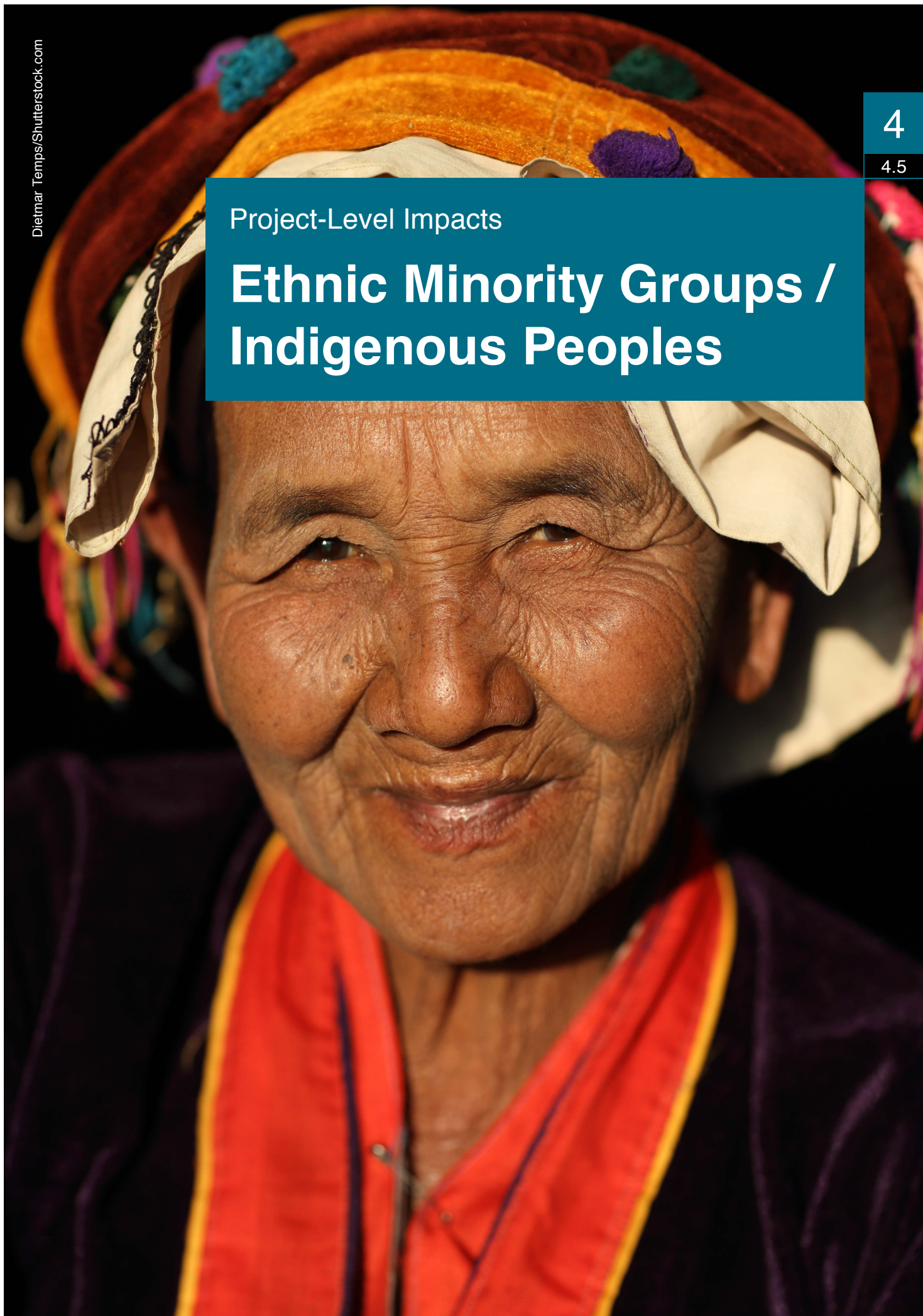


Project-Level Impacts

Ethnic Minority Groups / Indigenous Peoples



ETHNIC MINORITY GROUPS / INDIGENOUS PEOPLES

In this section:

- A. National Context
- B. Key Human Rights Implications for the O&G Sector
- C. Research Findings

A. National Context

Ethnic Minority Identities and Political Boundaries

Myanmar is one of the most culturally diverse countries in the region, and ethnicity is a complex, contested and politically sensitive issue where ethnic groups have long believed that the Government manipulates ethnic categories for political purposes.³²¹ Myanmar's ethnic minorities make up an estimated 30 - 40% of the population, and ethnic states occupy some 57% of the total land area along most of the country's international borders.³²² The Constitution makes no reference to ethnic minorities. It instead uses the term "national races". However this term is not defined by the Constitution, and is generally interpreted by applying the 1982 Myanmar Citizenship Law, which defines the 135 national races in its 1983 Procedures.³²³ Under the Citizenship Law, nationals of Myanmar include the "Kachin, Kayah, Karen, Chin, Bamar, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D."³²⁴ Almost all Rohingya are denied citizenship under the 1982 Citizenship Law – either because they do not meet its stringent and discriminatory citizenship requirements, or where they do, because they lack the documentary evidence required. People of Chinese, Indian or Nepali heritage are mostly denied full citizenship under this law because they do not automatically qualify under "national races".

The 2014 national census used the 135 categories of national races, with people required to check one of them, or indicate "other"; there was no option to indicate the often mixed heritage of many residents. This categorisation is strongly contested by ethnic minorities, as they believe it does not accurately represent their true ethnicity and also that the Government, comprised primarily of ethnic Bamars, is using this to lower the real number

³²¹ International Crisis Group, "[Myanmar Conflict Alert: A Risky Census](#)" (Feb. 2014).

³²² Transnational Institute/Burma Centrum Netherland, "[Access Denied: Land Rights and Ethnic Conflict in Burma](#)", (May 2013).

³²³ See: Burma Library, "[Burma Citizenship Law of 1982](#)".

³²⁴ Article 3, Myanmar Citizenship Law.

of each broad ethnic group. A last minute Government decision prevented those Muslims in Rakhine State identifying as Rohingya to write in “Rohingya” as their ethnic group during the census process.³²⁵

Political boundaries in Myanmar are to some extent organised according to ethnic demographics. Seven states are named after seven large ethnic minority groups – namely, Kachin, Kayah, Kayin, Chin, Mon, Rakhine, and Shan States. Although the Bamar do not have a specific state named after them, they are the dominant ethnic group living in the country, especially in the seven Regions (Sagaing, Magwe, Tanintharyi, Mandalay, Yangon, Ayeyarwady, and Bago). There are also six self-administered areas that are part of Regions or States, each named after the minority national race that forms the majority in the relevant area (Naga, Danu, Pa-O, Palaung, Kokang and Wa Self-Administered Areas)³²⁶. Myanmar national law sets out rights of ethnic nationalities to representation in State parliaments.

Ethnic Minorities and Armed Conflict

Non-international armed conflict between ethnic minority armed opposition groups in the border areas and the central Bamar-dominated Government broke out shortly after independence in 1948.³²⁷ Bitter and protracted conflict has continued ever since. A nationwide peace process is currently ongoing, with involvement of the Government and 16 ethnic armed groups. A nationwide ceasefire accord is under negotiation, with the aim of signing the accord by August 2014; however, this timeframe may not be met. The next step of the process will be a structured political dialogue involving not only ethnic armed groups, but other national stakeholders.

In its decades-long counter-insurgency campaigns against various ethnic minority armed opposition groups, the Myanmar army has committed a wide range of violations of international human rights and humanitarian law. As troops entered ethnic minority villages, they seized foodstuffs, destroyed villages, used civilians for forced labour, particularly portering, killed and tortured civilians, and forcibly displaced them. Armed ethnic minority opposition groups have also committed abuses, although to a lesser degree.³²⁸

Ethnic grievances have centred on these abuses; the lack of self-governance and resource sharing with the central Government; discrimination and marginalisation; religion; and lack of education in ethnic minority languages. Many ethnic minority leaders believe that the Burman-dominated central government instituted a policy of “Burmanisation”, which has resulted in suppression of ethnic minority cultures, languages and religions and ethnic people being treated as “second-class citizens”.³²⁹

³²⁵ See International Crisis Group, “[Counting the Costs: Myanmar’s Problematic Census](#)” (15 May 2014).

³²⁶ Article 56, Constitution.

³²⁷ At the same time, armed conflict broke out between the government and the Burman-dominated Burma Communist Party.

³²⁸ For a full discussion of the human rights situation in the counter-insurgency context, see reports from Amnesty International from 1988 – 2008, and Human Rights Watch.

³²⁹ For a further explanation and discussion of these issues, please see Transnational Institute/Burma Centrum Netherlands reports from 2011 to 2013.

Conflict has greatly inhibited economic development in the ethnic border areas, and poverty rates in these areas are high. For example 73% of the population in Chin State lives below the poverty line, 44% in Rakhine State (though the World Bank's reinterpretation of the data suggests a rate of 77.9%) and 33% in Shan State; the national poverty rate is 26% (the World Bank's reinterpretation of the data reveals a 37.5% rate – see [Part 4.2](#) on Communities).³³⁰ At the same time ethnic minority states are rich in natural resources, including minerals and gems, hardwoods, and hydropower; there are also natural gas deposits off-shore from these states that are national assets, though the residents of these areas do not necessarily see it that way. Significant natural gas deposits are present in Myanmar territorial waters off the coasts of Rakhine and Mon States and Tanintharyi and Ayeyarwady Regions.

Ceasefires have made land more available to commercial interests, some of which are linked to the central Government and the military. Ethnic minority armed groups also have business interests in their territories. At the same time these areas are highly militarised, including Myanmar army troops and allied militias,³³¹ ethnic minority armed groups, and armed criminal elements. This has resulted in very poor land governance, with a heightened risk of land grabs, instability and a climate of fear.³³² Future demining operations that make land more accessible and commercially valuable will likely exacerbate these risks (see further [Part 4.3](#) on Land).

Indigenous Peoples

Indigenous peoples are recognised as being among the world's most vulnerable, disadvantaged and marginalised peoples. Due to their general social and economic marginalisation, indigenous peoples are particularly at risk of human rights impacts connected to business activities and are often excluded from decision-making processes and other consultations regarding matters that may impact them.³³³ The recognition of indigenous peoples' rights has been a long-contested process and remains so in several parts of the world, though with significant political movement in favour of recognising a distinct set of human rights in the UN Declaration on the Rights of Indigenous Peoples in 2007.³³⁴

There has also been increasing engagement from companies, particularly the extractive sector, at policy and practice levels, in recognising indigenous peoples' rights and developing approaches – though in many places indigenous peoples remain sceptical and even hostile to extractive industries, owing to negative experiences.³³⁵

³³⁰ ADB, "[Interim Country Partnership Strategy: Myanmar 2012 – 2014, Poverty Analysis \(Summary\)](#)" (2012).

³³¹ There are dozens of militias formed by the government; some of them known as "people's militias". These groups are armed and operate in ethnic minority states.

³³² Transnational Institute/Burma Centrum Netherland, "[Access Denied: Land Rights and Ethnic Conflict in Burma](#)" (May 2013). See other reports by Transnational Institute from 2011 to 2013, and also reports by the International Crisis Group, the Karen Human Rights Group, the Shan Human Rights Foundation, and the Human Rights Forum of Monland.

There are political, legal, policy and practical considerations to be taken into account in addressing indigenous peoples' rights in Myanmar. The term "indigenous people" is not widely understood, nor is the term generally used (this is explored in the Research Findings below). However, there is a growing body of national and international law on the rights of indigenous peoples that recognises the cultural and other specificities of indigenous peoples; calls for special measures to be adopted to safeguard the persons, institutions, property, labour, cultures and environment of these peoples; recognises 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 about their development, including through a process of free, prior and informed consent (FPIC).³³⁶

B. Key Human Rights Implications for the O&G Sector

Applying International Standards on Indigenous Peoples

- **The concept of indigenous peoples in Myanmar:** Ethnic identity is an important dynamic in Myanmar society that will play out in many ways in relation to extractive sector policy and projects, particularly in areas that are emerging from long-running conflict or still suffering from inter-communal violence. Previously, ethnic identity was generally not expressed in terms of broader international standards on indigenous peoples' rights, but that is changing as a result of capacity-building programmes and international networking. O&G companies (and others) with experience in engaging with indigenous peoples rights elsewhere are likely to see increased references in Myanmar to international standards on indigenous peoples as a framework for engagement.³³⁷
- **Draft EIA Procedures on indigenous peoples:** The latest available English translation of the draft Environmental Impact Assessment (EIA) Procedure provides for consultation but does not specifically refer to FPIC. It also explicitly states "Projects involving resettlement or potentially affecting Indigenous People shall additionally comply with separate procedures issued by responsible ministries, and in the absence of such procedures all such Projects shall adhere to international best practice on Involuntary Resettlement and Indigenous People." If adopted as is, adherence to international best practice on indigenous peoples will become a requirement, not just an option.³³⁸ The OECD has recommended the use of free, prior and informed consent (FPIC) for all land acquisitions, not just those involving ethnic minorities / indigenous peoples.³³⁹
- **International financial institutions safeguards concerning indigenous peoples:** Several international financial institutions (IFIs) including the Asian Development Bank (ADB) and the World Bank Group (WBG) are considering how to apply their safeguard

³³⁷ See for example, International Alert, "[Free, prior and informed consent in Myanmar](#)", (Oct. 2012).

³³⁸ OECD, "[OECD Investment Policy Reviews: Myanmar 2014](#)" (March 2014). See for example, UNDRIP (Art. 10 and 28), and IFC Performance Standard 7, which requires companies to obtain the free, prior, informed consent of indigenous peoples (FPIC) in certain circumstances (para. 12-17).

³³⁹ OECD, "[OECD Investment Policy Reviews: Myanmar 2014](#)" (March 2014).

policies in Myanmar, including on indigenous peoples.³⁴⁰ Since there are unlikely to be major changes in national policy under the existing Constitution, the evolving IFI approach to indigenous peoples in Myanmar -- and the critical feedback they are already receiving -- can probably provide practical lessons to O&G companies on applying these relevant international standards in the Myanmar context.

Operations in Ethnic Minority Areas, including those Affected by Armed Conflict

- **Local trust building:** The field assessments indicated that current practice in Myanmar in the extractive sector involves little to no consultation with communities. That indicates that there is a long way to go towards a far more consultative, consensus based approach for companies and communities on land, resources and more general operations issues. In the ethnic states, this will require a greater effort and longer-term trust building. Engagement in local languages will be important.
- **The legacy of history:** The experience of many ethnic armed groups during the previous round of ceasefires in the 1990s was that “no war” did not equate to “peace”, since a plethora of armed groups remained in control of a confusing and overlapping patchwork of territories, and continued to fund their activities through informal taxation, resource exploitation and various illegal activities. New economic actors that entered these areas after the earlier ceasefires generally resulted in negative rather than positive outcomes for local communities. There is considerable concern now, among armed groups and communities that their areas will be vulnerable to further economic exploitation, and companies with operations in these areas will inevitably face a high level of concern and suspicion that they will have to address.
- **Benefits sharing:** Key demands of ethnic groups are for revenue-sharing arrangements between the centre and the states/regions (which will likely be addressed in the future political phase of the peace process, but not the current constitutional amendment process), as well as much greater local control of commercial activities in their areas. O&G companies should be sensitive and responsive to the prevalent view that ethnic minorities see very little benefit from O&G extraction in their areas.
- **Effective consultation:** In armed conflict-affected areas, there are additional challenges for effective consultation. The Myanmar State has historically never been present in many of these areas, and its legitimacy is fundamentally questioned. O&G companies with activities in these areas will need to undertake detailed consultations with ethnic armed groups who are the de facto authority in many of these areas. Wherever possible, they should seek to engage with ethnic representatives directly, while being careful not to undermine or contradict on-going peace processes.³⁴¹ However, as these groups do not necessarily represent the interests and concerns of all communities in these areas, such consultation should not be seen as a substitute for community consultation. It should be recognised that in conflict-affected areas,

³⁴⁰ The ADB is carrying out a “country systems safeguard” review, that covers the ADB safeguards on indigenous peoples. The World Bank has a safeguard policy on indigenous peoples and IFC as a Performance Standard on indigenous peoples. The World Bank has already applied its Indigenous Peoples Safeguard Policy to a [project in Myanmar](#).

³⁴¹ IPIECA provides a summary of emerging practices in relation to the oil and gas industry interaction with Indigenous Peoples, “[Indigenous Peoples and the oil and gas industry: context, issues and emerging good practice](#)” (April 2012).

such consultation is difficult. People may not always feel free to speak openly, and there can be serious risks to people if consultations are mishandled. It is advisable that such consultations be facilitated by individuals or organisations with a strong track record of conducting such consultations in these areas, and with detailed knowledge of local political, ethnic and conflict dynamics. In addition, companies may need specialist advice from anthropologists or other social scientists with expertise in ethnic minority cultures in Myanmar.

See further the [Part 4.3](#) on Land, which highlights concerns around national law failing to adequately recognise customary and communal land rights.

C. Research Findings³⁴²

Recognition of Indigenous Peoples

Human Rights Implicated: Right to determine their own identity or membership in accordance with their customs and traditions; right to self-determination

Assessment

- The recognition of certain groups living in Myanmar as “indigenous peoples” is **unclear in law and contested in practice.**
- **The Myanmar Constitution and most domestic laws are steadfast in not acknowledging any concept of special minority or indigenous groups** who have additional or special rights.
- The **Foreign Investment Law refers to “ethnic nationalities” or “native peoples”** (depending on the translation) and specifically allows the Myanmar Investment Commission (MIC) to restrict or prohibit foreign investment activities “which can affect the traditional culture and customs of the national races within the Union;” unless the investments is found to be “for the interest of the Union and citizen especially the native people with the approval of the Union Government”. This approval shall take into consideration the opinions from the local population and civil society, relevant regional administrative entities and the region or state government.³⁴³
- **Myanmar has not ratified ILO Convention 169 - Indigenous and Tribal Peoples Convention.** However, **Myanmar voted in favour of endorsement of the UN Declaration on the Rights of Indigenous Peoples in 2007**, while noting that it “would seek to implement it with flexibility.” The Myanmar statement did not take a position of whether there are or are not indigenous peoples in Myanmar. The **standard working definition for qualification as an “indigenous people”** uses several criteria: historical continuity; commitment to preserving ethnic identity;

³⁴² Note that given security constraints and time limitations, the SWIA field teams did not carry out in-depth consultations in ethnic minority areas. The findings in this section are therefore presented as “research findings” rather than “field findings” as in the other sections.

³⁴³ MIC Notification 11/2013, Art. 14.

distinct differences from the prevailing sectors of society; and formation of non-dominant sectors of society³⁴⁴, as well as the criteria of self-identification which is included in many definitions. **There are ethnic minority groups in the O&G development areas that meet the criteria of indigenous peoples.**

- **The IFIs have already applied or indicated that they will apply their indigenous peoples safeguard policies to their operations in Myanmar.**
 - In 2013, the World Bank applied the World Bank Safeguard Policy on Indigenous Peoples in a project to upgrade the Thaton gas fired power plant in Mon State, noting that the overwhelming majority of people in the project area in Mon State are indigenous peoples.³⁴⁵

Land and Natural Resources

Human Rights Implicated: Right to self-determination; right to autonomy or self-government in matters relating to their internal and local affairs; right to develop their own strategies for development

Assessment

- **Foreign investors are prohibited from obtaining rights to lease and use “religious lands” or regions that are designated by the Government as regions of cultural or natural heritage.**³⁴⁶
 - How these lands are designated, and any role that ethnic minorities might play in such designation, is not clear from the Foreign Investment Law.
- Myanmar has a centralised (i.e. unitary) form of government.³⁴⁷ In particular, the Union-level Government is given control over the administration of investment and appointments to region or state government.³⁴⁸ **The Union Government does not need approval from state or regional governments for large-scale investments in their local jurisdictions, although they must be informed.**³⁴⁹
- **Under Myanmar’s Constitution, all lands and natural resources belong to the State, and the State has exclusive jurisdiction to authorise the use of all lands and natural resources** – i.e. Myanmar’s recognition of the right of self-government in matters relating to internal and local affairs for some topics does not extend to the jurisdiction (i.e. use and management) by ethnic nationalities over lands and natural resources within their claimed territories. However state and division legislatures

³⁴⁴ ILO, “[Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169](#)”, (2008).

³⁴⁵ “*The Indigenous Peoples policy is triggered because of the presence of ethnic minorities (EMs)/Indigenous Peoples (IPs) within the project’s area of influence. The overwhelming majority (over 90 percent) of the beneficiaries and affected peoples in the Project influence area are IPs and, therefore, a separate Indigenous Peoples Plan (IPP) has not been prepared, but relevant elements of the policy will be integrated into project design.*” World Bank, “[Myanmar - Electric Power Project: environmental assessment](#)” (2013), pg. 17.

³⁴⁶ Rule 128(a), (b), 2013 Foreign Investment Rules.

³⁴⁷ Article 8 of the Constitution provides that “[t]he Union is constituted by the Union system.”

³⁴⁸ Article 262, Constitution. Ministers for border and security affairs are to be nominated by the Commander-in-Chief. Although the nominees must be approved by the Region or State Hluttaw, the said Hluttaw cannot refuse the appointment of the nominee “unless it can clearly be proved that the person concerned does not meet the qualifications of the Chief Minister of the Region or State.” Article 262(c), Constitution.

³⁴⁹ Transnational Institute/Burma Centrum Netherland, “[Access Denied: Land Rights and Ethnic Conflict in Burma](#)”, (May 2013).

have the power to regulate on environmental protection, within the boundaries of national legislation.

- **Myanmar is undergoing a transition to more devolved government.** The regional and state governments were only set up in 2011, and there are still ambiguities in the delegation and separation of responsibilities between Union-level and state or region-level government. There are unlikely to be changes in central Government control over natural resources in the near future, although ultimately this will depend on the outcome of the ongoing peace talks and Constitutional amendment process. Ethnic minorities have called for amendments to the Constitution which would give them more control over their own resources and governance.
- **Once implemented, the Extractive Industries Transparency Initiative (EITI) process will bring some transparency** to the local or regional origin of extractive sector-generated Government revenues.
- **Promoting the involvement of local indigenous communities in resource extraction is an emerging international approach** to ensuring the local communities can retain control over and benefit from use and management of natural resources within their (communal) lands.³⁵⁰ Myanmar law limits on-shore O&G production to companies that meet requirements set out in tender requirements and therefore is not currently well adapted to explore new models of indigenous ownership.

Engagement and Free, Prior & Informed Consent (FPIC)

Human Rights Implicated: Right to consultation and cooperation, including through free prior informed consent (FPIC) for certain actions

Assessment

- Under the Foreign Investment Rules 11/2013, the Myanmar Investment Commission must seek permission from the relevant region or state government as to whether measures proposed to avoid or mitigate an impact on the environment or society in connection with an investment are sufficient. While these consultation procedures with relevant region or state governments provide the opportunity for review by these bodies that may have strong representation from the majority and minority ethnic groups in the region, **this is not equivalent to or a substitute for long-term engagement by O&G companies with local communities, including local indigenous communities.** Furthermore, it may lead to conflict, for example where a company seeks to obtain regional government support, for example, through financial support to regional economic development initiatives against the wishes of the local community.
- **The Government has recognised the relevance of FPIC** in the context of REDD+ and more specifically, FPIC's importance in the context of extractive operations.³⁵¹

³⁵⁰ See Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, "[Extractive industries and indigenous peoples](#)", A/HRC/24/41, (1 July 2013).

³⁵¹ Reducing Emissions from Deforestation and Forest Degradation (REDD). "REDD+" goes beyond deforestation and forest degradation, and includes the role of conservation, sustainable management of

- The SWIA field assessments indicated that, with limited exceptions, there has been **virtually no meaningful consultation** with local communities around land use or relocation for recent O&G developments, much less any kind of wider discussion that could be characterised as FPIC or even “broad community support.” This partly reflects the absence of legal requirements to conduct impact assessments prior to the adoption of the 2012 Environmental Conservation Law.
- The ADB, the World Bank (see above) and the IFC have all indicated that they will apply their **safeguard policies** on indigenous peoples to projects they finance in Myanmar, including their provisions on **FPIC**.
- **The forthcoming EIA Procedures are expected to require consultations with, and disclosure to, local communities.** According to the December 2013 draft, O&G exploration and production requires an EIA. The model Production Sharing Contract (PSC) also provides for EIAs and a social impact assessment (SIA) as an obligation and required step under the PSC (clause 17.2 bb). However the draft EIA Procedures do not currently require more detailed consultation or even consent when indigenous peoples/ethnic minorities are involved **but would require the application of international best practice in the absence of more detailed national procedures**, leaving the door open to the application of standards requiring more in-depth engagement and FPIC in designated circumstances.

Local Sharing of Benefits

Human Rights Implicated: Rights to own, use, develop and control the lands, territories, and resources that they have traditionally owned, occupied or used

Assessment

- **Myanmar currently does not have any agreed framework for sharing of benefits from O&G projects with communities from where those benefits derive.** The standard PSC has a few limited clauses that refer to preferential procurement of goods and services from Myanmar (subject to certain conditions) and to the need to “expedite ... Corporate Social Responsibility in the Contract Area.” None of the PSC provisions require a more in-depth engagement, or benefit-sharing, with local communities.
- **International good practice for resource extraction projects increasingly involves some form of a “Community Development Agreement” (CDA).**³⁵² This may be based on specific national obligations imposed by governments on developers to formally enter into a CDA; or specific legal regimes that require developers seeking access to indigenous lands to negotiate conditions of access or use with the traditional custodians of that land. Companies may also propose a CDA where there has been significant conflict involving the developer and local communities, and an agreement has been negotiated in an effort to resolve these conflicts, or to strengthen their social license to operate.

forests and enhancement of forest carbon stocks. See, Spectrum, “[Presentation on Transparency and Accountability](#)” (2014) and “[US-Myanmar Joint statement for Good Governance and Transparency in the Energy Sector](#)”.

³⁵² EI Sourcebook, “[Good Practice Note on Community Development Agreements](#)” (2011).

Box 20: Relevant International Standards and Guidance on Engaging with Ethnic Minority Groups / Indigenous Peoples, and Linked Initiatives in Myanmar

Relevant International Standards:

- [IFC Performance Standard 7 and Guidance Note – Indigenous Peoples](#)
- [UN Declaration on the Rights of Indigenous Peoples](#)
- [ILO Convention 169: the Indigenous and Tribal Peoples Convention](#)
- [UN Guiding Principles on Business and Human Rights](#)

Relevant Guidance:

- European Commission, “[Oil & Gas Sector Guide on Implementing the UN Guiding Principles on Business & Human Rights](#)”, particularly Part 3.II
- IIED, “[FPIC and the Extractive Industries: A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects](#)”
- International Council on Mining and Metals (ICMM), “[Good Practice Guide: Indigenous Peoples and Mining](#)”
- IPIECA, “[Indigenous Peoples and the Oil and Gas Industry: Context, Issues and Emerging Good Practice](#)”
- Reports of the [UN Special Rapporteur on the Rights of Indigenous Peoples](#)
- UN Global Compact, “[Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples](#)”

Myanmar Initiatives on Ethnic Minority Groups / Indigenous Peoples Linked to the O&G Sector:

- [SWISSAID](#) (Swiss Foundation for Development Cooperation), Natural Resource Management, community forestry, watershed management in Kachin State and Shan State
- [Mercy Corps](#) is working on Livelihoods & Food Security, Natural Resources Management, Emergency Response in Ayerwaddy Division, Mandalay Division, Rakhine State and Chin State
- [Promotion of Indigenous and Nature Together](#) (POINT), Research on indigenous knowledge and sustainable development in Myanmar
- [International Alert](#) co-hosted a roundtable discussion on free, prior and informed consent (FPIC)