

After decades of highly controversial land acquisitions for public purposes, Myanmar turns a new page by passing the Land Acquisition, Resettlement, and Rehabilitation Law 2019 (Law no. 24/2019, referred to herein as the "LARR 2019").

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MYANMAR'S NEW LAW AND PROCESS FOR COMPULSORY LAND ACQUISITION: WHAT PPP PROJECT DEVELOPERS NEED TO KNOW

After decades of highly controversial land acquisitions for public purposes, Myanmar turns a new page by passing the Land Acquisition, Resettlement, and Rehabilitation Law 2019 (Law no. 24/2019, referred to herein as the "LARR 2019"). The LARR 2019 is clearly an attempt by the Government to modernize and improve the rights, the process, and the protection of project-affected people ("PAP"); for example, when public infrastructure projects need to acquire land from private landowners/land rights owners, or when others see their livelihood or place of living affected by a project.

In this note, we analyze the LARR 2019 from the perspective of the needs and concerns of developers, and outline some of the key things that developers need to know about this game-changing new law. Although the LARR 2019 also establishes obligations for the Government to pay damages to PAP who do not have any land rights that are acquired, this client briefing note focuses only on the actual acquisition of land and its compensation. We will keep the issue of damages payable to other PAP for another client briefing note. Furthermore, we write this note based on the assumption of a project that the Government implements in cooperation with a private sector developer, such as in a public private partnership (the "PPP") scheme.

Highlights of this note

- ▶ How does the new process work?
- ▶ The proposal required for starting the land acquisition process has much more depth
- ▶ There is more room for objections by project-affected people under the LARR 2019
- ▶ The new legal framework says nothing about negotiated, voluntary transactions, which are the vast majority of land acquisitions for infrastructure projects
- ▶ The problem with farmland conversions
- ▶ Who is entitled to compensation for land and buildings or for damages?
- ▶ What about the cut-off date?
- ▶ Who determines the compensation?
- ▶ How much is the compensation for land and structures?
- ▶ Can you compensate in kind, by offering other land?
- ▶ What happens with objections and refusals?
- ▶ Is the new law already in force?

How does the new process work?

The LARR 2019 sets out the process the Government needs to follow to acquire land from land rights owners for public projects. It's noteworthy this was not specified through a regulation, but rather is in the actual law, that imposes how the Government needs to proceed, meaning that there will be little room for deviating from the statutory process.

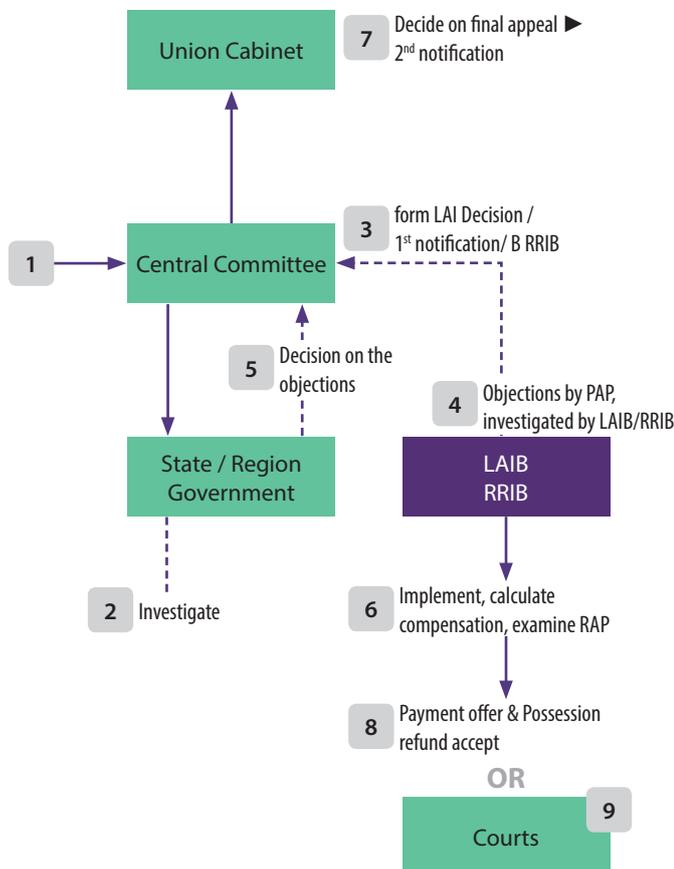
In short, the acquisition process begins with an application to a newly created body called the Central Committee (the "CC"), which is a cabinet-staffed body. The CC refers the application to the relevant State or Regional Government (the "SRG") to conduct a preliminary investigation. The state or regional level investigation is done with the help of an ad hoc team. By law, this inspection requires the input of PAP and members of parliament ("MPs"). Once the SRG reports back to the CC, the CC can decide whether to accept the proposal. If it does, a first

public notification is issued, called the necessity notification. This first notification includes information on the area and the Resettlement Action Plan (the "RAP"), and a summary of the environmental and social impact assessment (the "ESIA"). The Land Acquisition Implementation Body ("LAIB")/Resettlement and Rehabilitation Implementation Body (the "RRIB") is also formed at this stage. The first notification triggers a 45-day period for PAP to lodge objections, which need to be investigated by the LAIB/RRIB. New in the process is a separate report by the LAIB/RRIB on their investigation into PAP objections, which are remitted to the CC for a decision. If the CC decides to go ahead despite the objections, the LAIB/RRIB will start with a wide range of tasks, such as calculating compensation, measuring the area, examining the RAP, and collecting further PAP objections. A major report is then made by the LAIB/RRIB to the SRG and the CC, and finally, to the Cabinet for

a final decision, which triggers the second and final notification. That second notification clears the way for payment offers to be made to PAP and, if accepted, possession to be taken. Any refusals or disputes will be heard by the courts, presumably at the state or regional level, and perhaps culminating at the Union Supreme Court. The process is outlined in the diagram below.

The proposal required for starting the land acquisition process has much more depth

There are a number of similarities between the Land Acquisition Law 1894 (the "LAL 1894") and the LARR 2019, but also many obvious differences. The depth to which the Government departments are involved with the initial proposal to start the process is one of those differences. In the LAL 1894, the initial proposal is lodged at the district level, with the District Administrator (the "DA") managing the preliminary



Land Acquisition Resettlement and Rehabilitation Act 2019 Process in (very) brief

- 1 The application is received directly at a top level, notably the CC, which will task the State or Regional Gov't to conduct a preliminary investigation
- 2 The state or regional level investigation is done with the help of an ad hoc team. By law this inspection requires input of PAP & MP's.
- 3 Once the SRG reports back to the CC, the CC can decide to accept the proposal. If so, a first public notification is published called the necessity notification. This 1st notification includes information on the area, the RAP and summary of the ESIA. The LAIB/RRIB is also formed at this stage.
- 4 The first notification triggers a 45 day objection period for the PAP's which need to be investigated by the LAIB/RRIB
- 5 The LAIB/RRIB's reports on the objections are remitted to the CC for a decision.
- 6 If the CC decides to go ahead despite the objections, the LAIB/RRIB will start with a wide range of tasks, such as calculate compensation, measure the area, examine the RAP, and collect further PAP objections.
- 7 A major report is then made by LAIB/RRIB to the SRG and CC and finally the Cabinet for a final decision which triggers the second and final notification.
- 8 That clears the way for payment offers to be made to PAPs and if accepted, possession to be taken.
- 9 Any refusals will be heard by the courts.

inspection. In addition, the proposal in LAL 1894 does not need to have much detail. In the LARR 2019, the requirements for the initial proposal have been significantly increased. It now needs to include an ESIA, a RAP, and a rehabilitation plan. This means that a lot more work will have to be completed by developers earlier on in the process compared to the LAL 1894.

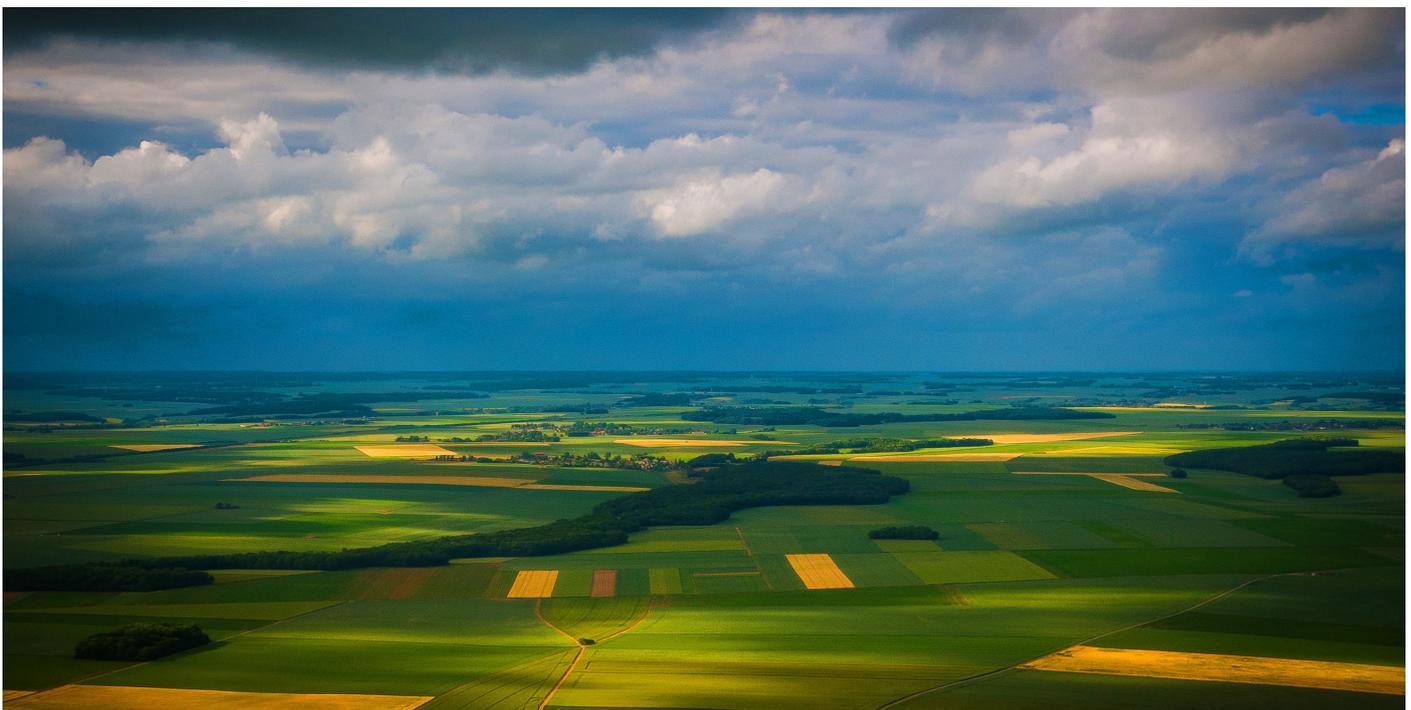
So the process has become more frontloaded than it used to be. Is that good or bad? Well, it certainly does have some important repercussions on how a project can be conceived and prepared. For starters, despite the fact that officially speaking the Government only gets involved in land acquisition after the ESIA and RAP have already been prepared, from a practical perspective, when we consider PPP projects, completing an ESIA and a RAP will require a lot of cooperation between the Government and the private sector stakeholders of the project prior to that point. For example, most likely, a resettlement site can only be found with substantial cooperation from the Government, as how could a resettlement site be earmarked if the developer is unsure if the site will be approved by the Government? Clearly, in practice, the Government will need to get involved quite a bit before anything is submitted to the CC. That is not

explicitly foreseen by the LARR 2019; however, it is also not excluded. To put it another way, we are going to have to interpret the process set out in the LARR 2019 as not excluding all other measures the stakeholders may take.

Another impact of the increased requirements for the initial proposal is that the contact between the stakeholders will have to happen a lot sooner. That is to say, in order for the developer to prepare the ESIA, it is going to have to conduct surveys and build PAP name lists. It has always been difficult in land acquisition to begin doing surveys and talking to PAP when officially, there is no confirmation that the Government has definitively decided it wants to do the project, let alone approved the prices for the to-be-acquired land. Practically, when the developer's agents contact PAP at such a stage, before the first notification has even been published, the level of cooperation by PAP might be quite varied. In our experience, landowners want to know as soon as possible the amount of the offer, and some may withhold all cooperation until they hear a satisfactory number. Is it even possible to get an ESIA together or collect reliable data on land values without Government support before that stage? Perhaps, but based on our experience, it will be a lot more difficult.

There is more room for objections by project-affected people under the LARR 2019

It is undeniable that the LARR 2019 has substantially improved the right of PAP to be heard. Now by law, the first acquisition investigation prior to the first notification requires input from PAP and from MPs from that area; this is a new requirement. Furthermore, the first notification triggers a 45-day objection period by PAP, which in itself is not new; however, such objections must now be investigated and decided upon by the CC first through a special procedure by the LAIB or RRIB. The LARR 2019 also stipulates explicitly that the reports of the LAIB and RRIB must include notes on any additional objections after this 45-day period, which are again decided upon as part of the second notification process. Perhaps more importantly, the key body that manages the acquisition implementation, which was purely staffed by Government officials under the LAL 1894 (after many administrative changes, the DA office), will now by law also include *"landowners, local representatives, ethnic representatives and experts."* We will have to wait until we see the regulations implementing the LARR 2019 to know how this is actually going to work; however, the basis is there for a much more significant impact by stakeholders other than the Government.



The new legal framework says nothing about negotiated, voluntary transactions, which are the vast majority of land acquisitions for infrastructure projects

Although a legal basis for compulsory acquisitions has existed in Myanmar since 1894 (as well as under other laws that we leave out of this analysis), currently land acquisition for infrastructure projects in Myanmar is, in the vast majority of cases, conducted as a negotiated, voluntary transaction. That is to say, the Government offers to pay a price that is acceptable to the landowners, and the acquisition is implemented as a land purchase between a willing seller and a willing buyer. As far as the World Bank's Performance Standard number 5 ("**PS5**") is concerned, a voluntary sale is acceptable, even preferable, provided that the seller genuinely willingly agrees to sell at this price and is also properly informed. The PS5 standard still applies if there is a possibility of compulsory proceedings if the negotiations are unsuccessful.

It is clear that where the Government is able and willing to pay the price the sellers would like to receive, negotiated settlements are always preferable. In such cases there is no need to go through the lengthy compulsory process; the entire land acquisition can be negotiated, and thus remains entirely outside the scope of the LAL 1894, or now the LARR 2019 (but not outside of PS5).

However, it is not that simple. Choosing a solely voluntary process means that the project can be held up by hold-out sellers, even speculative landowners. In addition, without a compulsory process, how will one deal with sellers defaulting on their promise to sell over time, when they think higher prices can be obtained?

In our experience, investors often need to resort to the compulsory acquisition process at some stage, or at least make the necessary preparations to fall back on statutory grounds for a compulsory acquisition. Trying to manage a two-track process is, however, rife with practical and logistical problems, such as timing differences between voluntary transactions and compulsory transactions, with prices set much later for compulsory ones.

The problem with farmland conversions

All land that is cultivated with crops of any kind is governed by the Farmland Law 2012.

The Farmland Law 2012 defines farmland as land designated to be used for agricultural purposes, such as for growing crops or gardening. Farmland is further classified into paddy land or lowland (*le*), upland (*ya*), alluvial island land (*kaing kyun*), orchard or garden land (*u yin*), uphill land under permanent or shifting cultivation (*tuang ya*), nipa palm land (*dani*), horticultural land, and perennial crops land.

The State is the ultimate owner of all farmland in Myanmar and governs the use of farmland through the Farmland Management Body (the "**FMB**"). The FMB has different tiers of management, from the central or union level through the state/region, district, and township levels to the village tract level. At all levels, the FMB is mainly composed of

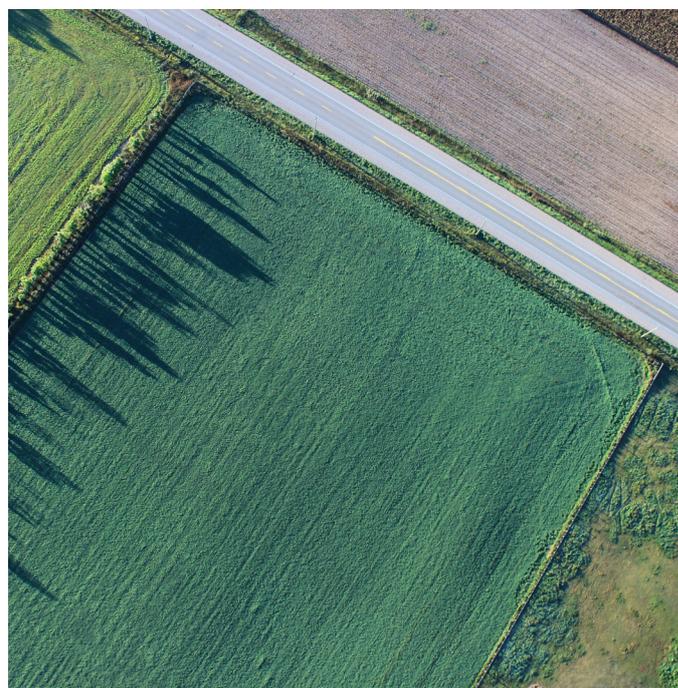
representatives from the Department of Agricultural Land Management and Statistics under the Ministry of Agriculture, Livestock and Irrigation, and the General Administration Department under the Ministry of the Office of the Union Government.

According to the Farmland Law 2012, all persons or organizations who are in possession of farmland, i.e. farmers, must register with the FMB in order to be officially granted land use rights over their farmland. Any farmer who has registered with the FMB is issued a "farming certificate" called a Form 7, which is the official land title document for farmland. A farmer who holds a Form 7 for a plot of farmland is granted an official tenure to hold and use the farmland for as long as the conditions of use under the Farmland Law 2012 are not violated. Moreover, the farmer is also entitled to sell, transfer, mortgage, or gift his/her land use rights to others.

The Farmland Law 2012 stipulates that farmland must be used only for agricultural purposes, and using farmland for other purposes requires a process of land conversion, as prescribed under Section 30 of the law. Landholders wishing to use farmland for non-agricultural purposes will have to submit an application for land conversion.

Therefore, before any plot of farmland can be transferred for use in an infrastructure project, either as a result of a voluntary transaction or a compulsory acquisition, approval from different Farmland authorities must be obtained to convert that plot from farmland for use for other purposes. The authorities involved will differ depending on whether the plot is paddy land "*le*" or "*ya*". In all cases, the procedure requires that different levels of approvals be secured, which may be a lengthy process that takes from several months to several years.

In our experience, projects rarely have the time to wait a few years, and there will be a need to commence some work on the land sooner rather than later.



Who is entitled to compensation for land and buildings or for damages?

Under PS5, PAP losing land include those *“who have legally recognized rights or claims on the land, those with customary claims, and those with no legally recognized claims.”* It does not include *“opportunistic settlers.”* Additionally, it also includes PAP whose livelihoods are affected because they are based on land access or land resources (e.g. fishermen or herders).

In the LAL 1894, the definition of *“person interested”* includes persons claiming an interest in compensation to be made on account of the acquisition of land under this law; *“a person shall be deemed to be interested in land if he is interested in an easement affecting the land”* (s. 3(b) Person Interested). There is some mention in its rules (the **“LAL Directions”**) of compensation in case of defective titles (s. 6 LAL Directions), as well as some reference to *“loss of earnings”* and *“costs incidental to changing a place of residence or place of business”* (s. 23).

In contrast, the LARR 2019, in s. 3, very clearly sets out the definition of *“landowner”* as someone who owns the land with strong evidence of ownership, and the term also includes:

- a person legally registered in the land record as the owner.

- a person who has acquired the land or ownership of it according to any existing law.
- a person who is declared or registered as the landowner by court order.
- a person who is recognized by the local community as the landowner according to local traditions, even though there are no legal documents.

Additionally, s.3 defines sharecroppers, tenants, business partners, and people who have been working on the land for 12 consecutive years as *“Persons related to the Acquired Land”* who are affected by the land acquisition.

It is interesting to note an apparent difference between LARR 2019 and PS5: Under PS5 occupants of land without any legal right at all, as long as they are not opportunistic recent arrivals, are eligible for compensation, while the Myanmar LARR 2019 seems to require some kind of legal right to the land, perhaps informal, but certainly legally recognized.

What about the cut-off date?

Under PS5, a cut-off date operates as a threshold for eligibility. It is set at the time of completion of the survey and inventory of assets. However, in case of delays, natural population growth after the cut-off date is still eligible. The cut-off date may have to be questioned if the government process

for setting it was not adequately documented and informed.

In the LAL 1894, there is a cut-off date in terms of market value, which is set at the time of the first notification. It is this market value that is compensated. Even though there is no formal cut-off date mentioned in the law itself or the LAL Directions, the administrative procedures of the General Administration Department for land acquisition require that the names and addresses of the landowners or persons interested be included as part of the application filed for land acquisition.

Whereas, there is no formal cut-off date specified in the LARR 2019 itself. Nevertheless, the first notification is supposed to be sent to *“each of the affected persons”* (s. 17 c), so a list must have been compiled during the preliminary inspection stage, before the first notification and after the submission of the proposal for land acquisition. Therefore, it is entirely possible that the forthcoming LARR 2019 regulations might indeed explicitly set out a cut-off date.

Who determines the compensation?

Under the LAL 1894, it is the District Administrator who prepares the report that proposes the prices used to compensate different PAP for land, assets, etc. These ultimately needs to be approved by the Cabinet, and



the approval for the price's riggers the second and final notification.

This is somewhat similar to the new LARR 2019, wherein the LAIB and RRIB prepare the report that proposes the prices for land and the settlement plan or the RAP after consultations with PAP. This is then approved by the Central Committee, and finally the Cabinet as part of the second and final notification.

It is fair to say that under Myanmar law, both present and future, the compensation is proposed by a specialized body, which since 2019 includes participation from stakeholders outside the Government, and approved by the Cabinet.

Under PS5, it is not prescribed which authority decides the amount of compensation for land taken. After all, rules will differ from country to country. PS5 is mostly concerned with how much PAP receive, not with the organization that does it. If local authorities do not compensate up to PS5 standards, the company or the investors, will have to top it up. PS5 also states that the company needs to scope in early the potential cost and integrate it in the design phase (GN21 2012).

How much is the compensation for land and structures?

Under PS5, the general principle for calculating the compensation for land and structures is to give full replacement cost, which is equivalent to the sum of the market value of the assets and the transaction cost. However, there are some exceptions to this rule, for instance: (i) the compensation mechanism for farmland is the sum of the market value of land of equal productive value located in the vicinity and the costs of preparation; (ii) the compensation mechanism for virgin, fallow, and vacant land is the market value of land of equal productive value located in the vicinity; and (iii) the compensation mechanism for structures is the cost of purchasing or building a new structure.

At least the terminology is somewhat different in the compensation mechanism as provided under the LAL 1894. In the LAL 1894 the general principle for compensation is the market value of the land as fixed at the date of first notification increased by 15%; damages for crops and structures taken; and loss of income. The compensation mechanism for structures is the cost of a new building at the time of first notification less depreciation (s. 41 of the LAL Directions).

The LARR 2019 provides for a detailed breakdown to determine compensation, wherein the general principle for compensation is the sum of land and buildings is fixed at the market value; for crops and trees it is three times the market value; loss of income is compensated at the estimated value; and livestock and equipment at the market value (s. 39).

However, since the Farmland Law, compensation for farmland is subject to its own price calculation rules, notably: (a) for the land itself - the market value or a negotiated price or a price determined by the farmland authorities based on the nature of the project, (b) for crops - three times the market value, and (c) for farm infrastructure - two times the market value.

Can you compensate in kind, by offering other land?

In practice, paying landowners by purchasing land for them in another site is a very common method of managing land acquisition. Under PS5 such an approach is, of course, also explicitly recognized as a way of properly compensating PAPs, if certain conditions are fulfilled.

In Myanmar law, however, it seems that a land swap has not been regarded as favorable. In s. 31(3) of the LAL 1894, the law allows the exchange of land but only with the permission of the Government (s. 44 LAL Directions) as "making an arrangement with the interested person".



Interestingly, the LARR 2019 has further qualified the use of land-for-land acquisitions. S. 38 of the LARR 2019 states that the LAIB may propose this, with the approval of the Union Government, but the landowners must agree. There is no obligation for them to accept. This preference for cash transactions, which we see in practice also, is now embedded in Myanmar law, for better or for worse.

What happens with objections and refusals?

A key requirement of PS5 is that there is ongoing disclosure to and engagement with PAP concerning the acquisition, resettlement and rehabilitation (PS5/10). In addition, there is a grievance mechanism to receive and address complaints (PS5/11), in addition to local law judicial process (6N34).

Intense participation was never envisaged back in the 19th century, so the LAL 1894 does not have equivalent provisions. It is true that formal objections to an acquisition by "Persons Interested" can be filed under the LAL 1894, notably within 30 days after the first notification (s. 5A (1)). At later stages, Persons Interested can file formal objections to the compensation itself once that compensation is offered after the second notification (s. 18 (1)).

The LARR 2019 has boosted participation by PAP, and has offered more possibilities to make objections, more time to file them, and increased the seriousness with which they

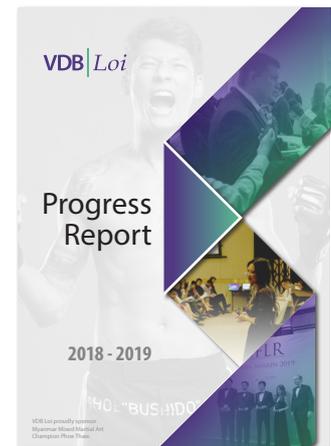
must be evaluated. The LARR 2019 requires that formal objections to an acquisition by PAP must be filed within 45 days right after the first notification (s. 18 (a)) and by the public in general during the subsequent investigation by the LAIB (s. 21 (b)). A special, stand-alone investigation process is set apart in the LARR 2019 to address those objections against the first notification. Formal objections to compensation by PAP must be filed when compensation is offered after the second notification (s. 41). Finally, as previously, PAP are under the LARR 2019 able to commence legal proceedings with the Myanmar courts related to the land acquisition.

Is the new law already in force?

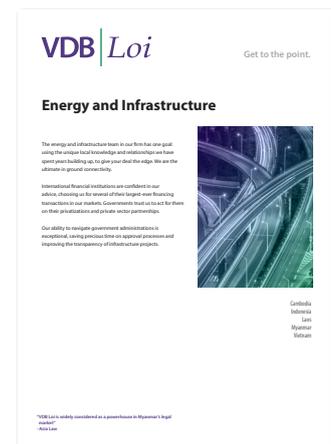
Yes, and no. It has been promulgated into law, so the LARR 2019 is not a draft or a bill. It's an actual law. But (s. 1 (b)) of the LARR 2019 provides that the provisions of the law will only enter into effect after a special notification by the Government. That notification has not yet been issued, so the provisions do not yet effectively work.

Nevertheless, nothing prevents the various Government authorities empowered under the old LAL 1894 from asking, in their discretion provided by law, for elements or criteria (say a Resettlement Action Plan) which are specifically set out under the new LARR 2019, even if they were not so mentioned in the old LAL 1894.

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