

CONCEPT PAPER

Roadmap for Myanmar's Labour Law Reform Process Aaron Halegua¹

I. Initiative and Project Background

1. The *Initiative to Improve Labour Rights and Practices in Myanmar* (the “*Initiative*”) was formally launched by Myanmar, the United States, Japan, Denmark, and the International Labour Organization (“ILO”) in November 2014. The European Union joined in May 2015. The *Initiative* seeks to support the promotion of fundamental labour rights and responsible business practices. Specifically, the *Initiative* will (1) develop a multi-year labour law reform plan to build on the legislative progress already made by Myanmar, (2) support institutional capacity building in line with identified priorities, and (3) provide a forum for domestic and international stakeholder engagement and input.
2. The ILO has already been engaged in providing technical assistance to the Government of Myanmar (“GOM”) for a number of years, including providing the Ministry of Labour, Employment, and Social Security (“MOLES”) with substantive comments on both existing laws and specific draft legislation.
3. Similarly, the ILO and partner governments are already involved in various capacity-building efforts in Myanmar. For example, Denmark has a program working with occupational health and safety inspectors and the United States is training mediators and arbitrators on dispute resolution techniques.
4. This paper has two main objectives. First, to help Myanmar develop a comprehensive framework or “roadmap” for the next several years of labour law reform. Second, to help the various stakeholders develop procedures or principles to guide this process of labour law reform.
5. Three main activities were undertaken in preparing this report. First, a review of background materials relevant to the project and conversations with individuals knowledgeable about the current labour situation in Myanmar. Second, a 10-day mission (the “Mission”) to Yangon and Nay Pyi Taw to meet with relevant domestic and foreign stakeholders.² Third, additional research on comparative labour law frameworks, further consultations with stakeholders and experts, and the drafting of this report.

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² Meetings were conducted with representatives and leaders from the GOM (including the Attorney General’s Office and MOLES), Parliament, trade unions, employer and business organizations, labour rights NGOs, domestic civil society groups and research institutes, ILO project managers and staff, and the embassies of the United States, Japan, and Denmark, among other stakeholders.

6. This paper proceeds in five parts, including this background section. Part II briefly describes the current state of Myanmar’s labour laws, the ongoing reform effort, and the use of consultation in the legislative process. The remainder of the paper seeks to assist Myanmar in developing a roadmap for its future labour law reform. Part III considers what framework Myanmar might adopt for its labour laws. Primarily, it suggests Myanmar adopt a cohesive labor standards act, discusses options for structuring such a law, and proposes a timeline for its creation. Part IV makes suggestions concerning a process for developing a labour law reform strategy as well as ways to improve consultations with the social partners, other stakeholders, and the public during the legislative process. Finally, Part V describes certain capacity building programs that could assist Myanmar in its labour law reform effort.

II. The Current Status of Myanmar’s Labour Law Reform

Labour laws

7. A February 2015 presentation by MOLES identified 17 pieces of labour legislation in effect at that time. Of these, five were enacted from 1923–1948 (during the British colonial period), four from 1951–1959, one in 1999, and six from 2011–2014.³ Yet, even this list fails to capture the series of laws that are not solely dedicated to labour issues but are of some relevance, such as the forced labour provisions in the *Ward and Village Tract Administration Amendment Law* (2012). A more complete list of all labour-related legislation is provided in **Appendix A**. Much of the recent legislation results from efforts to comply with specific international standards. And, indeed, this legislative activity has addressed certain gaps in the legal framework and made progress in several areas.
8. Nonetheless, individuals inside and outside MOLES acknowledge that certain gaps and inconsistencies in the existing legal framework persist. For example, different laws use different definitions of key terms such as “employer” and “worker.”⁴ Some laws apply only to certain types of workplaces (e.g., factories of a given size), others to workers in a given profession, and some seek to cover all workers. The above may cause confusion and result in gaps in coverage.
9. In light of the above, MOLES is committed to continuing reform of its labour laws.⁵ The goals of such continued reform include creating a system that is:

³ U Myint Kywe, Deputy Director, Department of Labour Relations, “Labour Law Reform and Institutional Capacity Building,” Employment Opportunities Sector Working Group, Feb. 25, 2015.

⁴ For instance, the *Factories Act* (1951) mostly refers to the “occupier” of a factory, which seems to mean the owner of the factory (Sec. 2(n)), while other laws focus on the existence of an employment agreement as the basis for establishing an employment relationship, such as the *Settlement of Labour Disputes Law* (2012) (Sec. 2(c)). The *Factories Act* also establishes a presumption of employment in certain situations (Sec. 95), which is absent in other laws.

⁵ In fact, Myanmar is engaged in an effort to modernize and improve its laws that extends well beyond just the labour context. For instance, this article discusses efforts to merge the *Myanmar Citizens Investment Law* and the *Foreign Investment Law* into a single piece of legislation so as to “remove incongruities between the two laws.” Sandar Lwin, “DICA extends consultations for investment law,” *Myanmar Times* (Apr. 2, 2015), available at: <http://www.mmtimes.com>.

- a. *comprehensive* in that it covers all workers and leaves no unintended “gaps”;
- b. *accessible* in that the laws can be easily understood by all stakeholders, including workers, employers, labour inspectors, mediators, arbitrators, and judges, which will help to prevent unnecessary disputes resulting from ambiguous rules;
- c. *appropriate* in light of Myanmar’s history and present conditions; and
- d. *consistent* with its ILO commitments and international labour standards generally.

Legislative reform process

- 10. At present, there does not appear to be a formal structure or process for GOM or MOLES to receive input or consult with stakeholders about a vision for a national labour law framework—namely, how the various individual laws fit together.
- 11. In the legislative process for issuing individual laws, GOM and MOLES have acknowledged the need for increased openness and consultation. **Appendix B** is a flowchart prepared by MOLES showing the process from the time a bill is drafted until the President signs it.⁶ As shown, the responsible MOLES department first drafts the legislation; it is then reviewed by MOLES’ Law Team; and later sent to the Attorney General’s Office and Cabinet for comments. The bill is then submitted to Parliament, where it is first considered by the Bills Committee and later the plenary. Upon approval by Parliament, the legislation is sent to the President.
- 12. Various forms of consultation normally occur during this process. MOLES will consult with employer and worker representatives prior to the bill being approved by the Minister and sent to Parliament. MOLES officials will then also consult with Parliament. After the bill reaches Parliament, the draft bill is routinely published in the newspaper.
- 13. Consultations with employer and worker representatives.
 - a. The nature of these consultations has been to invite the representatives to a meeting to comment on the draft bill. The meetings can be quite large, sometimes involving over seventy people. The representatives report that the draft bill is sometimes not provided prior to the meeting.
 - b. These consultations usually occur shortly before the draft bill is approved by the Minister and sent to Parliament. In some instances, the consultations occur at the time MOLES is also soliciting comments from the Attorney General’s Office and other ministries.

⁶ U Myint Kywe, Deputy Director, Department of Labour Relations, “Labour Law Reform and Institutional Capacity Building,” Employment Opportunities Sector Working Group, Feb. 25, 2015.

- c. MOLES officials are generally dissatisfied with the quality of the comments received at these sessions. The employer and worker representatives are dissatisfied with the lack of opportunity to study the draft legislation, consult with their members, and prepare comments prior to meeting. Both sides feel that attendees often lack expertise relevant to the draft bill being considered.

14. Consultations with Parliament; newspaper publication.

- a. The draft legislation first goes to the Bills Committee, which generally has seven days to produce a report for the full Parliament. During this time, the Bills Committee may consult with the relevant technical committee in Parliament (e.g., the committee handling labour issues) and MOLES officials may give a presentation and answer questions about the bill.
- b. The general perception is that Parliament has struggled to play an effective role in the legislative process. The members generally lack sufficient staff, resources, or knowledge to meaningfully consider and comment on draft legislation. The large number of bills sent to Parliament each session (some estimate over thirty) and the short time Parliament has to consider them only exacerbate this problem.
- c. The publication of draft bills in the newspaper has not proven to be an effective means of soliciting public comments on labour laws. In fact, MOLES officials were unable to recall receiving any such comments for any of the various draft bills that underwent this process. One potential contributing factor is that the newspaper generally does not state how comments on the legislation may be submitted or to whom they should be directed.

15. Consultations with the ILO.

- a. The ILO has provided substantive comments to MOLES on a number of their draft bills or recently enacted legislation. These comments are provided with an understanding that the draft is confidential and the ILO will also keep its comments confidential for at least six months, unless MOLES chooses otherwise.
- b. MOLES officials report that the comments have been useful. However, digesting technical comments delivered in English can be burdensome and time-consuming.
- c. MOLES officials also note that for different laws, technical assistance may be required or most valuable at different stages of the legislative process, or even at multiple stages. Therefore, the officials request that the ILO be available on an “as needed” basis throughout the legislative process.

16. In sum, MOLES officials affirm the importance of consulting with and receiving input from relevant stakeholders, including employer and worker representatives, Parliament, and the public. However, they believe the quality of these consultations and comments should be improved.

17. Notably, all stakeholders consulted in connection with this paper were supportive of at least the following two ideas:
 - a. First, that the social partners should be provided with draft legislation far enough in advance of meetings such that they have sufficient time to consult their members and respond thoughtfully and meaningfully. MOLES officials agreed that drafts should be circulated two weeks prior to the consultation meeting.
 - b. Second, that it would be of great value to create a smaller “working group” of stakeholder representatives with relevant expertise who commit to longer-term substantive engagement (i.e. attending regularly scheduled meetings) with the legislative reform process and particular pieces of legislation.
18. Attorney General’s Office. During the Mission, in discussions about Myanmar’s labour law reform program, the Attorney General’s Office expressed support for the process and committed two staff people to assist: one from the department responsible for reviewing all labour law legislation; and one from the department overseeing international treaties and conventions.

III. “Roadmap” for a Labour Law Framework

19. In constructing a labour law framework, the domestic stakeholders made clear that Myanmar would not simply adopt the labour laws of another country. Instead, it will create its own system that is congruent with its unique conditions, including its history, culture, and level of economic development. However, it is still possible to use the experiences of other countries as a reference. During the Mission, stakeholders expressed a particular interest in learning more about the Republic of Korea (“Korea”), Singapore, and the other ASEAN countries.
20. This section outlines some of the steps that Myanmar could take and questions that it might consider in formulating its own labour law framework. In addition, it provides some potential options for this framework as well as a proposed timeline in order to provide a starting point for conversations.

Preliminary tasks

21. Policy objectives. In deciding how to structure the legislative reform, it may be helpful to first define the general policy goals and objectives of the reform effort. This list may include goals such as economic growth, job creation, ensuring decent work, etc.
22. Identifying elements. A useful preliminary step in designing the labour law framework is to identify the topics or elements to be addressed in that framework. **Appendix C** provides a sample list of such topics drawn from (1) issues already covered in Myanmar’s existing laws or draft legislation, and (2) areas addressed by international standards, such as ILO Conventions and Recommendations, or commonly found in other countries. Once completed, consideration can be given as to which chapter or law should address each of the elements.

23. Mapping the existing legal landscape. Another important preliminary exercise is to identify all existing sources of labour law or laws with implications for labour issues. Statutes are one important such source of law, but relevant law may also be found in the constitution, international treaties, ministerial regulations, or court decisions. If this step is not performed, there is a risk that new provisions will duplicate or contradict existing ones, or that important provisions may be inadvertently repealed. Therefore, to the extent not already done, this mapping should be undertaken at the outset of this reform process. **Appendix A** and **Appendix G** (discussed below) can serve as starting points for this task.

Terminology and concepts

24. What is a “labour code”? As a preliminary matter, it is important to distinguish between two different things that are both sometimes referred to as a “labour code.” For the sake of clarity, the paper refers to one as a “labour standards act” and one as a “compilation.” The concept of “consolidation” is also described herein.
- a. Labour standards act. The *first* type of “labour code” implies a law that concerns multiple labour topics and also exhibits a certain level of cohesiveness. For instance, the law may state a set of generally applicable principles, definitions of key terms, and enforcement procedures applicable to multiple topics. The most common type of such a “labour code” is a single piece of legislation that sets basic labour standards in key areas, such as payment of wages, working hours, and employment contracts. (As discussed below, many countries address OSH, industrial relations, and social security in separate legislation.) Many countries label such laws as a “labour standards act” (LSA) and it often serves as the most foundational and important piece of labour legislation in that jurisdiction. Some examples of this type of legislation include the *Labour Standards Act* in Japan and Korea, the *Labour Protection Act* in Thailand, and the *Employment Act* in Singapore.
 - b. Compilation. The *second* type of “labour code” may more appropriately be termed a “compilation.” In this arrangement, several individual laws relating to labour issues are collected in a single place, but the various laws are not meaningfully interrelated or connected. For instance, the United States organizes its numerous, individual federal labour laws – on diverse subjects like collecting labour statistics, minimum wage and working hours, OSH, and worker training – as chapters in Title 29 of the U.S. Code. However, Title 29 has no common provisions that apply to or link together its various chapters. Similarly, the three-part *Canada Labour Code* was created by taking three separate laws enforced by different regulatory agencies – industrial relations, OSH, and labour standards – and organizing them into a single code. While lacking some of the benefits of a labour standards act, these compilations still do make key labour laws easier to find and more accessible.
 - c. Consolidation. The process of “consolidation” is worth some explanation. Many countries amend their laws by passing a separate piece of legislation authorizing certain changes rather than re-issue the entire law with the changes incorporated. From time to time though, a jurisdiction may then issue

a “consolidated” version of the law that updates and incorporates the amendments into the original text. For instance, when the *Canada Labour Code* was created, not only were three laws placed together into a single code, but each of those individual laws was a consolidation of existing amendments, regulations, and court decisions that had modified the original law. Similarly, France completed a process of consolidating its *Labour Code* in 2008 in which it sought to simplify the language and codify evolutions in the law. The Philippines issued a consolidated *Labour Code* in 1974. This process can be very useful in creating a single, comprehensive version of a law with all its amendments.

- d. **Appendix D** provides the tables of contents for various labour standards acts, compilation labour codes, and consolidated labour codes.

Contents and design of an LSA

- 25. Advantages of an LSA. There are several reasons for Myanmar to adopt an LSA—a single piece of legislation addressing basic labour standards.
 - a. Consistency. When this format is used, a common statement of general principles may apply to the various topics covered in that law.⁷ Similarly, key terms such as “employer,” “employee,” “worker,” “wages,” and “hours,” may be defined once at the outset and then apply throughout the multiple sections. Using a common set of definitions also helps to ensure that the same terms are not given different meanings in different contexts, which can cause considerable confusion and gaps in coverage.
 - b. Efficiency. This format may also allow more efficiency in the legislative process. For instance, definitions need only be drafted, discussed by social partners, and presented to and passed by Parliament a single time. If a change needs to be made, amending one law instead of several is simpler. There may also be sections or provisions that apply to multiple topics and will only need to be stated once. For instance, the powers and duties of labour inspectors are likely to be similar whether the worker is in a factory or a shop, and whether the claim concerns a working hours violation or illegal wage deduction.
 - c. Accessibility. Workers and employers should be able to easily access and understand the nation’s labour laws. This is best achieved by having the key provisions governing employment consolidated in a single place, rather than spread out among various, disconnected laws.
- 26. Thematic groupings versus sector- or job-specific laws. As mentioned above, Myanmar currently has some labour laws that apply to particular types of workplaces (the *Factories Act* and *Shops and Establishments Act*) or types of workers (*Dock Workers Act*). More recent legislation is organized by theme or topic and spans various sectors and industries, such as the *Minimum Wage Act* (2013) and *Labour*

⁷ For instance, in the “General Provisions” chapter of the Philippines’ *Labour Code*, Article 4 instructs: “All doubts in the implementation and interpretation of the provisions of this Code, including its implementing rules and regulations, shall be resolved in favor of labor.”

Organization Law (2011). The consequence of this mixed system is that there may be gaps in coverage of certain workers. For instance, domestic workers neither work in factories nor shops, nor have their own law addressing issues such as overtime. These fragmented laws also treat key issues in different ways, such as defining an employment relationship. This may create unnecessary confusion and loopholes. In addition, this fragmented coverage scheme might increase employer's ability to evade certain regulations by adapting their business to fall outside the scope of a particular law.

To avoid these problems, as **Appendix D** shows, most jurisdictions have instead adopted legislation that is generally applicable to all workers in all industries and gradually repealed their sector- or job-specific laws. To the extent that certain special provisions are necessary, those can be included as sections in that general law.⁸ As this helps to ensure consistency, eliminate gaps in coverage, and reduce employers' ability to evade regulation, the ILO has recommended this structure for Myanmar's labour standards legislation. And, as noted, Myanmar has increasingly adopted this approach in its recent legislation. Accordingly, this paper presents LSA options consistent with this format.

The same principle applies to Myanmar's OSH legislation and the ILO has made the same recommendation in that context. There would be a single law governing this area and, to the extent necessary, sections within that law or separate regulations that provide special rules for various sectors (i.e. manufacturing, mining, etc.). Indeed, other countries with British-influenced legal structures have gradually repealed or replaced their *Factories Act* and *Shops and Establishments Act* as they adopted generally applicable, theme-based legislation.⁹ If Myanmar decides on such a gradual approach, it must significantly amend the existing laws with OSH-related provisions and take great care to ensure consistency between them and the general OSH law.

27. Threshold questions in creating an LSA. In deciding which topics to include in an LSA and how to structure the contents of the LSA, there are several important preliminary questions that will likely need to be resolved. An initial list of such questions is provided in **Appendix E**. The remainder of this subsection seeks to provide initial answers to some of these questions.
28. What goes into the LSA? There are no firm rules or universally accepted standards as to the components of an LSA. In some countries, such as Cambodia and Vietnam, the LSA addresses a wide range of topics, creating little need for other labour legislation.

⁸ South Africa's *Basic Conditions of Employment Act* addresses this issue by creating general labour standards applicable to all employers, but then Chapter 8 describes a process by which the Minister of Labour can set special labour standards for particular sectors.

⁹ There are some instructive examples of moving towards a theme-based approach, including the United Kingdom, Canada, Sri Lanka, Thailand, and the Australian States of New South Wales, Victoria, and Queensland. Japan also had a *Factory Act* (1911) and *Shops Act* (1938) that were both repealed upon passage of the *Labour Standards Act* in 1947. One obstacle to entirely repealing Myanmar's *Factories Act* is that it contains non-labour provisions concerning the registration of factories. GOM might consider moving these provisions to other theme-based laws that cover business registration more generally or amend such laws to ensure they include factories.

In other countries, the scope of the LSA is far narrower. Myanmar will need to determine what specific format is most suitable to its own conditions. Nonetheless, in order to provide a point of reference, this paragraph offers some observations on how other countries have designed their LSAs.

- a. Core elements of a LSA. Most jurisdictions at least address the following areas in their LSA.
 - i. Employment contracts, dismissal, termination, severance;
 - ii. Working hours, holidays, leave, overtime;
 - iii. Minimum wages;
 - iv. Payment of wages, deductions;
 - v. Employer record-keeping obligations;
 - vi. Labour inspection, penalties;
 - vii. Dispute resolution (see the paragraph below on this subject).

For instance, the following acts include most or all of these elements: Japan's *Labour Standards Act*; Korea's *Labour Standards Act*; Thailand's *Labour Protection Act*; South Africa's *Basic Conditions of Employment Act*; and Singapore's *Employment Act*.

- b. Other common elements in LSAs. In addition to the above, several other elements are also commonly included in LSAs. These topics and examples of some countries that include them in their LSA are listed below. Myanmar could also consider incorporating these into its LSA.
 - i. Forced labour and trafficking (Japan; Thailand; South Africa);
 - ii. Non-discrimination, equal pay for equal work (Indonesia; Japan; Korea; Thailand), sexual harassment (Canada);
 - iii. Child labour, maternity, or other special protections (Cambodia; Japan; Indonesia; Singapore; Thailand; Vietnam);
 - iv. Subcontracting, dispatch workers, multiple employers (Singapore; Canada; Thailand);
 - v. Regulations on employment agencies/labor brokers, overseas employment, and foreign workers (South Africa; Philippines¹⁰);
 - vi. Employee training and apprenticeships (Indonesia; Japan; Korea; Vietnam).
- c. Occupational safety and health. Some countries also include OSH regulations in the same law as these other standards, such as the *Czech Labour Code* (Part Five). More common is to address these issues in a separate law or through agency regulations. For instance, Cambodia and Vietnam offer a few short provisions on the topic in their LSAs, but then leave the details to be supplied by agency regulations. Japan and Korea have a separate OSH law, but include a single article in their LSA directing readers to the OSH law.¹¹ As Myanmar

¹⁰ The Philippines addresses these topics in its consolidated labour code.

has already made considerable efforts to draft an independent *Occupational Safety and Health Law*, and it is important to issue this law soon, the best approach may be to keep it as a separate law. This would not preclude Myanmar from incorporating it into a consolidated labour code at a later date.

- d. Industrial relations. “Industrial relations” generally refers to collective labour issues, such as freedom of association, the formation of unions and employer organizations, strikes and lockouts, collective bargaining, unfair labor practices, resolving certain “rights” disputes (such as violations of a collective agreement), and resolving “interest” disputes. As with OSH, countries differ as to whether these topics are addressed in the LSA or a separate law.¹²

Myanmar adopted a *Labour Organization Law* in 2011 and *Settlement of Labour Disputes Law* in 2012, but the ILO and domestic stakeholders have already identified necessary, urgent amendments to the legislation.¹³ Accordingly, Myanmar might consider keeping these laws separate from the LSA and quickly adopting the needed changes. Nonetheless, the LSA should certainly reference the *Labour Organization Law* as there will be inevitable overlap. For instance, the LSA provisions on individual employment contracts should acknowledge the relationship with (and primacy of) conflicting provisions in any applicable collective bargaining agreement. Myanmar can later consider consolidating this law too into a comprehensive labour code.

- e. Social security and workers’ compensation. Myanmar passed the *Social Security Law* and a related implementing regulation in 2012. The ILO has identified several necessary legislative revisions that should be considered. The *Workmens’ Compensation Act* (1923) is in the process of being amended. In revising these laws, drafters should note any overlap with other labour laws, particularly the *OSH Law*, and harmonize the relevant provisions. At this stage, these laws may remain separate from the LSA, but could later be considered for consolidation into a labour code.

¹¹ Article 76 of Korea’s *Labour Standards Act* provides: “The safety and health of workers shall be subject to the conditions as prescribed in the Industrial Safety and Health Act.” Similarly, Article 42 of Japan’s *Labour Standards Law* provides: “Matters concerning the safety and health of workers shall be as provided for by the Industrial Safety and Health Law (Law No. 57 of 1972).”

¹² For instance, the Czech Republic’s *Labour Code*, New Zealand’s *Employment Relations Act*, Australia’s *Workplace Relations Act*, Indonesia’s *Manpower Act*, and Vietnam’s *Labour Code* all address labour standards topics as well as aspects of industrial relations. By contrast, the United States and Korea address industrial relations almost entirely through separate legislation.

¹³ Some of the issues with the current legislation are noted in the CEACR’s Observation, adopted in 2014, concerning Myanmar’s implementation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), available at: www.ilo.org. The recommendations in the U.S. Federal Mediation and Conciliation Service’s reports, dated December 2013 and December 2014, should be considered as well.

29. Special chapters for children, maternity protections, and protected groups. Many countries have chapters or sections in their LSAs with comprehensive rules governing children or other special groups, such as maternity protections. This is in contrast to interspersing child-related provisions throughout multiple chapters. In other words, the chapter on child labour will cover minimum ages, working hours, discrimination, and employment certification procedures. Many such chapters also address OSH issues relating to children—even if a separate law addresses OSH issues for workers generally. This approach is used in Thailand (*Labour Protection Act*, Ch. 4), the United States (*The Fair Labour Standards Act*, 29 U.S.C. §§ 203, 212), Korea (*Labour Standards Act*, Ch. 5), Singapore (*Employment Act*, Part VIII), and Japan (*Labour Standards Act*, Ch. 6), among other countries. In most cases, these chapters contain general provisions and the specific occupations, tasks, or conditions in which children are prohibited from working are set by regulation. Placing all provisions related to children or another special group in a single place helps ensure they are consistent and easily accessible. Alternatively, if child-related OSH provisions are placed in that act, the LSA chapter on children should still refer to the *OSH Law* and note the existence of these stricter provisions.¹⁴
30. Labour inspection and penalties. The labour inspectorate will play an essential role in promoting workplace compliance with the labour standards set out in multiple chapters of the LSA and even other statutes, such as the *OSH Law*. Currently, the numerous laws governing the inspectorate have inconsistent nomenclature (at least in English) and provisions. The ILO has recommended creating a single text containing common definitions and general provisions for labour inspection. This may take the form of a separate law, but would also fit logically as a chapter in the LSA. That chapter should address topics such as the rights and duties of inspectors and the procedure for issuing fines; then specific technical laws can set out more specialized provisions, such as OSH inspectors' power to enjoin dangerous working conditions. In terms of content, some of the key topics to address in such a chapter include: the rights and duties of inspectors; penalties for employer non-compliance with various provisions; procedures for inspection, issuing fines, and enforcing fines; availability of criminal sanctions; the relationship to private rights of action; complaint procedures; and anti-retaliation protections for workers who file complaints or participate in investigations. Drafters should also consider the relationship, and potential collaboration and coordination between the inspectorates for labour standards, OSH, and social security issues.
31. Dispute resolution. In addition to administrative and criminal actions by the labour inspectorate, civil actions by workers play an important role in enforcing labour standards in most countries. Currently, Myanmar's *Settlement of Labour Disputes Law* sets forth some procedures for resolving all types of labour disputes—including individual and collective disputes, rights and interest disputes. However, the LSA will need to clarify several issues, including: for what specific provisions is a private right of action available; the statute of limitations on various actions; legal and

¹⁴ There has been some suggestion that Myanmar's *Child Law* will be amended and make certain provisions regarding child labour, such as setting minimum ages for various types of work. Laying out those general provisions in the *Child Law* and then offering more specific detail in the relevant labour statutes is a reasonable approach. Of course, however, the two must be harmonized to avoid any contradictions or ambiguities.

equitable remedies available in these actions (liquidated damages, litigation costs, attorneys' fees, interest, reinstatement); and protections from retaliation for bringing an action.

Myanmar may choose to maintain a dispute settlement law separate from the LSA, particularly if various types of disputes will largely use the same dispute resolution machinery (namely, workplace coordinating committees, conciliation bodies, arbitration bodies, etc.).¹⁵ Indeed, other countries, such as China, have a separate labour dispute resolution law.¹⁶ If Myanmar takes this approach, the LSA and *Settlement of Labour Disputes Law* should cross-reference each other. Further, it may still be logical to address certain issues in the LSA itself, such as whether a civil action is available for a particular provision.

32. Diagrams of sample LSAs. **Appendix F** is a series of options that Myanmar may consider for its LSA and more general labour law framework. In accordance with the above recommendations, the options take a theme- or topic-based approach and envision individualized chapters for special groups of workers, such as children. Nonetheless, these models are merely intended as *examples* that can provide a *starting point* for discussions by stakeholders about the type of framework that best fits Myanmar. Any of these diagrams would require significant modification and far greater detail before it could be considered a comprehensive framework or a suitable “roadmap” for the envisioned legislative reform.

Plan for creating an LSA

33. Identify existing legislative provisions. After deciding on the format of the LSA, the relevant actor (see discussion of the Framework Working Group below) should identify what statutes or other sources of law already exist on each topic. **Appendix G** is an initial effort in this regard.
34. Each chapter should be a new text. The chapters of the LSA should not be a series of articles that refer to provisions scattered amongst various other laws. That would be contrary to the goals of creating a law that is easy to access and understand. Instead, each chapter should be a newly drafted text in which all of the relevant contents are contained within. To the extent that parts of existing laws will be incorporated into the chapter, those parts should be written into the chapter and the relevant portion of the old law shall be repealed.
35. Repeal of other laws. Generally, once the relevant provisions of existing laws have been incorporated into the LSA, or superseded by the LSA, those old provisions and laws should be repealed. In order to provide an opportunity for stakeholders to become accustomed with the new laws, and make necessary arrangements for

¹⁵ In recent meetings, MOLES expressed that it was considering establishing a labour court, as provided for in Article 53 of the *Settlement of Labour Disputes Law*, and consulting with the ILO about this.

¹⁶ China initially combined labour standards and dispute resolution procedures into a single *Labour Law* (1995), but later created a separate dispute resolution law, the *Labour Dispute Mediation and Arbitration Law* (2008), even though it dealt almost exclusively with rights-based disputes.

implementation and enforcement, drafters may consider delaying the effective date of the new LSA until several months after its passage.

Sequencing and prioritization of reforms

36. The design of a labour law framework and the enactment of its legislative pieces is a considerable undertaking that will take multiple years. GOM and MOLES should develop priorities for this reform process, considering items such as:
- the urgency or prevalence of certain issues that need to be addressed;
 - the relative adequacy of existing legislation in a particular area; or
 - whether a topic is one of the ILO's fundamental principles.

This paper proposes a three-stage approach to the legislative reform. As shown below, the expectation is that as the target labour law framework and the content of the LSA are being designed or drafted, MOLES will continue to pass pieces of individual legislation simultaneously. It is expected that each piece of legislation listed below will go through a proper consultative process (see Part IV) and then be presented to the Parliament.

Phase 1:

- Design and agree upon the framework of an LSA;
- Design and agree upon a broader legislative framework;
- Pass the *Occupational Safety and Health Act* (and, if not repealing them, harmonized versions of the *Factories Act* and other laws containing OSH-related provisions);
- Pass the *Child Law* and associated regulations;
- Pass amendments to the *Labour Organization Law* and *Settlement of Labour Disputes Law*;
- Pass the *Alien (Foreign) Workers Law* and pass amendments to the *Overseas Employment Act*; and
- Pass amendments to the *Social Security Law* and *Workmens' Compensation Act*.

Phase 2:

- Draft the LSA, hold consultations, and present it to Parliament;
- Pass new legislation or amend existing legislation to address those topics not included in the LSA or otherwise addressed in Phase 1; and
- Issue regulations necessary to implement legislation passed in Phase 1.

Phase 3:

- Review existing legislation and rules; combine LSA and other labour legislation into a *consolidated* labour code.

The rationale for this plan is to lay a strong legal foundation for the most fundamental components of a labour regulation system as soon as possible—namely, basic standards to ensure fair treatment of workers, rules to protect workers' safety, an inspectorate to enforce these standards, procedures to resolve disputes, and other rules governing collective labour relations. Again, this sequence is only intended as a

starting point for discussion by stakeholders as to their priorities and a realistic timeline.

IV. The Labour Law Reform Process

37. The primary challenges for Myanmar in this labour law reform effort are ensuring the necessary capacity exists and ensuring the process is sufficiently open and consultative. This applies to both the development of a labour law framework as well as the issuance of specific labour legislation and regulations. Some positive steps have already been taken in both of these areas. This section offers some initial reflections on how MOLES can build upon these trends to meet the demands of the labour law reform project described above.

Relevant bodies

38. National Tripartite Dialogue Forum (“NTDF”); formalization. NTDF is currently an informal forum that brings together MOLES officials and the social partners – namely, employer and worker representatives – to discuss labour issues in the country. MOLES initiates the meetings, which the parties have agreed will take place on a quarterly basis, with the ILO initially providing the technical, logistical, and secretarial support. Thus far, two dialogue sessions have occurred: the first in December 2014, and a second in March 2015. A third is scheduled for June 2015. A draft Terms of Reference document, including plans for formalization of the NTDF as the labour relations environment matures, has been circulated to the parties for inputs and will be discussed towards possible acceptance at the June 2015 meeting.

During the Mission, representatives from MOLES, worker organizations, and employer organizations affirmed the importance of the social partners participating together in the law reform process. Indeed, MOLES has stated its intention that the NTDF will, amongst other things, provide such a mechanism for consultation on both the labour law reform process and the content of specific draft legislation and regulations. The NTDF could also be used to conduct the tripartite consultations required by the ILO’s Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) (not ratified). Some countries, such as South Africa and Korea, have established through legislation more permanent tripartite mechanisms with defined roles in consulting on the nation’s labour policy and achieved some positive results.¹⁷

39. Creating two types of “working groups” under the NTDF. Designing a labour law framework and strategy for achieving it, as well as making plans for an LSA, will require GOM and MOLES to address numerous technical issues and questions. There was agreement that individuals with relevant knowledge and experience as well as a

¹⁷ The ILO’s *Labour Legislation Guidelines* provides information on various formal and *ad hoc* tripartite mechanisms that countries have adopted. See Ch. 9 (“The drafting process”), available at: <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/index.htm>. For a discussion of Korea’s Tripartite Commission, which later became the Economic & Social Development Commission (ESDC), see Korea International Labor Foundation (KOILAF), *Current Labor Situation in Korea (2008 updated ed.)*, pp. 65–66, available at: <http://www.koilaf.org>.

commitment to this process will be needed to accomplish these tasks. The same is true for designing and drafting individual pieces of labour legislation. The NTDF is a good body from which such smaller working groups can be created. Specifically, (1) a longer-term “Framework Working Group” should be established to work on the general labour law framework and the LSA, and (2) an “Ad Hoc Working Group” should be created for each individual piece of legislation. Both are discussed further below.

40. Labour Law Reform Cluster. In October 2014, GOM established the Technical Committee Cluster on Labour Law Reform and Institutional Capacity Building (“Labour Law Reform Cluster” or “Cluster”) under the Employment Opportunities Sector Working Group (“EOSWG”)—one of fifteen working groups established pursuant to the Nay Pyi Taw Accord for Effective Development Cooperation.¹⁸ This Cluster brings together a broader group of stakeholders than the tri-partite NTDF, including other Myanmar government ministries, foreign governments, research and policy institutes, international development banks, the chamber of commerce, employer organization representatives, and others. Since its inception, the Cluster has convened twice, with the most recent meeting on February 25, 2015, at which it decided to invite worker representatives to future meetings.

Plan for developing a general labour law framework and LSA

41. “Framework Working Group”.
- a. Responsibilities. Some of the Framework Working Group’s responsibilities could include: (1) developing a general labour law framework; (2) developing an LSA; (3) creating a plan and timeline to achieve the proposed framework; (4) conducting consultations concerning the above; and (5) reviewing individual legislation to ensure consistency with the general framework.
 - b. Composition. The group should be small (ideally not more than ten members) so as to facilitate in-depth technical study and discussions. The group might include, for instance, the following people: MOLES legal experts;¹⁹ worker representatives; employer representatives; Attorney General’s Office staff; and an ILO representative to provide technical advice and, if requested, joint secretariat services. Each member should have relevant expertise and dedication to the mission. The same individuals, not different people from the same office, should attend each meeting; other experts could be invited on an as-needed basis.
 - c. Progress meetings. The Framework Working Group should provide an update on the status of the general framework and LSA to various stakeholders at least annually. The Cluster could be a good forum to convene such a meeting of stakeholders, including the *Initiative* partners.

Plan for open and consultative legislative process for specific legislation

¹⁸ The White House, “Joint Statement,” Nov. 14, 2014, available at: <https://www.whitehouse.gov>.

¹⁹ MOLES already has a “Law Team” of four members who review all legislation drafted by the ministry. These members are likely good candidates to serve on this working group.

42. “Ad Hoc Working Groups”. As stated above, the NTDF should consider establishing “ad hoc working groups” to draft and study each particular draft legislation or regulation. In addition to designing and drafting the legislation, these groups should also play a role in identifying the relevant civil society organizations and representatives from Parliament to consult with on that particular legislation, as discussed below. The composition of each group should include MOLES officials, employer and worker representatives, and an ILO representative, each of whom has relevant subject knowledge or expertise.

43. Improvements to legislative process. Given its previous disappointment with the quality of the feedback received in its consultations on draft legislation, MOLES and GOM should work to improve this process. Below are some issues to be considered in revising this process.

a. Make drafts available to social partners earlier. When MOLES has produced a draft labour law framework, or specific draft legislation or regulations, it should provide the social partners and other stakeholders with sufficient time to study the text with their members prior to the consultation. A period of at least two weeks prior to the consultation is likely necessary, but a longer period is preferable. In addition, encouraging stakeholders to submit written feedback may result in higher quality comments and provide MOLES with a useful resource in revising the draft. If necessary, procedures for keeping the drafts confidential can be made.

Toward this end, consultations with the NTDF and Cluster should be regularized parts of the legislative process. MOLES should consider conducting consultations with these two bodies prior to submitting the draft bill to the Attorney General’s Office (after stage “2” on **Appendix B**) and as needed prior to or after that time. **Appendix H** is a modified version of **Appendix B** that includes consultations with the NTDF and Cluster.

b. Share ILO and other technical guidance. The ILO has regularly offered technical guidance to MOLES on draft labour legislation under the condition that the guidance remains confidential for six months. However, MOLES’ provision of this guidance to the social partners and other concerned stakeholders may be useful in their understanding of the legislation, including why MOLES adopted certain provisions or language. In addition, the ILO recommendations that MOLES chose *not* to adopt may also provide fruitful topics for consultation and discussion. The NTDF and Cluster would both be appropriate bodies to review the ILO guidance and forums to discuss them.

c. Involve Parliament earlier. MOLES would likely benefit from more meaningful engagement with Parliament about its reform plans and specific legislation. For instance, if Parliament understands the goals and intentions of the legislation, it may be less likely to introduce amendments that frustrate that purpose. It has proven difficult to achieve this level of understanding when Parliament is not engaged until the Minister approves the draft bill. One way to involve Parliament earlier is to invite key members, such as those on

the committee that handles labour issues, to take part in NTDF or Cluster meetings concerning proposed legislation.

- d. Involve appropriate civil society organizations. Many civil society organizations have expertise that is relevant to certain pieces of legislation, or sections of legislation, that MOLES will propose. MOLES should engage these groups in the legislative process so as to get quality feedback on draft laws and increase awareness about proposed reforms among relevant populations. These groups might be invited to take part in consultation sessions organized by the NTDF or the Cluster.
- e. Make draft available for public comment earlier. GOM and Parliament should develop procedures to ensure opportunities for the public to meaningfully engage in the legislative process. When draft legislation is made publicly available, clear instructions on how to submit comments and how they will be handled should be included. In some cases, GOM has also made draft legislation available for public comment even before final approval by the relevant minister (and submission to Parliament), such as with the draft *Investment Law* and *Company Law*. The *Company Law* was made available on the website of Directorate of Investment and Company Administration (DICA) along with a briefing paper and instructions on exactly where to submit comments.²⁰ India has also adopted this practice in its labour law reform efforts. The draft *Labour Code on Wages*, which seeks to consolidate four existing laws, was made available on the website of the Ministry of Labour and Employment after tripartite consultations took place but before submitting the bill to parliament.²¹

V. Related Capacity Building Needs

44. Ongoing efforts: As referenced above, the ILO and partner governments have been engaged in a variety of efforts to build Myanmar's capacity to better address labour issues. The proposals described herein are not intended to replace these efforts but to supplement them. As Myanmar works to reform its labour law framework, it will simultaneously continue to build its implementation capacity.
45. New efforts. Additional technical assistance and capacity building programs will be critical to assisting Myanmar's stakeholders in this legislative reform process. A non-exhaustive list of such programs is provided below. Some of the programs, such as further education on international labour standards or training on legal drafting techniques, may be conducted with multiple stakeholders simultaneously.

²⁰ These announcements and draft bills are available on DICA's website: <http://dica.gov>.

²¹ The call for public comments and draft legislation are available on the Ministry's website, <http://labour.gov.in>.

46. Capacity building with MOLES.
- a. Further education on international labour standards to help in drafting particular legislation and contextualize ILO and stakeholder comments.
 - b. General education on legal drafting techniques.
 - c. Training on how to design and conduct consultation sessions on legislation as well as public forums to solicit feedback.
 - d. In order to maximize the impact of the ILO's written technical guidance on draft legislation, it is critical that, as envisaged by the *Initiative* partners, the ILO make a legal expert available for multiple, in-depth small sessions with the MOLES drafters to explain the technical guidance and how it can be translated into draft text. Technical guidance that is not understood is unlikely to be incorporated.
47. Capacity building with worker and employer representative groups.
- a. Enhancing awareness of international labour standards.
 - b. Support in evaluating the potential impact of legislative proposals on members, including techniques for surveying members or otherwise gathering data.
 - c. Training on effective engagement in the legislative process, including the development of comments and amendments, participation in consultation sessions, and presentation of feedback.
 - d. Further support with legal drafting techniques.
48. Capacity building with Parliament.
- a. Enhancing awareness of international labour standards.
 - b. Further support with legal drafting techniques.
 - c. Training on analyzing legislation, developing amendments or proposals, and constructively engaging in consultations with MOLES and other stakeholders.²²

²² UNDP already has a program to develop the capacity of Members of Parliament, including improving their ability to analyze proposed legislation. It is worth exploring whether it makes sense to collaborate on any projects proposed here.