



# BRIEFING PAPER

## Indigenous Peoples' Rights and Business in Myanmar

FEBRUARY 2016



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## Acknowledgement

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The partner organisations would like to thank the Governments of Denmark, Ireland, Netherlands, Norway, Switzerland and United Kingdom for their on-going support to MCRB.

This paper was written by Donna Guest of IHRB with inputs from Vicky Bowman and Hnin Wut Yee of MCRB and Brigitte Feiring from DIHR, and following consultation in Yangon with ethnic nationalities representatives from Myanmar IP/EN Network and POINT (Promotion of Indigenous and Nature Together).

**The Myanmar Centre for Responsible Business (MCRB) was set up in 2013** by the Institute for Human Rights and Business (IHRB) and the Danish Institute for Human Rights (DIHR) with funding from several donor governments. Based in Yangon, it aims to provide a trusted and impartial platform for the creation of knowledge, capacity, and dialogue amongst businesses, civil society organisations and governments to encourage responsible business conduct throughout Myanmar. Responsible business means business conduct that works for the long-term interests of Myanmar and its people, based on responsible social and environmental performance within the context of international standards.

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Contents	
I Introduction.....	4
A note on terminology.....	5
II International Standards.....	5
Free Prior and Informed Consent (FPIC).....	7
III Best practice guidance relating to indigenous peoples .....	9
Extractive Industries .....	12
IV Ethnic nationalities and indigenous peoples in Myanmar .....	14
National laws governing the rights of ethnic nationalities .....	15
Ethnic armed conflict and inter-communal violence in Myanmar .....	18
Indigenous peoples and customary and communal land tenure .....	19
Indigenous women and their rights to land in Myanmar .....	21
V Challenges and considerations for companies .....	21
Lack of trust.....	21
Lack of transparency .....	22
Lack of availability of remedy.....	22
Lack of State recognition of indigenous peoples .....	23
Lack of State requirement for Free Prior and Informed Consent (FPIC).....	23
Lack of process for how ‘Consent’ could be obtained .....	24
Conflict and insecurity.....	24
Legacies of land expropriations.....	25
Lack of benefit- or resource-sharing arrangements .....	25
Shortage of anthropologists and social safeguards specialists .....	26
VI Recommendations for Companies .....	26
Prior to accessing the region.....	26
Early after arrival in the region.....	26
Consultation.....	27
Complaints and grievances .....	28
Where it is necessary to obtain Free Prior and Informed Consent (FPIC).....	28
VII Useful Guidance.....	30
VIII Contacts.....	30
IX Glossary.....	32

## I Introduction

This paper on ‘Indigenous Peoples’ Rights and Business in Myanmar’ is part of a Briefing Paper series from the Myanmar Centre for Responsible Business (MCRB). Indigenous peoples are present throughout the country, particularly in conflict-affected areas. The briefing sets out the local and international context for indigenous peoples, including a short analysis of applicable international standards and domestic laws. It also describes the current policy, legal and political economy landscape concerning indigenous peoples in Myanmar. The paper gives guidance on how to apply relevant international standards on indigenous people to Myanmar. It is not intended as a substitute for legal advice.

This paper is primarily intended to assist businesses operating in Myanmar who want to understand how to respect indigenous peoples’ rights and how to apply relevant international standards. The business case for companies to build respectful relationships with local communities and create shared value is increasingly understood, particularly for extractives companies who hope to stay for years in a community. When local communities are indigenous peoples, the case is even stronger. It may be reinforced by national legal requirements as well as international standards. These may even lead companies to reach formal agreements with indigenous communities<sup>1</sup>.

There are also many examples of how failure to respect indigenous people’s rights has led to conflicts, costly project delays, litigation, and the loss of the legal as well as the social licence to operate.<sup>2</sup> In Myanmar several companies have incurred significant costs for hydroelectric dam projects which may never materialise, partially as a consequence of the failure to build positive and respectful relationships with local indigenous peoples.

Sectors which potentially have significant land and cultural impacts on indigenous peoples in Myanmar include: the extractives industry (oil and gas, mining); agriculture (plantations, contract farming); infrastructure projects (industrial zones, telecommunications); transportation (roads, rail and airports); energy (hydropower, power plants); and tourism. Companies investing or planning to invest in these sectors are encouraged to read this paper.

Where a company already has a policy commitment to respect indigenous peoples’ rights, the paper highlights how to implement this in Myanmar. It provides guidance on human rights due diligence, particularly with regard to ensuring indigenous land tenure rights, and establishing effective community relationships and grievance mechanisms in partnership with local communities.

This paper also aims to provide information to Myanmar civil society, including indigenous peoples groups, and the Government of Myanmar. It concludes with considerations and recommendations to companies, which can assist them to work in accordance with international standards and build their social licence to operate with indigenous

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<sup>1</sup> See for example the [2012 participation agreements](#) between the mining company Rio Tinto and six groups of Aboriginal Traditional Owners in the Pilbara region in Western Australia.

<sup>2</sup> One recent case is litigation in Guatemala during September 2015 when the Constitutional Court ordered the suspension of licenses for the Vega I and Vega II hydroelectric projects in indigenous Ixil territory. The company had failed to consult with indigenous peoples prior to issuing project permits. The Court ordered the Ministry of Energy and Mining to ensure that consultation with the affected indigenous communities took place according to applicable international standard. See Upside Down World, [‘The Power to Defend Our Territory: Indigenous Communities Win Consultation Law in Guatemala’](#), 18 November 2015

communities, and indeed the wider population.

As part of its work with indigenous peoples in Myanmar, MCRB facilitated two workshops with ethnic nationalities/indigenous peoples to seek their views on private sector projects and how it affects their communities.<sup>3</sup> At the Myanmar People's Forum, participants recommended that the government adopt accessible clear policies on indigenous peoples, particularly on land. They reported that the central government issued business licenses of which local government often had no knowledge. They recommended that decision-making processes about private sector projects be decentralized and involve local people. Some participants noted that companies did not uphold promises made to communities and recommended that businesses should hold discussions with them and elicit suggestions. They also reported the lack of effective operational grievance mechanisms. Finally, participants expressed concern about environmental impacts and urged companies to conduct social and environmental impact assessments for their projects and to respect indigenous customs.

### A note on terminology

The term 'indigenous peoples' is used in international law and standards. Some groups working on the subject capitalize it as Indigenous Peoples or Indigenous peoples. We have chosen not to do so, following general UN usage.

During September 2015 MCRB facilitated a discussion in Yangon with some 15 participants from ethnic nationality or indigenous peoples groups, including the Karen, Karenni, Rakhine, Chin, Kachin, Mon, and Danu peoples. The participants had a preference for term 'ethnic nationality', as opposed to ethnic minority, which to them implied inferior status (one representative noted that among some Kachin, the term 'indigenous' was also perceived negatively, for the same reason). Ethnic 'nationality' rather than 'minority' is therefore used throughout this briefing.

However it should be noted that the word used in Burmese (*'tain-yin-tha'*) is the same for both 'ethnic nationality', and 'national race', the former military government and Constitution's term for the official but contested list of 135 ethnic groups in Myanmar, including the majority Bamar. Furthermore, it was clear from the consultation that even amongst these groups there were different perceptions of the meaning of terms both in English and in Burmese. Further information is provided in the Glossary.

## II International Standards

Indigenous peoples are acknowledged as bringing unique cultural contributions and diversity to the society in which they live, and more widely. At the same time they are among the world's most disadvantaged and marginalised peoples. A growing body of international law calls for special measures to be adopted to safeguard their persons, institutions, property, cultures, labour, and environment. International law also recognizes their right to freely determine their political status and freely pursue their economic, social, and cultural development and sets out processes for engaging with indigenous peoples and tribal peoples<sup>4</sup> about their development, including through the process of free, prior, and

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<sup>3</sup> MCRB convened one [discussion in September 2015](#). The December 2015 workshop was part of the annual [Myanmar Peoples Forum](#)

<sup>4</sup> The 1989 International Labour Organization ([ILO Convention No 169](#), (Indigenous and Tribal Peoples) does not define these terms, but provide a set of criteria to identify who indigenous and tribal peoples are in a given

informed consent (FPIC – see below). ILO Convention No. 169 does not differentiate between the rights of indigenous and tribal peoples. For practical reasons, this document uses the term ‘indigenous peoples’, which is also the most commonly accepted term and the one used in other international instruments.

Due to their general social and economic marginalisation, indigenous peoples are at particular risk of adverse human rights impacts connected to business activities and are often excluded from decision-making processes. This is as true in Myanmar as elsewhere. Many of the areas in Myanmar inhabited by indigenous peoples are rich in natural resources including energy, minerals and gems, timber or have agricultural potential. Moreover, indigenous civil society groups suspect that the authorities have shifted the boundaries of some resource-rich areas previously in ethnic nationality States to the central Bamar-dominated Regions. Where these resources have been exploited by companies, the government, or armed groups, indigenous peoples have generally not benefitted, and have often been left in a worse condition as a result of displacement, environmental degradation and resource-driven armed conflict.<sup>5</sup>

Recognition of indigenous peoples’ rights has been a long-contested process and remains so in several parts of the world. However a distinct set of human rights was recognised through the 1989 [ILO Convention No. 169 \(Indigenous and Tribal Peoples\)](#) and the [UN Declaration on the Rights of Indigenous Peoples](#) (UNDRIP) adopted by the UN General Assembly in September 2007.<sup>6</sup> The Myanmar Government voted in favour of UNDRIP, as did most other countries, while noting that it “would seek to implement it with flexibility”. The Government does not recognize the term indigenous peoples in law, policy or practice and they have not taken a position concerning whether there are indigenous peoples in Myanmar.

While international instruments such as UNDRIP mainly apply to States, it is an important starting point for companies seeking to understand indigenous peoples’ rights, and is used as the basis for the IFC’s Performance Standard 7 (see below). The Declaration establishes a universal framework of minimum standards for the survival, dignity, well-being and rights of the world’s indigenous peoples. It addresses both individual and collective rights; cultural rights and identity; and rights to education, health, employment, and language, among others. To that end, the UN Human Rights Council has mandated a Special Rapporteur on the Rights of Indigenous Peoples to ‘gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations of their human rights and fundamental freedoms’ and to ‘formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations’.<sup>7</sup>

While the [UN Declaration on the Rights of Indigenous Peoples \(UNDRIP\)](#) is not a formally binding treaty, it sets out rights and freedoms, such as self-determination and non-discrimination, provided for in binding international human rights treaty law, some of which may be considered customary international law, and reflects a global consensus on

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context, using self-identification as a main criterion. Other identification criteria for indigenous peoples are historical continuity and the retention of their own institutions So far, twenty-two countries, but not Myanmar, have ratified this Convention.

<sup>5</sup> For a further discussion of the impact of the jade industry in Kachin State, see ‘[Jade: Myanmar’s Big State Secret](#)’, Global Witness, October 2015

<sup>6</sup> [UN Declaration on the rights of indigenous peoples](#) “General Assembly Adopts the UN Declaration on the Rights of Indigenous People: ‘Major Step Forward’ toward Human Rights for All”, says President, 13 September 2007.

<sup>7</sup> [Mandate of the UN Special Rapporteur on the Rights of indigenous Peoples](#)

indigenous peoples' rights.<sup>8</sup> It calls on States to prevent or provide redress for abuses against indigenous peoples, including any action aimed at, or with the effect of, the deprivation of their integrity as distinct peoples, their cultural values, or their ethnic identity; dispossession from their traditional lands; or assimilation or population transfer (Article 8).

There is no single definition of indigenous peoples. However [ILO Convention No. 169](#) (which Myanmar has not ratified) applies to:

- Tribal peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.
- Peoples who are regarded as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>9</sup>

The Convention also states that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply.

The term “indigenous peoples” [*hta-nay tain-yin-tha* ဣၤနၢ တိုင်းရင်းသား] is not widely understood or generally used in Myanmar, other than among those working on ethnic rights. The Glossary analyses a variety of Burmese terms currently in use in law and in discussions. Section IV analyses the issues around identification as an indigenous people in Myanmar.

### Free Prior and Informed Consent (FPIC)

The former UN Special Rapporteur on the rights of indigenous peoples has provided a useful context to free prior and informed consent. He states that neither consultation nor consent is an end itself, nor are consultation and consent stand-alone rights. The consultation and consent standard that applies specifically to indigenous peoples is a means of effectuating indigenous peoples' rights. These include *inter alia* the rights to property, culture, religion, non-discrimination in relation to lands, territories, and natural resources, including sacred sites and objects, health, and pursuing their own priorities for development, including of natural resources, as part of their fundamental right to self determination. Moreover, consultation and consent are not the only means to safeguard indigenous peoples' rights. Other safeguards include prior impact assessments, the establishment of mitigation measures to avoid or minimize impacts on the exercise of these rights, benefit sharing and compensation for impacts in accordance with relevant international standards.<sup>10</sup>

The former Special Rapporteur also notes that the duty of States to consult derives from the overarching right of indigenous peoples to self-determination and as such is firmly rooted in international human rights law. The principle of due diligence requires that companies should recognize States' duty to consult indigenous peoples prior to the adoption of measures which would affect them and respect their right to participate in decisions

<sup>8</sup> [Indigenous Peoples and the United Nations Human Rights System Factsheet No 9](#), page 8, Office of the High Commissioner for Human Rights 2013,.

<sup>9</sup> [International Labour Organization C-169](#)

<sup>10</sup> The [Report of the Special Rapporteur on the rights of indigenous peoples](#), James Anaya, paragraphs 49 – 52, 6 July 2012

affecting them by ensuring adequate mechanisms for consultation and dialogue.<sup>11</sup> Thus the collective right to give - or withhold – from government or companies the Free Prior and Informed Consent (FPIC) to ‘actions that affect their lands, territories and natural resource’<sup>12</sup> is an important component of indigenous peoples’ rights. It is also the most controversial with both States and companies, some of whom prefer to operate on the basis of free, prior informed consultation (in place of consent).<sup>13</sup> As noted below, the World Bank uses the standard of free prior and informed consultation rather than consent, but its guidelines on indigenous peoples are currently being revised.

It is also sometimes argued that FPIC conflicts with States’ powers of eminent domain (the exercise of power by government or quasi-government agencies to take private property for public use) and that FPIC is therefore subordinate to eminent domain<sup>14</sup>. However it is generally argued that *‘eminent domain is subject to human rights law in the same way as any other prerogative of state and, therefore, should not be granted any special status or exemption, in this case, to justify denial of the right of FPIC.’*<sup>15</sup> A State should only exercise such a power while protecting human rights, and in this case, the recognised collective rights of indigenous peoples. Others have expressed concern that FPIC can allow a small minority, or even an individual, to block development projects supported by a majority. However FPIC contains no requirement for unanimity.

The concept of FPIC appears in UNDRIP:

- **Article 10** of UNDRIP states that *‘Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return’*.
- **Article 11** states that *‘States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs’*.
- **Article 19** requires that *“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them;...”*.
- **Article 28** provides the right to redress for indigenous peoples whose traditional lands have been *“confiscated, taken, occupied, used or damaged without their free, prior and informed consent...”*

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<sup>11</sup> The [Report of the Special Rapporteur on the rights of indigenous peoples](#), paragraphs 77, 79, 99, and 100, 10 August 2011.

<sup>12</sup> Oxfam Australia, [Guide to Free Prior and Informed Consent](#), June 2010.

<sup>13</sup> For a brief discussion of the controversies surrounding FPIC, see Transnational Institute/Burma Centrum Netherlands, ‘FPIC Fever: Ironies and Pitfalls’ in [‘Access Denied: Land Rights and Ethnic Conflict in Burma’](#), page 7, May 2013.

<sup>14</sup> For a discussion on FPIC vs. the doctrine of eminent domain in the Philippines, see [http://www.thai-ips.org/Documents/FPIC\\_philippines.pdf](http://www.thai-ips.org/Documents/FPIC_philippines.pdf).

<sup>15</sup> [Legal Commentary On The Concept Of Free, Prior And Informed Consent](#) Expanded working paper submitted to the UN Commission on Human Rights by Mrs. Antoanella-Iulia Motoc and the Tebtebba Foundation, July 2005



- **Article 32** gives indigenous peoples the right to develop their own priorities and/or strategies for their own lands, and requires States to obtain FPIC before approving any project affecting indigenous lands or territories.

Although the Myanmar Government has no national legal requirement or framework for free, prior and informed consent (FPIC – see below), indigenous peoples and Civil Society Organizations (CSOs) working with them are increasingly aware of the concept. Whether or not a company has a policy commitment to strive to achieve the FPIC of indigenous peoples, every step a company takes towards understanding the concerns of indigenous peoples and respecting their rights will reduce the chance of local opposition, project delays or outright suspension. Moreover, respect for informed participatory decision-making and property rights is a fundamental principle of human rights and good governance. It should also be emphasized that as significant parts of indigenous lands in Myanmar are conflict-affected, it is important for companies to be aware of conflict and post-conflict dynamics which could also affect the project.

### III Best practice guidance relating to indigenous peoples

The [2007 UN Declaration on the Rights of Indigenous Peoples](#) and the 1989 [ILO Convention No. 169 on Indigenous and Tribal Peoples](#) are international agreements by UN member states, whose provisions are mainly applicable to governments. Other standards which are relevant have been established by international financial institutions, and can provide guidance to companies and development projects which could have an impact on the rights of indigenous peoples. The [IFC Performance Standards](#) (especially 7 and 8) are particularly important for companies. Other applicable standards include the [World Bank Safeguard Policy on Indigenous Peoples](#) and the 2009 [Asian Development Bank \(ADB\) Safeguard Policy Statement on Indigenous Peoples](#). Given the relevance of indigenous peoples to the extractives industries, the two main business associations focused on environmental and social standards, the [International Council of Mining and Metals \(ICMM\)](#) and [IPIECA](#) (which brings together leading oil and gas companies) have both developed guidance on the subject for its member companies.

[International Finance Corporation Performance Standard 7](#)<sup>16</sup> (IFC PS 7, Indigenous Peoples) provides extensive guidance to companies working with the IFC on how to respect the rights of indigenous peoples and pursue FPIC. It is also used as a basis for some companies even where they are not partnered with the IFC. However the Performance Standards do not have the same legal status as an international convention or declaration. They are compulsory for companies implementing projects with IFC funding, but they are also increasingly adopted by companies more generally as a policy commitment and to guide implementation.<sup>17</sup>

IFC PS7 recognizes that indigenous peoples, as social groups with identities that are distinct from mainstream groups in national societies, are often among the most marginalized and vulnerable parts of the population. It sets out processes and standards to anticipate and avoid adverse impacts of projects on communities of indigenous peoples, or when avoidance is not possible, to minimize and/or compensate for such impacts. PS7 also sets out elements for the identification of indigenous peoples, while noting that there is no universally accepted definition. The elements include, to varying degrees:

<sup>16</sup> [IFC Performance Standard 7 on indigenous Peoples](#), January 2012

<sup>17</sup> See also [the Equator Principles](#) which is a risk management framework adopted by financial institutions to determine, assess and manage environmental and social risk in projects.

- Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- Customary cultural, economic, social, or political institutions that are separate from those of the mainstream society or culture; or
- A distinct language or dialect, often different from the official language or languages of the country or region in which they reside.<sup>18</sup>

As with all IFC Performance Standards, PS7 is accompanied by a [Guidance Note](#)<sup>19</sup> which interprets the Performance Standard and provides guidance to business on its implementation. IFC PS 7 Article 6 is particularly relevant to Myanmar, as indigenous peoples there have a collective attachment to their land, and many others have been displaced from them by armed conflict, private sector development projects, and Government expropriation.

*Article 6 states: “This Performance Standard applies to communities or groups of Indigenous Peoples who maintain a collective attachment, i.e., whose identity as a group or community is linked, to distinct habitats or ancestral territories and the natural resources therein. It may also apply to communities or groups that have lost collective attachment to distinct habitats or ancestral territories in the project area, occurring within the concerned group members’ lifetime, because of forced severance, conflict, government resettlement programs, dispossession of their lands, natural disasters, or incorporation of such territories into an urban area.” Para GN7 of the associated [Guidance Note](#) gives more examples.*

IFC PS7 Guidance Notes (GN) 7 states that indigenous peoples who maintain a collective attachment to distinct habitats or ancestral lands and the natural resources therein may include inter alia: ‘...those who are nomadic or who seasonally migrate over relatively short distances...’ and ‘...Groups of Indigenous Peoples who reside in mixed settlements, such that the Affected Indigenous Peoples only form one part of a more broadly defined community...’.

IFC Performance Standard 8<sup>20</sup> is also an important international instrument providing guidance to companies whose projects affect cultural heritage. It sets out processes for companies to follow to ensure they protect cultural heritage in the course of their project activities. This includes intangible cultural heritage such as unique natural features or tangible objects that embody cultural values, such as sacred groves, rocks, lakes, and waterfalls.

IFC Performance Standard 1<sup>21</sup> (Assessment and Management of Environmental and Social Risks and Impacts) is also highly relevant for companies engaging with communities, including those with indigenous peoples, including when undertaking impact assessments.

While the need to ensure adequate participation, consultation and consent arise in these international standards and as a broad requirement under international law, IFC PS7 sets out the more specific circumstances in which it requires its clients to obtain FPIC, focusing

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<sup>18</sup> [IFC Performance Standard 7](#), January 2012.

<sup>19</sup> [IFC PS7 Guidance Note](#)

<sup>20</sup> [IFC Performance Standard 8 on Cultural Heritage](#), January 2012,

<sup>21</sup> [IFC Performance Standard 1 on Assessment and Management of Environmental and Social Risks and Impacts](#), January 2012

on a risk of alienation from land, natural and cultural resources and where there are potentially adverse impacts concerning:

- Lands and natural resources subject to traditional ownership or under customary use;
- Relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use;
- Significant impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples' lives, including natural areas with cultural and/or spiritual value such as sacred groves, sacred bodies of water and waterways, sacred trees, and sacred rocks; or
- Use of cultural heritage, including knowledge, innovations or practices of indigenous peoples for commercial purposes.<sup>22</sup>

IFC PS7 Para 12 Notes that there is no agreed definition of FPIC but that it *'builds on and expands the process of informed consultation and participation described in Performance Standard 1 and will be established through good faith negotiation between the [company] and the Affected Communities of Indigenous Peoples. The [company] will document: (i) the mutually accepted process between the [company] and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.'*

With regard to unanimity, IFC PS7 GN 18 advises companies to bear in mind that communities of indigenous peoples are not necessarily homogeneous and can have divergent views and opinions. GN 18 states further that: *'The consultation should take into account the interests of these segments in the community while being cognizant of traditional cultural approaches that may exclude segments of the community [women, the elderly, young people] from the decision-making process.'*

GN 19 addresses the need to ensure that the consultation process is ongoing over the lifetime of the project: *'Providing adequate information to the members of the indigenous community about a project's potential adverse impacts and proposed minimization and compensation measures may involve an iterative process involving various segments of the community.'*<sup>23</sup>

Although the IFC is an institution of the World Bank, the World Bank has a separate 2005 [Safeguard Policy on Indigenous Peoples \(Operational Policy/Bank Policy OP/BP 4.10\)](#), which predates UNDRIP and only requires the borrower 'to engage in a process of free prior and informed consultation'.<sup>24</sup> The World Bank Safeguard policies are currently undergoing revision and a third round of consultations<sup>25</sup> which will align the structure more closely with the IFC Performance Standards. The Indigenous Peoples Safeguard Policy will be revised. This paper will not consider the current World Bank Safeguard Policy on Indigenous Peoples further, except to note that the Bank claims that it has already been triggered in Myanmar, for financing of the rehabilitation of a Gas Fired Power Plant in Thaton, Mon State. In their 2013 environmental assessment of the project, the Bank stated: *"The Indigenous Peoples policy is triggered because of the presence of ethnic minorities (EMs)/Indigenous Peoples*

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<sup>22</sup> [IFC PS 7, Articles 13 – 17](#).

<sup>23</sup> IFC, [Guidance Note 7](#), Indigenous Peoples, January 2012.

<sup>24</sup> World Bank, [OP 4.10, Indigenous Peoples](#), July 2005, revised April 2013

<sup>25</sup> <https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies>

(IPs) within the project's area of influence.”<sup>26</sup> People living in the affected villages are from the Karen ethnic minority, but also some from the Pa'O ethnic group, both of whom are indigenous peoples. An independent human rights risk assessment by NGO NomoGaia in 2014 found the consultation process to be lacking, particularly as concerns engagement with communities in minority languages.<sup>27</sup>

UN Development Program (UNDP)'s Social and Environmental Standards also cover indigenous peoples and are fully aligned with UNDRIP. These standards are binding upon UNDP and project implementing partners, including recipient countries and other UN agencies.<sup>28</sup>

**Asian Development Bank (ADB) Safeguard Requirements 3: Indigenous Peoples** requires borrowers/clients to undertake meaningful consultations with affected indigenous peoples to ensure their consent to the project, in order to avoid negative impacts on them and to benefit them in a culturally appropriate manner. In this context, consent refers to ‘a collective expression by’ affected indigenous communities of broad community support for project activities.

The client/borrower should also retain experts to carry out a full Social Impact Assessment (the need for experts is also foreseen in IFC PS7). If impacts are identified by the Assessment, the ADB client/borrower should prepare an Indigenous Peoples Plan in meaningful consultation with the affected indigenous peoples, so that they receive appropriate economic and social benefits and potential adverse effects are identified and dealt with. The client/borrower should establish a Grievance Redress Mechanism for affected people and ensure that monitoring and reporting take place. Importantly the ADB Safeguard Requirements state that the client/borrower should integrate an action plan for the legal recognition of customary rights to land, territories and ancestral domains of indigenous peoples.<sup>29</sup>

### Extractive Industries

The International Council on Mining and Metals (ICMM), a membership organization comprising 23 mining companies and 35 mining associations, produced a Position Statement regarding Indigenous Peoples in May 2013, following the adoption of the new IFC Performance Standard in 2012. The Position Statement<sup>30</sup> sets out ICMM members' approach to engaging with indigenous peoples and to free prior and informed consent (FPIC). In this statement all ICMM members make six commitments related to engaging with indigenous peoples.

These commitments include: *‘Work[ing] to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples, including where relocation of Indigenous Peoples and/or significant adverse impacts on critical cultural heritage are likely to occur. Consent processes*

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<sup>26</sup> World Bank, [Environmental and Social Assessment for the Thaton Gas-Fired Power Plant, Mon State, Myanmar](#), p 17-18, August 2013

<sup>27</sup> Nomo Gaia, [Human Rights Risk Assessment Thaton](#)

<sup>28</sup> [‘Social and Environmental Standards, UNDP, pp 35 – 41, 2014,](#)

<sup>29</sup> Asian Development Bank, ADB Policy Paper, [Safeguard Policy Statement](#), June 2009, Appendix 3, pp 55-62,

<sup>30</sup> [International Council on Mining and Minerals, Indigenous Peoples and Mining, Position Statement](#) May 2013.

*should focus on reaching agreement on the basis for which a project (or changes to existing projects) should proceed. These processes should neither confer veto rights to individuals or sub-groups nor require unanimous support from potentially impacted Indigenous Peoples (unless legally mandated). Consent processes should not require companies to agree to aspects not under their control.'*

In general, the importance of obtaining consent varies, in accordance with the severity of the potential impact on the concerned indigenous peoples. If, for instance, the continued existence of an indigenous culture is at stake, the need for consent to proposed measures will be more important than in cases where decisions might result in minor inconveniences, without severe and lasting consequences.

The UN Special Rapporteur on the Rights of Indigenous Peoples underlines that “the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent” (A/HRC/12/34).

In most cases, companies will have no interest in proceeding with a given project without the consent of the concerned peoples, as it would simply undermine the legitimacy, results, and sustainability of such an action.

Building on the Position Statement, in October 2015 the ICMM published an updated ‘Indigenous Peoples and Mining Good Practice Guide’, which is intended to provide companies with practical tools to develop and maintain positive relationships in areas where they operate. It includes guidance on how companies can work towards obtaining FPIC of affected indigenous communities; good engagement with them; indigenous participation in decision making; managing impacts; developing agreements; and dealing with grievances.<sup>31</sup>

IPIECA is the global oil and gas industry association for environmental and social issues, comprising 36 companies, including all six supermajors and seven national oil companies; and 16 associations of over 400 oil and gas companies. IPIECA notes that companies have a responsibility to respect indigenous communities and protect their culture. In April 2012 IPIECA published an issues review called *Indigenous Peoples and the oil and gas industry: Context, issues and emerging good practice*.<sup>32</sup> Its purpose is ‘to provide a summary of the policy and legal context, and an overview of key issues and emerging good practices for the oil and gas industry’s interface with Indigenous Peoples. As such, it is intended to be a reference tool for companies seeking an overview of the issues they may face when operating in areas where Indigenous Peoples live, or which they customarily use, and to provide an understanding of trends in company interactions with Indigenous Peoples. It is not intended to be an industry standard or to provide detailed guidelines for companies.’ The document concludes with a summary of good practice in oil and gas companies’ interactions with indigenous peoples.<sup>33</sup>

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<sup>31</sup> [ICMM Indigenous Peoples and mining good practice guide](#), October 2015

<sup>32</sup> IPIECA, “[Indigenous Peoples and the oil and gas industry: context, issues and emerging good practice](#)”, 2012.

<sup>33</sup> IPIECA, “[Indigenous Peoples](#)”

## IV Ethnic nationalities and indigenous peoples in Myanmar

Myanmar is one of the most culturally diverse countries in Asia. Ethnicity is a complex and politically sensitive issue there. Ethnic nationality groups<sup>34</sup> have long believed that the Government manipulates ethnic categories for political purposes. Moreover, the vast majority of armed conflicts which have afflicted Myanmar for more than sixty years have an ethnic basis.

Much of the ethnic nationality population live in remote areas, with few services provided by the Government or private sector. They maintain their own distinct languages, customs, and religions. However, there are no known “uncontacted tribes”, or “uncontacted people” in Myanmar, that is, people who have had no contact with the rest of the world and have remained in isolation.<sup>35</sup> There is no equivalent in Myanmar of India’s ‘Scheduled Tribes’.<sup>36</sup>

The 2008 Constitution makes no reference to ethnic minorities [*lu-neh-zu*] or indigenous peoples [*hta-nay tain-yin-thar*]; instead it uses *tain-yin-thar lu-myo-mya*, translated into English officially as ‘national races’. The term ‘national races’ is not defined by the Constitution. However, the government uses a much disputed list of 135 ‘national races’, which is almost identical to the one used during the 1962 – 1988 socialist era and resurrected during the early years of the previous military government (1988 – 2011). These were derived from a flawed census in 1931 under the British colonial government.<sup>37</sup> The list includes the majority Bamar and lists others under seven significant ethnic minority groups. However there are notable exclusions: Myanmar people of Indian, Nepali or Chinese ancestry are not among the 135 ‘national races’. The Rohingya people, Muslims who live in Rakhine State in western Myanmar, are also excluded from the list.

Indigenous rights activists use the Burmese term *hta-nay* (or *hta-ni*) *tain-yin-tha* for indigenous peoples, and base themselves on the international concept of indigenous, using the criteria of non-dominance in the national context, historical continuity, ancestral territories, and self-identification.<sup>38</sup> Myanmar’s indigenous peoples activists believe that the 135 categories of national races are not only inaccurate (for example grouping minorities by their location rather than ethnological links, or placing the Dawei/Tavoyans, who self-identify as a distinct group as a ‘Bamar’ subgroup), but also divisive (for example splitting the Chin of Western Myanmar, who self-identify as indigenous, with a shared history, cultural heritage, geographical homeland, traditional practices, and ethnic identity, into 53 sub-groups)<sup>39,40</sup>.

Certain groups, particularly the Chin, contested the use of the 135 categories of national races in the 2014 National Census, but the Census went ahead on this basis. Many Census respondents apparently classified themselves as ‘Other’ which could also reflect mixed parentage.

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<sup>34</sup> The term ‘ethnic nationalities’ is used throughout, as agreed at MCRB’s discussion with CSOs in Sept 2015.

<sup>35</sup> Metapedia, last accessed 8 September 2015, [http://en.metapedia.org/wiki/Uncontacted\\_peoples](http://en.metapedia.org/wiki/Uncontacted_peoples)

<sup>36</sup> The term ‘tribes’ or ‘hill tribes’ is rarely used in Myanmar except for tourist purposes.

<sup>37</sup> Transnational Institute/Burma Centrum Netherlands, ‘Ethnicity without meaning, Data without Context, p 2, February 2014, [https://www.tni.org/files/download/bpb\\_13.pdf](https://www.tni.org/files/download/bpb_13.pdf); see also Robert Taylor, ISEAS, ‘Refighting Old Battles, Compounding Misconceptions: The Politics of Ethnicity in Myanmar Today’, p 8, March 2015, [http://www.iseas.edu.sg/images/pdf/ISEAS\\_Perspective\\_2015\\_12.pdf](http://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2015_12.pdf).

<sup>38</sup> Draft UPR Fact Sheet, “Collective Rights of Indigenous Peoples”, by the Coalition of Indigenous Peoples in Myanmar/Burma, on file with MCRB/IHRB.

<sup>39</sup> [Chin Group says Burma Census Ethnicity Question Caused Confusion](#), Irrawaddy, 9 May 2014

<sup>40</sup> Chin Human Rights Organization, Individual UPR Submission, March 2015, on file with MCRB/IHRB.

The numerical breakdown for each ethnic group is therefore not yet known but Myanmar's non-Bamar ethnic nationalities are estimated at 30% - 40% of the population, and the seven ethnic States occupy some 57% of the total land area.<sup>41</sup> These States are named after the largest ethnic minority group in them (Rakhine, Chin, Kachin, Shan, Kayah, Kayin, and Mon). However there are also many ethnic minority groups without named States, including the Pa'O, Wa, Naga, and Palaung, and a number of other smaller groups. Ethnic nationalities live mainly in the seven States, engaging mostly in agriculture,<sup>42</sup> but they are also present in the seven Regions of Myanmar.

Many different languages are spoken in Myanmar, including the primary linguistic groups of Burmese (Bamar), Karen, Shan, Jingpho (the main Kachin language), Mon, Chin, Rakhine, and Bamar dialects such as Tavoyan. There are dozens of dialects and languages within these main linguistic groupings.<sup>43</sup> However, some ethnic minorities, particularly younger people in urban areas, may not speak a minority language (e.g. some Shan or Karen in Yangon). Moreover, many people are increasingly of mixed ethnic heritage, e.g. with a Mon mother and Shan father and are likely to speak Burmese as their first language.

This paper cannot attempt to identify which communities in Myanmar meet international definitions of indigenous peoples. Each case needs individual expert consideration including consideration of how the community self-identifies. However it is likely that Myanmar's rural ethnic minority populations who remain land-connected<sup>44</sup> (even where displaced by armed conflict and/or development projects) would meet international definitions. It is less clear whether ethnic nationalities in urban areas, and people of mixed ethnic heritage meet such a definition. These questions need further debate amongst the peoples themselves, consistent with the principle of self-identification.

### National laws governing the rights of ethnic nationalities

The 2008 Constitution grants some rights to ethnic nationalities. Art. 365 provides for the enforceable right of Myanmar citizens to freely develop literature, culture, arts, customs and traditions *'that they cherish'*. Article 365 also provides that *'any particular action which might affect the interests of one or several other of the national races shall be taken...'* only after obtaining the *'settlement of those affected'*. However, these protections and the exercise of these rights are circumscribed as they must be in accordance with the law, which is itself restrictive, and must avoid any act detrimental to national solidarity. Moreover, Art. 365 applies only to Myanmar citizens; tens of thousands of indigenous peoples there may not have proper identification documents that would grant them citizenship. Art. 22 of the Constitution provides for *'(i) development of language, literature, fine arts and culture of the national races; and (ii) promotion of solidarity, mutual amity and respect and mutual assistance among the national races; and promotion of socio-economic development including education, health, economy, transport and communication, of less-developed national races.'*<sup>45</sup>

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<sup>41</sup> Transnational Institute/Burma Centrum Netherlands, "[Access Denied: Land Rights and Ethnic Conflict in Burma](#)", May 2013.

<sup>42</sup> 70% of Myanmar's population is involved in agriculture.

<sup>43</sup> Myanmar Information Management Unit, [Main Spoken Languages of Myanmar](#).

<sup>44</sup> There is no known definition of 'land-connected' in international law but as noted above, indigenous peoples are recognized as having a special relationship to the land.

<sup>45</sup> In consultation Kachin representatives told MCRB they found this 'less developed national races' term objectionable and consider their society self-sustaining and not reliant on others for support.

The 2015 Protection of the Rights of National Races Law gives further effect to Article 22 of the 2008 Constitution, and in particular to provide a basis for the government to establish a Minister for National Races. However, according to the MCRB consultation with indigenous groups, there was no consultation with such groups during the drafting process. Article 3 of the Protection of the Rights of National Races Law includes the purposes of the law: (e) *'to aim for the socio-economic development of less-developed national races including education, health, economics and transportation'*. While Article 3 of the law provides for *'access to equal citizenship rights for all ethnic groups'*, and *'for ethnic groups to have full access to rights enshrined in the Constitution'*, it does not explicitly protect ethnic minorities against discrimination.<sup>46</sup>

The Protection of the Rights of National Races Law states further that no one can behave with intent to incite hatred, animosity and disunity among 'national races' and that ethnic rights and entitlements cannot be restricted without a sound reason. Chapter 4 establishes a Minister for National Races to be appointed by the President with the approval of the Union Legislature. The Ministry's mandate in Chapter 5 includes '(e) [to] carry out all round development activities including education, health, economics and transportation of less developed national races for their socio-economic development' and article (j) [to] 'carry out activities to develop, maintain, protect and improve language, literature, arts, culture and traditions of minority and endangered national races'.<sup>47</sup>

There is already a Minister for Border Affairs, appointed by the military under the provisions of the 2008 Constitution.<sup>48</sup> According to the Ministry of Border Affairs website, its mandate is *'...to effectively and systematically carry out development measures of border areas and national races....'*<sup>49</sup> The differentiation between the mandates of the existing Ministry of Border Affairs and the yet to be established Ministry of National Races was not clear at the time of writing.

Article 5 uses the phrase for indigenous peoples *hta-nay tain-yin-tha* - which is not included in the Definitions in Article 1 of the Law - and was inserted late in the Parliamentary process. It states that *'hta-nay tain-yin-tha 'should receive complete and precise information about extractive industry projects and other business activities in their areas before project implementation so that negotiations between the groups and the Government/companies can take place.'* The significance of this is further analysed below.

Myanmar law does not mention the UN Declaration on the Rights of Indigenous People (UNDRIP) or FPIC. However, mention of FPIC has been made in the context of a few other government documents copied from or drafted by other sources such as those relating to REDD+ (Reducing Emissions from Deforestation and Forest Degradation)<sup>50</sup> and extractives.

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<sup>46</sup> [Myanmar ICT Sector-Wide Impact Assessment](#), p 222, Groups At Risk, 4.8, MCRB/IHRB/DIHR,

<sup>47</sup> Ibid.

<sup>48</sup> The Ministers for Home Affairs and Defence are also appointed by the military, as will be the case when the new NLD-led government takes power in April 2016.

<sup>49</sup> The Ministry of Border Affairs, 'Development of Border Affairs and National Races Law', <http://www.mba.gov.mm/en/?q=node/278>.

<sup>50</sup> The UN-REDD+ Programme, which goes beyond Deforestation and Forest Degradation, and includes the role of conservation, sustainable management of forests and enhancement of forest carbon stocks, is the United Nations collaborative initiative on Reducing Emissions from Deforestation and forest Degradation (REDD+) in developing countries...The UN-REDD Programme supports nationally-led REDD+ processes and promotes the informed and meaningful involvement of all stakeholders, including indigenous peoples and other forest-



Having said that, there is no evidence of implementation of FPIC in REDD+ in Myanmar. The US-Myanmar Joint Statement on Good Governance and Transparency in the Energy Sector states that it is the objective of both Governments to manage the energy sector transparently. The statement emphasizes that transparency also helps companies to operate with the free prior and informed consent of affected communities.<sup>51</sup>

Forest and conservation laws in Myanmar also require the consultation of local communities and the consideration of community rights and benefits. Article 6 of the 1992 Forest Law<sup>52</sup> requires the consultation of local communities in the process of demarcation of the boundaries of reserved or protected public forest (but makes no specific reference either to communities or indigenous peoples). Article 7(a) of the Wildlife and Protected Area Law No 37/2002 provides for communities living in the proposed protected area to make claims to a Settlement Committee within 90 days of the announcement. Section 9 of this law provides that the authorities ‘...will review the community claims...a) arrange that communities rights and benefits are guaranteed, b) can establish a buffer zone and within the this zone provide customary land use rights and establish a record’.<sup>53</sup>

Myanmar’s Environmental Impact Assessment Procedure, dated 29 December 2015,<sup>54</sup> sets out definitions of environmental impacts (which importantly include social impacts) and makes specific mention of ‘indigenous peoples’ (translated in Burmese by another term, *tain-yin-tha myo-nweh-su*):

*2(h) **Environmental Impact** means the probable effects or consequence on the natural and built environment, and people and communities of a proposed Project or businesses or activities or undertaking. Impacts can be direct or indirect, cumulative, and positive or adverse or both. For purposes of this Procedure, Environmental Impacts include occupational, social, cultural, socio-economical, public and community health, and safety issues. Moreover, social impacts include Involuntary Resettlement and relating to Indigenous People.*

*2(v) **Indigenous People** means people with a social or cultural identity distinct from the dominant or mainstream society, which makes them vulnerable to being disadvantaged in the processes of development.*

It is not clear where this definition of ‘indigenous people’ was derived from in the ADB supported the Ministry on the EIA Procedures; and as mentioned above, the Burmese word used differs from that in the Ethnic Nationalities Law.

The Environmental Impact Assessment Procedure (Art. 7) states further that: ‘*Projects that involve Involuntary Resettlement or which may potentially have an Adverse Impact on Indigenous People shall comply with specific procedures separately issued by the responsible ministries. Prior to the issuance of such specific procedures, all such Projects shall adhere to*

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dependent communities, in national and international REDD+ implementation (UN-REDD Programme, ‘Guidelines on Free Prior and Informed Consent’ January 2013).

<sup>51</sup> US State Department media note, [Joint Statement on Good Governance and Transparency in the Energy Sector](#), 20 May 2013.

<sup>52</sup> The Forest Law (1992) in <http://displacementsolutions.org/wp-content/uploads/THE-FOREST-LAW-1992.pdf>

<sup>53</sup> Unofficial translation of the Wildlife and Protected Area Law No 37/2002 on file with MCRB.

<sup>54</sup> MCRB, ‘MCRB Welcomes the Adoption of the Environmental Impact Procedures, and Calls for Effective Implementation and Enforcement’, 25 January 2016, <http://www.myanmar-responsiblebusiness.org/news/eia-procedures.html>.

*international good practice (as accepted by international financial institutions including the World Bank Group and Asian Development Bank) on Involuntary Resettlement and Indigenous Peoples*'. Therefore adherence to international standards is now a requirement for projects requiring an EIA, not just an option.

## Ethnic armed conflict and inter-communal violence in Myanmar

The situation of indigenous peoples in Myanmar is intimately entwined with conflict. Armed conflict between ethnic nationality-based armed groups in border areas and the central Burman-dominated Government broke out shortly after independence in 1948. Bitter and protracted fighting has continued since then. As part of its reform process, the Government initiated peace talks with ethnic nationality armed groups. A Nationwide Ceasefire Agreement was signed on 15 October 2015 by the Government and eight parties to the conflicts. However, seven other ethnic nationality armed groups, including the largest and most powerful, did not sign the Agreement, and active conflict is ongoing in their areas of Kachin and Northern Shan States.

Conflict has greatly inhibited economic development in the ethnic border areas, and poverty rates in these areas are high. For example an estimated 73% of the population in Chin State lives below the poverty line, 44% in Rakhine State; and 33% in Shan State. The national poverty rate is estimated at 26%.<sup>55</sup>

Ethnic nationality grievances have centred on abuses against civilians by the Myanmar army during armed conflicts; the lack of self-governance or resource and benefit-sharing with the central Government; discrimination and marginalization; restrictions on religions practiced by ethnic minorities (many of whom are Christian as a result of colonial era missionary activity)<sup>56</sup>; and the lack of education in ethnic minority languages.<sup>57</sup>

To varying degrees, ethnic nationality-based armed groups control territory and have influence over ethnic nationality populations. Several of them, most notably the Kachin, Mon, and Kayin (Karen) groups, have developed civil administrative structures in their areas, including for health, land and education. Education has focused on teaching ethnic minority languages and religion, as part of transmitting indigenous culture to the next generation.<sup>58</sup> Other important aspects of indigenous culture include sacred sites; festivals such as the Manau celebration by the Kachin; and Indigenous medicine.<sup>59</sup> All of these practices constitute a critical cultural heritage<sup>60</sup> which ethnic minorities are seeking to preserve in the face of a perceived or actual 'Burmanisation' policy by the central Government intended to suppress ethnic minority cultures, languages and religions.

Unlike the six other ethnic minority States, Rakhine State has been less affected by armed conflict. However, it has been affected by sporadic and at times intense inter-communal violence between the majority Buddhist Rakhine population and the minority Muslim

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<sup>55</sup> ADB, "[Interim Country Partnership Strategy: Myanmar 2012 – 2014](#), Poverty Analysis (Summary)" (2012)

<sup>56</sup> For more information on lack of religious freedom in Myanmar, see the [USCIRF Annual Report 2014](#),

<sup>57</sup> For further information, see "[The peace process and ethnic education in Burma](#)", Dr. Ashley South and Professor Marie Lall, DVB, 18 October 2015,

<sup>58</sup> For a detailed discussion of such governance structures, see "[Ethnic conflict and territorial administration in Myanmar](#)", Asia Foundation, July 2015,

<sup>59</sup> See MCRB, Sector Wide Impact Assessment, "Why pay attention to Indigenous Peoples?", in [Human Rights and Business Fact Sheet, Groups At Risk](#)

<sup>60</sup> International Finance Corporation [Performance Standard 8. Cultural Heritage](#), January 2012,

population.<sup>61</sup> Most Muslims living in Rakhine State who self-identify as Rohingyas are not recognised as qualifying for Myanmar citizenship, and have experienced widespread exclusion and repression, including inter-communal violence. The latest outbreak of violence, most of it directed at Rohingyas by Rakhine Buddhists, began in June 2012, resulting in the displacement of almost 130,000 people.

### Indigenous peoples and customary and communal land tenure

Customary land is often defined as land that is owned by indigenous and other rural communities and administered according to custom by their institutions. Communal ownership is one form of customary land ownership. Rural people who practice communal farming generally do so under customary land ownership systems. Tenure systems may be collective, for example when a village comes together to work a contiguous area of land or to manage a collective forest or grazing lands.<sup>62</sup> Put simply, farmers share the land communally among themselves and help one another, for example during planting and harvest times. ILO Convention No 169 provides for States to identify and protect traditional customary and/or communal land owned by indigenous peoples, through FPIC inter alia.<sup>63</sup>

Customary use and communal ownership of land by indigenous peoples in Myanmar is widespread. These encompass both upland and lowland farmland, grazing land, forest land, village land, and vacant, fallow or virgin land.<sup>64</sup> Shifting cultivation, or swidden agriculture (*taung-ya*)<sup>65</sup>, where some plots of land are cultivated and some left fallow on a rotating basis, is common in the uplands of Myanmar. Few of the farmers using shifting cultivation have formally recognized titles for land they have traditionally occupied.

Some ethnic nationality armed groups, including the New Mon State Party and the Karen National Union, administer their own systems of land registration, in some cases including recognition of communal rights, customary rights, and shifting cultivation. The Kachin Independence Organisation (KIO) have developed a draft land policy but the resumption of fighting has prevented its formal adoption. In Constitutionally-established Special Administration Zones (SAZ), of which there are [6], local Administrations have some limited autonomy, although they may not have chosen to exercise it. In the Danu SAZ, as a consequence of negative impacts of and inward investment and migration, particularly in mining areas, Danu civil society and youth groups are discussing ways in which the Danu people can be protected, given that Danu autonomy is not granted by the Constitution<sup>66</sup>.

Some areas where indigenous peoples live may be subject to two administrations, that of the Government on the one hand, and that of the armed group on the other, potentially leading to disputes between the Government and armed ethnic nationality-based armed

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<sup>61</sup> See International Crisis Group, [The Politics of Rakhine State](#), October 2014,

<sup>62</sup> Land Core Group, Legal Analysis of Recently enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law, pp 15 – 16, op. cit.

<sup>63</sup> [Indigenous and Tribal Peoples' Rights in Practice](#), ILO, pp 90 – 99, 2009,

<sup>64</sup> Vacant, Fallow and Virgin (VFV) Land is land which the authorities consider as unused, but which in fact is often inhabited by indigenous and other peoples. The 2012 VFV Land Management Law provides for the acquisition of land use rights for a fixed term for both foreign and Myanmar companies. See MCRB/IHRB/DIHR, Land Briefing Paper, p 10 and 14 for a discussion of VFV land, p 10 & 14, March 2015, Op Cit.

<sup>65</sup> Under Article 17 of the 2012 Farmland Law, the Central Farmland Management Body has the duty and responsibility: '(i) to give guidance and control in respect of shifting Taungya cultivation'. It is not clear how this provision is applied, if at all, in practice.

<sup>66</sup> Based on information from MCRB Consultation with ethnic nationality CSOs, September 2015.

groups, and confusion among indigenous peoples about parallel land jurisdictions. According to comments made during the September 2015 MCRB consultation with indigenous peoples groups, in some cases neither the Government nor the armed group takes responsibility for land issues, including expropriations and disputes.

The current legal framework does not adequately recognize customary and communal land tenure arrangements, which are therefore not sufficiently protected. Indigenous peoples lack land tenure security under the existing legal framework governing land use rights. The 2008 Constitution provides that the State owns all land and natural resources on or in the land and grants conditional land use rights. It makes no reference to indigenous peoples, nor does it recognize their collective land rights or customary land use practices in their territories. The Constitution also recognizes private property. In addition, new land laws do not sufficiently recognize customary land rights.

What this means in practice is that indigenous peoples who practice shifting cultivation in a communal fashion on their traditional lands are particularly at risk of having their land taken in the absence of land registration documents and formal recognition of their land resource property rights.<sup>67</sup> Indeed, the Government has already expropriated land in Myanmar's borderlands where indigenous peoples have practiced shifting cultivation for decades.<sup>68</sup>

The Land Core Group, a consortium of local and international organizations in Myanmar, has provided a useful overview of the various types of land expropriations by the Government. These include state sponsored agricultural projects; agro-industrial plantations of private companies; large industrial development projects, especially industrial zones; and large public infrastructure projects.<sup>69</sup> However, much of the land expropriated has not been used and has in fact been left vacant. But the land has not been returned to its original owners, who had often farmed the land productively before the expropriation. Indigenous peoples are among those affected by these land takings, with little or no recourse to remedy. Land rights experts have recommended that the Government formally recognize customary law for land use rights and provide mechanisms for communal ownership of land.<sup>70</sup>

In a positive development, during October 2014 the Government initiated consultations with civil society groups on a draft National Land Use Policy, with a view towards the drafting of a new national land use law. Consultation, including with indigenous groups continued during 2015. The final version of the National Land Use Policy was issued on 30 January 2016<sup>71</sup>. Article 7(d) states that one of its Guiding Principles is 'To recognize and protect private and communal property rights of citizens as included in the constitution;', thereby acknowledging communal land use rights by indigenous peoples. Article 68 provides that customary land of 'ethnic groups...shall be transparently reviewed, registered, and protected as "customary land" '. Article 70 calls for formal recognition, reclassification and recognition of customary land rights relating to shifting or rotating cultivation, commonly used by indigenous peoples. While consultation with stakeholders is mentioned throughout the document, there is only one mention of free prior and informed consent (FPIC). Article 33(f) provides for FPIC and environmental and social impact assessments (ESIAs) in order to address the problem of land speculation and monopolization, but does not appear to call for

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<sup>67</sup> MCRB/IHRB/DIHR, Land Briefing Paper, p 23 - 24, Op Cit.

<sup>68</sup> "[Indigenous Rights Coalition Plans UPR Submission](#)", The Irrawaddy, 21 July 2015,

<sup>69</sup> Land Core Group, [Legal Analysis of the Recently enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law](#), pp 13 14, September 2012,

<sup>70</sup> MCRB/IHRB/DIHR, [Myanmar Oil and Gas Sector-wide Impact Assessment](#), pp 105 – 106, 2014

<sup>71</sup> The Republic of the Union of Myanmar, '[National Land Use Policy](#)', January 2016,.

FPIC specifically for indigenous peoples. The wording of this clause is vague, as 'land speculation and monopolization' are not defined in the Policy, so it is not clear what they constitute in practice. There is also a lack of clarity about when FPIC and ESIA will need to be applied and a lack of consistency with the new EIA Procedures.

The formal adoption of the National Land Use Policy is the first step in the drafting and enactment of a new overarching Land Law. However scores of laws relating to land will need to be reviewed, revised and adopted by the new Parliament in order to comply with the provisions of the Policy, which will presumably be reflected in the Umbrella Land Law. The Policy does appear to provide protection of customary and communal land tenure rights for ethnic nationalities/indigenous peoples, and recognizes their use of swidden agriculture. Whether these provisions will translate into adequate protection for indigenous land rights in practice remains to be seen.

#### Indigenous women and their rights to land in Myanmar

Myanmar acceded to the UN Convention on the Elimination of Discrimination against Women (CEDAW) in 1997,<sup>72</sup> and as such is obliged to guarantee women equal access to land and other resources. However the reality in Myanmar is characterized by widespread discrimination against women, including in owning land and using its resources. The 6<sup>th</sup> Draft of the National Land Use Policy calls for equal rights of men and women with regard to land (Part IX), but at present the enjoyment of this right by women remains aspirational. Indigenous women in particular often do not have land tenure rights due to widespread discrimination, although practice varies by ethnic group and some groups allow for equal inheritance rights for men and women, whereas others do not. They also face geographic, cultural and language/literacy barriers to land ownership.<sup>73</sup> As a result, very few indigenous women possess sufficient written documentation of customary tenure rights to their land. Even if their husbands have such documentation, indigenous women usually do not appear on the deeds of ownership, nor do they always have rights of inheritance. All of these factors present significant challenges to indigenous women themselves, and to companies when they conduct due diligence around indigenous land rights for women.

## V Challenges and considerations for companies

Companies operating in areas of Myanmar in which indigenous peoples live will face a number of challenges which may be present in other areas of Myanmar but are more acute in indigenous areas. These include:

### Lack of trust

Stakeholder consultation and engagement in Myanmar are difficult for a number of reasons. The Government has historically placed itself as the main interface between companies and communities. The right to freedom of speech and peaceful assembly was forcefully suppressed for decades. As a result, many are still reluctant, even fearful, to voice opinions to companies, particularly where these discussions take place in settings associated with local authorities.

Furthermore, a widespread distrust of the Bamar in areas which have experience of armed conflict, means that Yangon-based company employees and consultants may not be able to

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<sup>72</sup> [UN Treaty Collection, Myanmar accession July 1997.](#)

<sup>73</sup> "Linking Women and Land in Myanmar: Recognizing Gender in the National Land Use Policy", Transnational Institute, p 6, February 2015, [https://www.tni.org/files/download/tni-nlup-gender\\_0.pdf](https://www.tni.org/files/download/tni-nlup-gender_0.pdf).

access local views, or understand the significantly different perspectives on the role of the Government and business in these areas. Language may also be a barrier.

### Lack of transparency

There remains a general lack of transparency on the part of the government, including about business. Official information is gradually becoming more available through Government-controlled media and the President's and Ministry websites.<sup>74</sup> However, this is incomplete and certainly does not capture local level or informal business activity such as small-scale mines. Generally neither local Government nor non-state armed groups provide relevant information to communities about business operations in their areas, nor do companies operating or planning to operate there.<sup>75</sup> It remains to be seen whether the new requirements for disclosure of environmental impact assessments will lead to either government or businesses actually publishing more information. In the meantime, civil society groups and international NGOs are seeking to fill the gap.<sup>76</sup>

The Thein Sein Government became a Candidate country for the Extractive Industries Transparency Initiative (EITI),<sup>77</sup> and has started the application process to join the Open Government Partnership. These both hold open the prospect of more data availability and offer openings for civil society to engage government and business, provided they can speak freely. But changes in mindsets are also needed, particularly, but not only, in government.

### Lack of availability of remedy

Accessing remedies in Myanmar is very difficult, if not impossible. At present, few companies in Myanmar have operational grievance mechanisms.<sup>78</sup> There is little or no faith that the judicial system can currently deliver this. Systemic corruption in the administration of justice is a major concern, manifesting itself through bribes, delays, and obstructions,<sup>79</sup> with a widespread local perception that the courts in Myanmar are corrupt and unfair.<sup>80</sup>

Furthermore, there is a lack of experience among local Government officials in addressing complaints constructively and effectively; and in some cases a lack of organisations in indigenous communities with the experience and expertise to assist in moderating and mediating between the private sector and communities.

Where they can, communities '*[resort] instead to local-level dispute resolution mechanisms they perceive to be more reliable, accessible and affordable*'.<sup>81</sup> These local-level mechanisms generally involve village leaders and/or elders' councils. Although the village leader has an

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<sup>74</sup> See for example: [www.president-office.gov.mm/en/](http://www.president-office.gov.mm/en/) and [www.modins.net/myanmarinfo/ministry/home.htm](http://www.modins.net/myanmarinfo/ministry/home.htm)

<sup>75</sup> MCRB's Pwint Thit Sa/Transparency in Myanmar Enterprises report scores 100 large Myanmar companies for the information they provide on their websites including on land holdings and land acquisition policies.

<sup>76</sup> See for example '[Jade: Myanmar's "Big State Secret"](#)', Global Witness, October 2015 and <http://www.opendatamyanmar.com/>

<sup>77</sup> [Myanmar EITI](#) is based on a number of principles including transparency and accountability. EITI membership also requires that civil society are able to operate freely and "...are able to speak freely on transparency and natural resource governance issues, and ensure that the EITI contributes to public debate." EITI Standard, Protocol: Participation of Civil Society.

<sup>78</sup> MCRB held a workshop on grievance mechanisms on 3 June 2015. Additionally, MCRB held a workshop on [community engagement for extractives companies](#) on 2 February 2015.

<sup>79</sup> International Commission of Jurists, '[Right to Counsel: Independence of Lawyers in Myanmar](#)', Dec 2013

<sup>80</sup> See: USIP, '[Burma/Myanmar Rule of Law Trip Report](#)' (June 2013), pg. 5 and 34.

<sup>81</sup> See: USIP, above, p. 5.

obligation to inform the police about serious crimes, smaller issues and petty crimes can be settled by the village leader and/or the elders' council, a small group of respected men in a village. However such local-level dispute resolution opportunities may not be accessible where government or large companies are involved, particularly where companies are believed to be well-connected in the distant capital, Naypyidaw.

Lack of effective community-company engagement and lack of access to effective judicial or non-judicial remedy for real or perceived damages to livelihoods or other rights can increase tensions between indigenous communities and companies. There are live examples of this: indigenous and non-indigenous groups throughout the country campaigned for the cancellation of the Myitsone Dam project on the Ayeyarwady River in Kachin State, leading President Thein Sein to suspend dam construction in September 2011. Currently Shan, Karen and Mon indigenous groups are campaigning against the Mongton Dam on the Thanlwin River in Shan State. Disputes are ongoing between the Dawei, Karen and other local people and the Thai and Myanmar Governments/companies involved in the Dawei Special Economic Zone in the far southeast of Myanmar.

Operational level grievance mechanisms – i.e. processes that allow indigenous peoples' concerns to be raised and remedied locally at the company level (rather than at far away headquarters) – are therefore even more important in Myanmar, where there are few other outlets to resolve concerns.

### Lack of State recognition of indigenous peoples

The absence of systematic identification of indigenous peoples in Myanmar's legal framework, or a recognition of their collective rights has been described above. The only references to 'indigenous peoples' are found in a handful of administrative documents, and an ad hoc reference in Article 5 of the National Races Law (see below).

However, even if the absence of clear State law, the UN Guiding Principles on Business and Human Rights specify that business enterprises have a responsibility to respect internationally recognized human rights, independent of States' obligations, such as those outlined in section III. The former UN Special Rapporteur on the Rights of Indigenous Peoples has noted that this responsibility extends to compliance with international standards concerning indigenous peoples' rights, in particular those set out in UNDRIP. Businesses should not assume that compliance with State law meets international standards concerning the rights of indigenous peoples. They need to conduct due diligence, part of which may mean involve seeking free prior and informed consent (FPIC) from indigenous peoples.<sup>82</sup>

### Lack of State requirement for Free Prior and Informed Consent (FPIC)

As noted above, there are also no Myanmar legal requirements to seek FPIC.<sup>83</sup> Ethnic nationality representatives told MCRB that in their experience there was inadequate or

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<sup>82</sup> [Report of the UN Special Rapporteur on the Rights of Indigenous Peoples](#), James Anaya, UN Human Rights Council, July 2013, p. 15

<sup>83</sup> In this regard, Displacement Solutions, an international land rights organization has noted: 'Free prior and informed consent requirements appear to be entirely absent from existing law and policy governing land acquisition leading to involuntary resettlement.' [Displacement Solutions, "Land Acquisition Law and Practice in Myanmar"](#), p 20, May 2015.

often no consultation, let alone FPIC, with the local population before private sector projects began. They also said that information provided by companies in ‘consultations’ tended to mention only the positive aspects of the project, without giving all the relevant facts.

However, as mentioned above, Article 5 of the 2015 Protection of the Rights of National Races Law provides that ‘indigenous peoples’ (in Burmese– *ta-ni tain-yin-tha*, which is not defined in the Law) should receive complete and precise information about extractive industry projects and other business activities in their areas before project implementation so that negotiations between the groups and the Government/companies can take place. This phrase was added late in the process and has not yet been tested.

### Lack of process for how ‘Consent’ could be obtained

FPIC is a poorly understood and contested term in Myanmar, as it is in many countries. But there is now increasing awareness of the concept amongst civil society organisations. However there has not been an opportunity to test what it means in practice, including which groups should have the right to give or withhold consent; what the process should be; or appropriate populations and thresholds. Ethnic nationality CSOs are starting to consider how Article 5 of the Law should be implemented. It is likely that there will be diverging views, both amongst them, and with Government.

Administrative boundaries do not reflect populations of indigenous peoples, although the Constitution does provide for these boundaries to be changed. In some States and Regions many ethnicities live together, some of whom may self-identify as indigenous, including in nearby locations. 2014 Census data on ethnicity and religion have not yet been released due to their sensitivity. Furthermore, the use in the Census of the list of 135 national races (see above) raises questions about their accuracy.

Companies need to identify and engage with all communities present, regardless of whether they self-identify as indigenous. This should include nationalities who live in States named after other nationalities, e.g. Shans in Kachin State, Pa-O in Shan State, Mon in Kayin State and vice versa, as they often form significant populations. Rakhine State presents special challenges because of ongoing tensions between Buddhists and Muslims. Buddhists may resent companies who consult with Muslim communities about future projects there.

Furthermore, ethnic nationalities who may or may not self-identify as indigenous may nonetheless have an attachment to critical cultural heritage even where they are not local or land-connected. For example the Karen people live in many locations in Myanmar, but believe they should be consulted with regards to development in areas of cultural significance to the Karen such as the symbolic Zwegabin Mountain. The importance of the Myitsone confluence to the Kachin was seen from the movement against the proposed dam.

### Conflict and insecurity

Most of Myanmar armed conflicts, both those ongoing in the north, and those currently the subject of ceasefires, are ethnic-based, between majority Bamar and other ethnic nationalities, and in some cases between ethnic groups themselves. Armed conflict and inter-communal violence have led to insecurity in all of the seven States and in some of the seven Regions. The proliferation of armed groups, including Government-allied militias,



non-state armed groups, breakaway groups, and criminal gangs has meant that the indigenous civilian population lives with a high degree of insecurity on a daily basis, even in ceasefire areas. Anti-personnel mines and small weapons are prevalent. Business activities, including mining and logging, are a driver of conflict, as are Government development projects such as dams.

As a result of the conflict, human rights defenders from ethnic nationalities are at particular risk of imprisonment for peaceful protest, notwithstanding the post-2011 reforms. During 2014 and 2015 the Government cracked down on land rights activists, including indigenous peoples. For example in August 2015 the authorities reportedly arrested an indigenous Karen land rights leader and nine other farmers and activists.<sup>84</sup>

### Legacies of land expropriations

One of the major problems for companies operating in Myanmar is past land expropriations by the Government and inadequate compensation. While the Government recognizes the problem and has taken some steps to address it,<sup>85</sup> tens of thousands of people may have lost their land from “land grabs”<sup>86</sup>, i.e. expropriations.<sup>87</sup> Some land has been returned to the owners, but the majority remains in the hands of the authorities, including the Myanmar military, and concession-holders.<sup>88</sup> Land in indigenous areas has been particularly vulnerable to expropriation due to conflict and displacement, and the lack of formal title in upland areas with customary tenure (see above Section IV) and the attendant difficulty of identifying the original land users. These legacies further highlight the need to conduct enhanced due diligence when using land in indigenous areas, in order to understand these complexities and recognise their customary rights<sup>89</sup>.

### Lack of benefit- or resource-sharing arrangements

Myanmar lacks Constitutional arrangements for resource or revenue-sharing, and there are few examples of attempts to achieve this in practice<sup>90</sup>. Since many ethnic areas are resource-rich, particularly in timber, jade, gemstones and minerals, the absence of revenue-sharing is a driver of the long-standing conflicts.

Additionally, upland ethnic nationalities or indigenous peoples have generally not been able to legally establish tenure rights under customary and communal land systems in the absence of official land registration documents and accurate Government land cadastres (maps), leading to their expropriation.

Indigenous communities should have the opportunity to obtain economic and social benefits arising from responsibly managed private sector projects. Investors in these areas will need to work out how to reach agreements on these issues if they are to achieve a social licence

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<sup>84</sup> see Human Rights Watch, “[Land Rights Activists are Newest Political Prisoners](#)”, 15 August 2015,

<sup>85</sup> See the discussion of the 6<sup>th</sup> Draft of the National Land Use Policy above.

<sup>86</sup> The term ‘land grab’ in Myanmar is used to cover a wide range of situations, including land disputes and government/military expropriation of land for companies and its own use.

<sup>87</sup> For recent examples of ‘land grabs’ in Karen areas, see ‘[With only our voices, what can we do?: Land confiscation and local response in southeast Myanmar](#)’, Karen Human Rights Group, June 2015,

<sup>88</sup> Op cit., Land: MCRB Briefing Paper, pp 17-18; 21-22.

<sup>89</sup> MCRB/IHRB/DIHR, [Land Briefing Paper](#), p 25, March 2015

<sup>90</sup> [Natural Resources and Subnational Governments in Myanmar: Key considerations for wealth sharing](#), Thet Aung Lynn and Mari Oye, Asia Foundation, June 2014

to operate. Such agreements can emerge from the process of seeking FPIC, or wider consultation. Whether or not a community is indigenous, disagreements about how scarce resources and benefits are shared could lead to factionalism within the community. Companies will need to be aware of the potential for such divisions and take steps to include all members of a community in consultations, including women, youth, and others who may be marginalized, as well as traditional decision-making bodies.<sup>91</sup>

### Shortage of anthropologists and social safeguards specialists

Myanmar should be the subject of endless anthropological study. But there have been few academic studies of indigenous peoples. The country was closed for several decades, which meant that foreign anthropologists could not easily conduct field research there. Most social sciences were regarded as suspect by the military and socialist regimes and there were no local credible anthropology departments in universities, although this is gradually changing with more possibilities for Myanmar university students to conduct ethnographic research. Indigenous peoples were not free to voice their opinions, especially in the many indigenous areas affected by armed conflict. Where information exists, it was rarely collected by qualified anthropologists and may have been written up to meet a political agenda. Furthermore until recently, there were no international development programmes or businesses undertaking impact assessments.

As a result, there is little baseline information about the many communities of indigenous peoples; a shortage of Myanmar and foreign academic anthropologists, and a shortage of local EIA consultants who understand social safeguards including for indigenous peoples. Most Myanmar EIA consultants are environmentally trained and lack experience of assessing social, cultural or human rights impacts, indigenous peoples or knowledge of international standards.

## VI Recommendations for Companies

Companies seeking to operate in areas of Myanmar in where indigenous peoples may be present, or from which they have been displaced as a result of conflict or violence should:

### Prior to accessing the region

- Identify the different ethnic nationalities present in the area, including those who will be directly impacted.
- Seek expert advice about the current situation and any drivers of conflict. This should include the possibility of their own business contributing to conflict or tension. Academic experts or the groups listed in the Annex may be sources of advice.
- Employ qualified experts to research the social characteristics and dynamics of different ethnic nationalities; pair international experts with local consultants or academics to build capacity.

### Early after arrival in the region

- Subject to such engagement not placing the communities concerned at risk (which in turn should raise alarm bells about the wider investment climate and risks to human

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<sup>91</sup> Amy Lehr, [Good Practice Note, Indigenous Peoples' Rights and the Role of Free Prior and Informed Consent](#), Global Compact, February 2014,

rights), directly consult with those indigenous and all other ethnically distinct communities through appropriate procedures, and in particular the representative institutions which the communities themselves have identified about their concerns and possible fears that company activities will increase tensions in their areas.<sup>92</sup>

- Adopt a human rights based approach, to ensure individuals are not put at risk; that women's voices are heard in these consultations; and communities are able to express themselves in local languages.
- Ensure that the social and ethnic background of local consultants and liaison officers is such that they will be able to obtain the trust of the community, and report without bias on its concerns. Particular care should be taken with using Bamar urban and educated researchers, who may not be able to connect with the community's concerns, particularly if they have not been appropriately trained.
- Research local governance, including any parallel land or other administrative systems (e.g national or local government, and non-state armed groups (NSAGs).
- Conduct enhanced due diligence on land ownership and legacy issues
- Make readily available factual information online and on paper about the nature of the company's activities. Do not rely on government information channels.
- Establish accessible contact points to receive enquiries, complaints and grievances.

## Consultation

- Engage openly with all potentially impacted communities and interested stakeholders, not only indigenous communities. An even-handed approach to consultation can help mitigate and reduce the risk of tensions between indigenous and non-indigenous groups living in the same project area. However separate consultations may be necessary to ensure all voices are heard, and also for language reasons.
- Provide accurate and timely information about the company's approach, including written information several weeks in advance.
- Do not solely use local government offices to disseminate information, reports etc.
- Minimise the involvement of local authorities, including in the selection of participants or locations for consultation.
- Conduct consultations at times and locations which meet the needs of different groups e.g. farmers, fishermen. Where participants must travel, refund their expenses.
- Use appropriate and non-technical language, visual aids and models.
- Undertake several rounds of consultations to ensure participants have the opportunity to reflect on information before they ask questions or make recommendations or comments.
- Ensure disclosure and publication of all impact assessments, management plans etc and that these are known to impacted communities.
- Ensure that security forces are not present during consultations, impact assessments etc. This may require prior discussion with the Government to reinforce the importance of this, as well as monitoring of the security presence.
- In areas where there is a long legacy of mistrust between indigenous communities and the local government or companies, trusted indigenous intermediaries may be required.

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<sup>92</sup> [Indigenous and Tribal Peoples' Rights in Practice](#), ILO, p 61, 188, 2009,

## Complaints and grievances

- Establish accessible Operational Grievance Mechanisms in consultation with indigenous communities and other rights holders who may be impacted, according to the criteria established in the UN Guiding Principles on Business and Human Rights.<sup>93</sup>
- Make complaints and grievance mechanisms part of a broader community engagement strategy.
- Deal with criticism through constructive and direct engagement. This will also demonstrate to the authorities that there are alternative mechanisms for dealing with dissenting communities without intimidation.
- Use lessons learned from dealing with grievances to improve engagement with indigenous communities and on-going operations, and to avoid repeating activities that previously led to the complaints.

### Where it is necessary to obtain Free Prior and Informed Consent (FPIC)

Where there is a risk of alienation of indigenous peoples from land, natural and cultural resources and where there are potentially adverse impacts, companies should seek to obtain FPIC. Such circumstances include:

- Use of lands and natural resources subject to traditional ownership or under customary use;
- Relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use;
- Significant impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples' lives, including natural areas with cultural and/or spiritual value such as sacred groves, sacred bodies of water and waterways, sacred trees, and sacred rocks;
- Use of cultural heritage, including knowledge, innovations or practices of indigenous peoples for commercial purposes.

IFC PS7 and associated Guidance Note gives further recommendations about the process of such engagement. In particular, Para. 10 states: *'... undertake an engagement process with the Affected Communities of Indigenous Peoples as required in Performance Standard 1. This engagement process includes stakeholder analysis and engagement planning, disclosure of information, consultation, and participation, in a culturally appropriate manner. In addition, this process will:*

- *Involve Indigenous Peoples' representative bodies and organizations (e.g., councils of elders or village councils), as well as members of the Affected Communities of Indigenous Peoples; and*
- *Provide sufficient time for Indigenous Peoples' decision-making processes.'*
- Ensure that the voices of women and others who may be excluded from decision-making processes are heard.
- Design company operations and consultation practices in a culturally appropriate manner to support local communities' own governing structures, and their traditional rights to lands, territories, and resources, and any ongoing reform processes aimed at strengthening these.
- Incorporate the community's perspective of what constitutes equitable benefit sharing.

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<sup>93</sup> See [UN Guiding Principle 31](#).

- Approach seeking consent as an ongoing and iterative process, responsive to community needs and the project life-cycle, rather than a one-time decision.
- Respect the withholding or withdrawal of consent, but do not view it as precluding continued engagement.

## VII Useful Guidance

IHRB, "[From Red Flags to Green Flags: The Corporate Responsibility to Respect in High-Risk Countries](#)"

International Alert, "[Conflict-sensitive Business Practice: Guidance for Extractive Industries](#)"

IPIECA [Community Grievance Mechanisms Toolbox](#)

ICMM [Indigenous Peoples and Mining Good Practice Guide](#)

## VIII Contacts<sup>94</sup>

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<sup>94</sup> This contact list includes participant organizations at MCRB's consultation in September, 2015 and also includes some additional organizations. MCRB is requesting confirmation of the organizations listed above for mentioning their name and address. AASYC and CHRO have already agreed to be included in the list. MCRB is still waiting for the confirmation of other remaining organizations.

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## IX Glossary

Burmese word	Transliteration	English meaning	Notes/usage
တိုင်းရင်းသား	<i>tain-yin-tha</i>	‘ethnic nationality’	This is the term used in the Constitution and the 2015 Protection of National Races Law
တိုင်းရင်းသား လူမျိုးစု	<i>tain-yin-thar lu-myo-su</i>	‘national race’	The Government has reportedly stated that all full citizens are indigenous ( <i>taing yin tha</i> in the Myanmar language)
တိုင်းရင်းသား လူမျိုးများ	<i>tain-yin-thar lu-myo-mya</i>	‘national races’	
တိုင်းရင်းသား မျိုးနွယ်စု	<i>tain-yin-tha myo-nweh-su</i>	‘Indigenous Peoples’	The EIA procedures use the word <i>tain-yin-tha myo-nweh-su</i> for Indigenous Peoples whom they define [Article 2(v)] as “people with a social or cultural identity distinct from the dominant or mainstream society, which makes them vulnerable to being disadvantaged in the processes of development.”
တိုင်းရင်းသား လူနည်းစု	<i>tain-yin-thar lu-neh-zu</i>	ethnic minority	The 2008 Constitution makes no reference to ethnic <u>minorities</u> [ <i>lu-neh-zu</i> ] or Indigenous Peoples [ <i>hta-nay tain-yin-thar</i> ]; instead it uses the English term “national races” [ <i>tain-yin-thar lu-myo-mya</i> ]  Some Myanmar ethnic groups do not like to use the <i>lu-neh-zu</i> (minority) word because they feel it sounds like ‘weakness’
ဒေသခံ တိုင်းရင်းသား	<i>de-tha-kan tain-yin-tha</i>	Local ethnic nationality/national race’	This word is sometimes used to refer to the particular ethnic group in the locality ( <i>de-tha-kan</i> means ‘local’)
ဌာနေ တိုင်းရင်းသား	<i>hta-nay tain-yin-thar</i>	Indigenous Peoples	<i>hta-nay</i> means ‘birthplace’ or ‘place lived at for long time’. This term is generally used by indigenous people groups. It makes one undefined appearance in the 2015 Law
ဒေသယဉ်း ဌာနေ တိုင်းရင်းသားများ	<i>de-tha-yin hta-nay tain-yin-thar</i>	Indigenous Peoples living in their ancestral lands	<i>de-tha-yin</i> means ‘original area’