amendments
16. The Contract Act, 1872 and amendments
17. Union Taxation Law (and annual tax laws)
18. Myanmar Stamp Act, 2016 and 2017 and amendments
19. The Special Goods Tax Law, 2016 and amendments (Rules)
20. Union Auditor General Law 2018 and amendments
21. Immigration Law
22. Anti-Corruption Code of Ethics for Companies and Body Corporates (by DICA)
23. 2019 National Records and Archive Law
24. Tax Administration Law

Extractive Industries Policy and Legislation

1. The Myanmar Mines Law, 1994 and amendments
2. The Myanmar Mining Rules, 2018
3. The Myanmar Gemstone Law, 2019
4. The Myanmar Pearl Law, 1995 and amendments

5. The Myanmar Pearl Rules, 2000 and amendments
6. Myanma Forest Policy, 1995
7. The Forest Law, 2018
8. The Forest Rules, 1995
9. Oil Field Act, 1918 and amendments
10. Oil Field Rules, 1918
11. Petroleum Rules, 1934
12. The Hand-Dug Well Law, 2017
13. Petroleum and Petroleum Products Law, 2018
14. The Labour Law, 1951 [Oil Field (Welfare of Laborers) Act, 1951]
15. Labour Organization Law, 2011
16. Settlement of Labour Dispute Law, 2012
17. Development of employment and Skill Law, 2013
18. 2013, Minimum Wages Law
19. 2016, Payment of Wages Law
20. Workmen Compensation Act, 1923
21. Environmental Conservation Law, 2012 (Rules,2014 and EIA Procedures,2015)
22. Electricity Law, 2014
23. Financial Institution Law, 2016
24. Conservation of River, Creek and Water Resources Law, 2006
25. Statistic Law, 2016
26. Forestry Laws, rules, Regulations

Other Laws and References

1. Any ASEAN related laws
2. International Treaties
3. Production Sharing Contracts
4. Existing Decrees and Practices on transparency and disclosure if there is any

Annex-II: List of Relevant Stakeholders

No	Title	Stakeholders	Remark
1	Public Financial Management	Myanmar Economic Bank Ministry of Planning, Finance and Industry Auditor General JPAC	
2	President Office		
3	Union Attorney General Office		
4	Ministry of Natural Resource and Environmental Conservation (MONREC)		
5	Central Bank		
6	Ministry of Electricity and Energy (MOEE)		
7	Anti-Corruption Commission		
8	Anti-money laundering taskforce		
9	Private sector	MFMA MGJEA Myanmar Oil & Gas Service Association (MOGSA) Myanmar Forest Products and Timber Merchants Association (MFPTMA)	
10	MIC	DICA	
11	Myanmar Development Institute		
12	Myanmar Stock Exchange		
13	National Economic Coordination Committee (NECC)		
14	MEITI	MSG members BO Task Force Members	