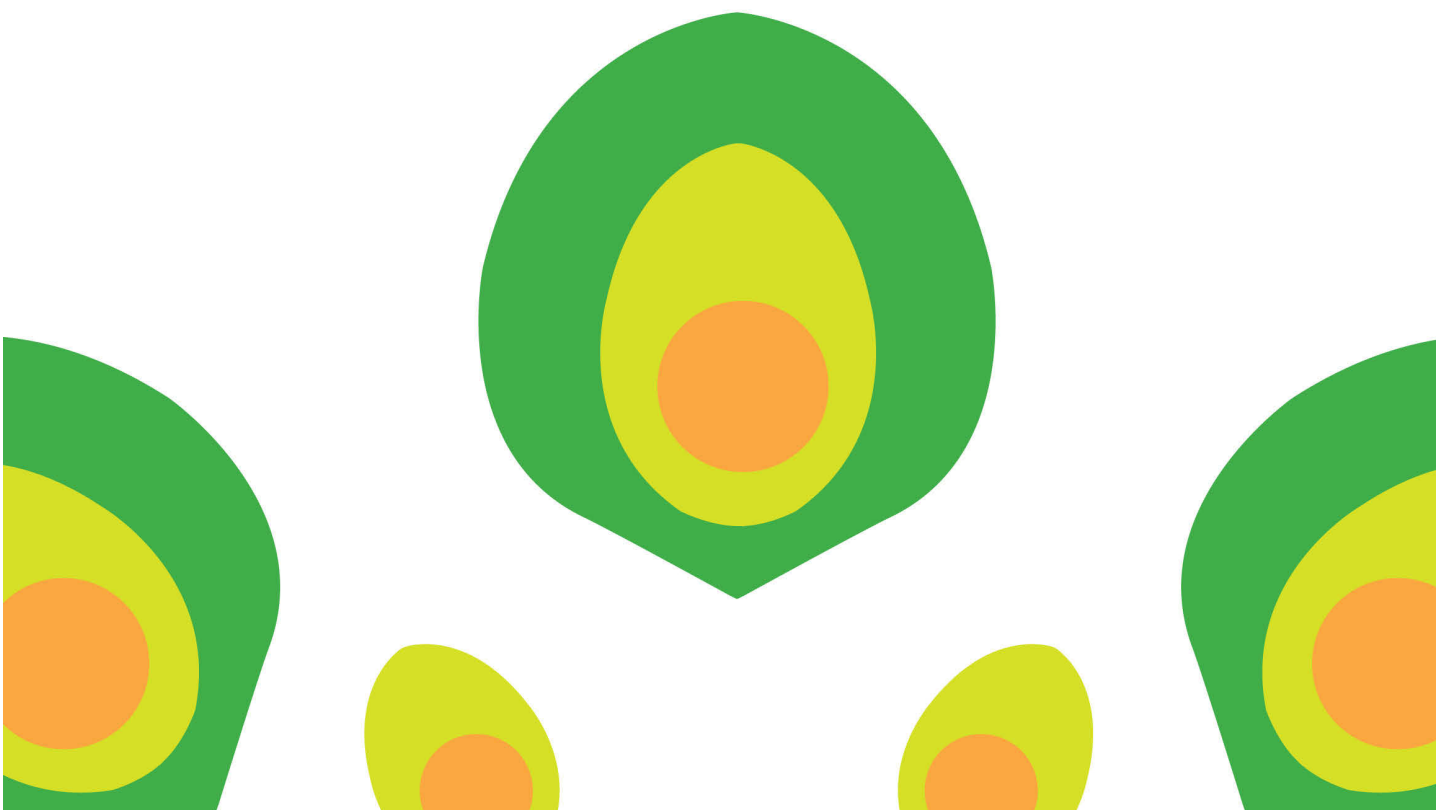


# Recommendations



# Recommendations

The following is a summary of the recommendations to the main actors in Myanmar's O&G sector. A fuller explanation of these recommendations and suggestions for how they can be implemented are included below.

The effective management of cumulative impacts is just one area where multi-stakeholder dialogue is likely to be more effective than individual action. This assessment of the Myanmar O&G sector has identified other areas where such a dialogue is desirable and the Myanmar Centre for Responsible Business (MCRB) stands ready to facilitate those discussions.

<b><u>To the Government of Myanmar</u></b>	<b><u>To Companies in the O&amp;G Sector</u></b>
<ol style="list-style-type: none"> <li>1. Strengthen the social and human rights requirements in the forthcoming Environmental (and Social) Impact Assessment (E(S)IA) Procedures.</li> <li>2. Strengthen the environmental, social and human rights requirements in the Production Sharing Contracts (PSC).</li> <li>3. Improve transparency of the O&amp;G sector at various levels of Government, including full implementation of the Myanmar Extractives Industries Transparency Initiative (MEITI), complemented by a modern Access to Information Law.</li> <li>4. Improve policy planning and enact legislative reform to establish a coherent framework for the O&amp;G sector with adequate safeguards.</li> <li>5. Adopt appropriate models of local benefits sharing from extractive projects.</li> <li>6. Undertake security sector reform aimed at protecting people and private sector operations in a way that respects human rights.</li> <li>7. Develop and strengthen effective non-judicial grievance mechanisms and require businesses to provide operational level grievance</li> </ol>	<ol style="list-style-type: none"> <li>1. Adopt a policy commitment to responsible business conduct and respect for human rights, communicate and implement this.</li> <li>2. Commit to applying international standards of responsible business conduct in the absence of developed national legal frameworks.</li> <li>3. Take account of local complexities and legacies when assessing the impacts operations may have, and integrate and act on these findings.</li> <li>4. Integrate consideration of conflict issues - latent, existing and potential - into all phases of operations.</li> <li>5. Monitor and track responses to risks and impacts, involving workers and communities.</li> <li>6. Communicate with stakeholders, particularly workers and communities, to build understanding and demonstrate transparency and accountability.</li> <li>7. Be prepared for negative impacts by having in place mechanisms that can address grievances quickly and effectively.</li> <li>8. Develop strategies for creating positive impacts at the local, regional and national level.</li> <li>9. Take collective action where appropriate</li> </ol>

mechanisms.	to address environmental, social and human rights issues.	
<p style="text-align: center;"><b><u>To Investors</u></b></p> <ol style="list-style-type: none"> <li>1. Identify and conduct enhanced due diligence on companies in their portfolios that are involved in the O&amp;G sector in Myanmar.</li> <li>2. Engage with investee companies involved in the O&amp;G sector in Myanmar to ensure that these companies meet or exceed international standards on responsible business conduct relevant to their business in Myanmar.</li> <li>3. Urge companies doing business in the O&amp;G sector in Myanmar to report robustly on how they manage risks and impacts associated with investments and operations in the country.</li> </ol>	<p style="text-align: center;"><b><u>To Civil Society</u></b></p> <ol style="list-style-type: none"> <li>1. Engage actively in E(S)IA consultation and disclosure processes, analyse and comment on the documents and hold companies to account.</li> <li>2. Continue to engage actively in the Myanmar Extractives Industries Transparency Initiative (MEITI) and press for MEITI to adopt the full range of options under the 2013 EITI Standard.</li> <li>3. Encourage companies and Government to engage in multistakeholder discussion on other extractives sector issues that are not part of the EITI mandate.</li> <li>4. Increase media reporting on the O&amp;G sector.</li> </ol>	<p style="text-align: center;"><b><u>To Development Partners / Home Governments</u></b></p> <ol style="list-style-type: none"> <li>1. Support better governance and management of the O&amp;G sector and programmes to ensure potential positive impact are realised.</li> <li>2. Support the strengthening of environmental and social policies and legal frameworks.</li> <li>3. Support implementation of the corporate responsibility to respect human rights in Myanmar by international companies.</li> <li>4. Ensure investment and free trade agreements negotiated with the Government of Myanmar reinforce responsible business practices.</li> </ol>
<p style="text-align: center;"><b>To All Stakeholder Groups - Concerning Cumulative Impacts</b></p> <ol style="list-style-type: none"> <li>1. Regional/State Governments, companies and relevant national ministries should work together to plan for and prevent or mitigate potential cumulative impacts.</li> </ol>		

## Part 7.1

# Recommendations to the Government of Myanmar

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**NB:** These Recommendations are presented in an order from immediate, short-term actions to longer-term actions.

### 1. Strengthen social and human rights requirements in the forthcoming Environmental (and Social) Impact Assessment (E(S)IA) Procedures.

The draft E(S)IA Procedures include welcome changes that will bring Myanmar's ESIA requirements much closer to international standards and good practice – including around Government-led and company-led community consultations and disclosure (See [Part 3](#)). These improvements should be maintained in the finalised version of the Procedures. However, there are additional improvements that could be made to the Procedures and their application to ensure that these processes are used as efficiently and effectively as possible to cover a fuller range of impacts from operations, while ensuring that limited Government resources to consider ESIA's are prioritised on high risk projects, and that assessments are conducted at meaningful stage-gates in the permitting process.

#### Key Points for Implementation:

- **Explicitly include social and human rights issues in the E(S)IA Procedure.** “Social” should be included in the title of the Procedures, which should include a definition of “social impacts” and “human rights impacts” and provide for consistent treatment of these impacts in the text<sup>462</sup>. If separate social/human rights impact procedures are to be forthcoming (including with respect to indigenous peoples and involuntary resettlement), indicate the ministry(ies) responsible.
- **Prioritise** the requirement for a full ESIA on those stages of the O&G project cycle which involve **the most serious potential negative impacts**.
- Do not require companies to undertake ESIA's until their **project status allows them to conduct realistic assessments** of the impact of their activities and meaningful public consultation.
- **Strengthen the right to information.** There are good consultation provisions in the current draft but they do not provide a clear right by communities or other third parties to ask the project proponent for further information, only to receive disclosed information.

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<sup>462</sup> This has been achieved, for example, in the IFC Performance Standards by both including human rights requirements within the Performance Standards and including an explicit reference to human rights.

- Provide for **appeal for project affected peoples** to challenge ESIA on procedural and substantive grounds to build trust in the process that it is more than just a tick-box exercise.
- **Clarify remaining uncertainties** in the E(S)IA Procedure process including:
  - The involvement of regional administrations in scrutinising assessments of social impacts and how they will take local views into account.
  - Whether requirements to update ESIA as needed will be included in contracts (such as the PSCs) issued by MIC or line ministries.
  - Whether an ESIA must be completed within 6 months of signing a PSC or will be a performance requirement which would need to be fulfilled to receive a permit for the next stage of activity (as is common practice elsewhere).
  - Whether MOECAP will issue more detailed standards or refer to existing standards for particular types of ESIA such as for onshore or offshore seismic operations, and how impact assessments and seismic shooting will be sequenced.

## 2. Strengthen the environmental, social and human rights requirements in the Production Sharing Contracts (PSC).

The Framework for Economic and Social Reforms (FESR) recognises that there is a need to update and modernise the legal frameworks for O&G operations. This should also include the PSC. This section draws on an analysis of Myanmar's Model Onshore and Offshore Production Sharing Contracts (PSC)<sup>463</sup> as well as on an analysis of emerging good practices on O&G contracts from other countries.<sup>464</sup> Two of the main recommended changes are included below – a more detailed set of suggested changes to the PSC is included in the [Annex to the Recommendations](#).

### Key Points for Implementation:

- **Include a contractual requirement that O&G operators meet the IFC Performance Standards and WBG Environmental, Health and Safety Guidelines** for [Offshore Oil & Gas Development](#) or [Onshore Oil & Gas Development](#)<sup>465</sup> that are designed to be applied in country situations like Myanmar. The PSC can be drafted so that Myanmar's environmental and social laws apply if and when they provide an equal or greater level of protection as the IFC Performance Standards, thus ensuring that forthcoming national laws are given due consideration. This approach would:
  - **Demonstrate that the Government is taking additional concrete steps** to implement its stated commitment in the FESR to **high environmental and social standards** and to attracting responsible investors.
  - **Level the playing field** among all competitors from all regions, ensuring that they are all operating to the same standards (in theory if not in practice).
  - **Provide specific benchmarks** to measure whether appropriate environmental and social measures have been put in place once operations have begun in order to

<sup>463</sup> These models are not yet publicly available from MOGE's website, which only publishes standard terms and conditions. See for example, [Myanmar Ministry of Energy](#).

<sup>464</sup> See for example [Open Contracting](#)

<sup>465</sup> The Guidelines set out good industry practice that is generally considered to be achievable in new facilities at reasonable costs by existing technology. Although the Guidelines are currently being updated, they still provide an important reference in the absence of updated Myanmar regulations for the sector.

hold companies accountable for their environmental, social and human rights performance.

- **Use familiar standards** which are already applied by many **O&G companies**, by 80 major **banks** around the world who often provide project finance for extractive and other large scale project financing (the Equator Principles)<sup>466</sup> and by many of the **Export Credit Agencies** from the OECD countries that may be providing guarantees or financing to suppliers of O&G operations in Myanmar.<sup>467</sup>
- **Modify the stabilisation clause to exclude changes in law related to responsible business conduct.** There is a planned programme of legislative changes covering a wide range of laws that will drive or at least affect responsible business requirements in Myanmar. The current PSC contains a “stabilisation clause” that requires that the economic equilibrium of the O&G operations should be maintained if there are changes in the law. Such stabilisation clauses may be considered important to investors, but should be very carefully crafted to exclude changes in areas of law that are important to responsible business practice from the scope of its application. Otherwise the Government would be locked into offsetting or even compensating O&G companies for foreseeable and needed changes in these areas of its legal framework.<sup>468</sup>

### 3. Improve transparency of the O&G sector at various levels of Government, including full implementation of the Myanmar Extractive Industries Transparency Initiative (MEITI), complemented by a modern Freedom of Information Law.

The Union Government has introduced some welcome measures around transparency, including its commitment to join the EITI, and more recently to the International Aid Transparency Initiative (IATI) and transparent government budgeting. In addition to requiring disaggregated reporting of revenue by company, the new EITI Standard will require reporting on state owned enterprises (SOEs), sub-national transfers, transit fees, and disclosure of social expenditures by companies – all of which will give a far clearer picture of the revenue flows in the sector than has ever been possible to date. The new EITI Standard also includes the option of requiring disclosure of contracts and beneficial ownership – two options that would be a useful addition under MEITI. Robust EITI implementation brings the immediate benefit of improved transparency, but also indirect

<sup>466</sup> The [Equator Principles](#) are based on the IFC Performance Standards and applied by 80 Equator Banks.

<sup>467</sup> Under the OECD Common Approaches, Export Credit Agencies must benchmark their environmental and social reviews against the IFC Performance Standards (or in some cases the World Bank Safeguard Policies). See: [Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence \(the "Common Approaches"\)](#), as adopted by the OECD Council on Thursday 28 June 2012: TAD/ECG(2012)5.

<sup>468</sup> The model Production Sharing Contracts do not exempt any areas of law from the operation of the clause. “Stabilization: If a material change occurs to the either MOGE's or CONTRACTOR 's economic benefits after the Commencement of the Operation Date of the Contract due to the promulgation of new laws decrees, rules and regulations, any amendment to the applicable laws, decrees, rules and regulations or any reinterpretation of any of the foregoing made by the Government, the Parties shall consult promptly and make all necessary revisions or adjustment to the relevant provisions of the Contract in order to maintain the affected Party's normal economic benefit hereunder.” Clause 27.2

benefits, such as: the development of a constructive multi-stakeholder dialogue; strengthening the capacity and protection of civil society, improving tendering, procurement and budgeting processes; and attracting more responsible investors. Beyond these important improvements, there are other steps the Government could take to improve transparency around the operation of the O&G sector.

### Key Points for Implementation:

- **Adopt a dedicated EITI Law to legally entrench EITI requirements into law in Myanmar.** This should involve a progressive approach which includes the options under the 2013 EITI Standard to require disclosure of beneficial ownership and disclosure of contracts.
- **Enhance the bidding process for O&G blocks.** Under the FESR, the Government has committed to “transparent, competitive and non-discretionary procedures for the award of exploration, development and production rights”<sup>469</sup> Other new EITI members have chosen to do a retrospective audit on earlier license awards under the EITI umbrella.<sup>470</sup> Disclosure of the following additional information both retrospectively and for future rounds would improve the governance of the bidding and selection process:
  - who is mandated to make the decision about awards.
  - the criteria and priorities for selection of winning bidders (these criteria should be revised to seek information on bidder’s commitments to environmental and social sustainability by requiring information on policies and management systems for environmental, social, human rights, health & safety, community engagement<sup>471</sup>).
  - whether there was a signature bonus paid and if so, to whom it was paid and how much.
  - the evaluation criteria and scoring MOGE uses, together with a brief justification for the selection of the chosen operators.<sup>472</sup>
- **Enhance the MIC permit process by including key contract requirements.**
  - Conditions relating to responsible business requirements (as reflected in a revised PSC) should also be included as a condition of the MIC permit, which could be monitored by both MIC and civil society.
  - MIC should issue public notifications that includes more than just a list of investments that have been granted MIC permits as it does currently, including information on the nature of those investment projects, the approved period of the investment’s construction and operation, and other key terms and conditions on which the permit was granted.
- **Adopt a modern Freedom of Information Law** that would generally permit the general public access to information held by the Government (subject to certain accepted exceptions). No such law currently exists. It would provide an important tool for the population, their representatives and the media to contribute to an evidenced based approach to governance of the sector.

<sup>469</sup> [“Framework for Economic and Social Reforms - Policy Priorities for 2012-15 towards the Long-Term Goals of the National Comprehensive Development Plan”](#), (Jan 2013) (Final Draft – Submitted to the First Myanmar Development Cooperation Forum), Section 5.3.

<sup>470</sup> See for example the [Liberia EITI](#) (LEITI).

<sup>471</sup> The recent bidding process run by the Myanmar Ministry of Communications and Information Technology (MCIT) provide good lessons learned on more transparent bidding and tendering processes.

<sup>472</sup> See MCRB, [“Draft SWIA consultation report”](#), p. 4.

## 4. Improve policy planning and legislative reform to establish a coherent framework for the O&G sector with adequate safeguards.

The commitments in the FESR to “extracting natural resources sustainably” need to translate into a comprehensive, coherent and coordinated energy and natural resource policy and legal frameworks, and incorporate measures that protect the environment and people. There are many laws affecting the operation of the sector that are in need of revision or replacement to bring the legal framework up to date with modern practices in the sector, and to better reflect human rights, social and environmental considerations. These reforms will take time not least to allow for the consultation of citizens and other experts. In the interim, as noted in Recommendation 2, the Government can use the contractual framework of the PSC to fill some gaps and provide an assurance (at least contractually) that international standards will be applied in the sector.

### Key Points for Implementation:

- **Include adequate environmental, social and human rights safeguards for private sector operations in each sector policy**, with specific plans to incorporate such safeguards into the legal framework and operating standards for projects.
- **Ensure** policy frameworks are coordinated, **with specific attention to the necessary long-term strategic** and land use planning to promote the coexistence of natural resource and energy development with **each other and with agriculture**.
- **Develop a new O&G law in line with international standards** to replace the current Petroleum Law in force since 1934.
- **Complete the transformation of MOGE** into a state owned national oil company and separate its current regulatory function into another part of the Ministry of Energy, to remove conflicts of interests, leading to better long-term regulation of the sector.
- **Complete the legal framework on environmental protection**.
- Develop a **comprehensive and overarching labour law framework** in line with international labour standards, including around freedom of association and collective bargaining, and extending protection to new types of workers, including temporary and migrant workers whose numbers will continue to increase alongside new investments.
- **Reform the land laws** to provide clear protections that reflect the customary and informal arrangements in the country both in terms of protecting security of tenure as well as providing appropriate process safeguards to eliminate or at least reduce unlawful acquisition (land grabbing).
- **Develop a new law on the expropriation of property** for public purposes and associated resettlement, grounded in international standards, to replace the current 1894 Land Acquisition Act currently governing such processes.
- **Eliminate the criminalisation of protests under the Law Relating to Peaceful Assembly and Peaceful Procession** to ensure that those affected by potential and actual O&G operations and their representatives can speak freely without fear of retribution or even imprisonment.



## 5. Adopt appropriate models of local benefits sharing from extractive projects.

Implementation of the EITI Standard will provide a better understanding of the revenue contributions of the O&G sector. However, this is just one part of the broader governance choices ahead for the Government in improving the management of the sector for the benefit of Myanmar's population – present and future.

### Key Points for Implementation:

- **Publicly debate options for sharing out benefits** between the Union Government and States/Divisions that will take account of the negative impacts experienced locally and in the region of O&G operations, and the costs and benefits of different options, including local content requirements and support for wider economic development. Consider international good practice for resource extraction projects which increasingly involves some form of a “**Community Development Agreement**” (CDA).
- Encourage companies to focus on “**strategic CSR**” which maintains the business link between social investment and the O&G project, and does not require the company to usurp the Government's role in fulfilling human rights (e.g. to provide health and education services). Require engagement and transparency around company CSR programmes, including an annual public report and budget.
- **Consider options for protecting the interests of future generations.** These could include safeguarding resources in the ground (also in light of climate change considerations), or a sovereign wealth fund or some other financial mechanism for the purpose of smoothing out and sustaining public expenditures and safeguarding some portion of revenue for future generations. There are numerous considerations the Government must take into account, including balancing shorter term desires for tangible benefits of reform versus longer-term needs.<sup>473</sup>

## 6. Undertake security sector reform aimed at protecting people and private sector operations in a way that respects human rights.

A peace process that brings with it reduced tensions around significant investments in the O&G sector can potentially pay multiple dividends and attract further investment into the country. The possibility of reducing militarisation around O&G projects diminishes the opportunities for clashes that could reignite conflicts. Local communities must feel secure and protected from criminalised or other potentially harmful activity that could flow into newly peaceful areas, including for land and resource grabbing. O&G operations also have a legitimate interest in protecting their personnel and operations. There are already training programmes underway involving the military and police focused on improving human rights performance but these are currently not connected to security and business operations.

<sup>473</sup> See the [Norwegian Oil for Development Programme](#) for further details.

### Key Points for Implementation:

- **Pro-actively address human rights and security issues in connection with the extractives sector**, learning from experiences of other emerging producers like Colombia.
- **Consider engagement with the [Voluntary Principles on Security and Human Rights](#)**, a tripartite government, private sector, civil society initiative implementing a set of principles designed to guide extractive companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights.
- Government (and business) should **engage with local governments and local communities** on security arrangements where O&G projects will be developed, to ensure that they do not feel excluded which can lead to frustration and understand the security arrangements.
- **Address the security measures in some oilfield areas (OFA)** that have been in place since the 1960's and that have negative impacts on local livelihoods. These Article 144 orders in OFA could be replaced with more targeted measures to control access to oil areas and prevent theft of oil, while also protecting local community members in line with human rights and permit appropriate local economic activities and freedom of movement.

## 7. Develop and strengthen effective non-judicial grievance mechanisms and require businesses to provide operational level grievance mechanisms.

Myanmar's judicial system requires comprehensive reform which will take many years. In the interim, and even in the longer term, it is important that effective alternatives to formal legal proceedings are available to ensure access to remedy is readily available to victims of business activities. There are some newly emerging non-judicial mechanisms in Myanmar, but these are already overloaded with complaints and hindered by limited mandates.

### Key Points for Implementation:

- **Review and strengthen existing non-judicial grievance mechanisms** for victims of business-related human rights abuse, to enable those mechanisms to provide or require a remedy. Remedy can take a variety of forms: restitution, apologies, rehabilitation, financial and non-financial compensation and punitive sanctions (criminal or administrative such as fines).
- **Encourage or even require companies to develop operational level grievance mechanisms.** Such mechanisms cannot address wider systemic issues that must be dealt with by the Government or the Government in coordination with companies in the sector. But effective company mechanisms can address concerns or grievances early and directly, potentially preventing harms from continuing and grievances from escalating.

# Recommendations to Companies in the O&G Sector

This section is addressed to all companies – Myanmar and foreign – in the O&G sector, including operators, suppliers, and service providers. Recommendations 1-7 build on the steps in the UN Guiding Principles on Business and Human Rights,<sup>474</sup> which is a core framework for the SWIA.

There are several guides for O&G companies on implementing the UN Guiding Principles on Business and Human Rights:

- European Commission, [Oil & Gas Sector Guide on Implementing the UN Guiding Principles](#) (2013)
- IPIECA and the Danish Institute for Human Rights: [Integrating human rights into environmental, social and health impact assessments: a practical guide for the oil and gas industry](#) (2013)
- IPIECA: [Human rights due diligence process: a practical guide to implementation for oil and gas companies](#) (2012)
- IPIECA: [Operational level grievance mechanisms: good practice survey](#) (2014)

## 1. Adopt a policy commitment to responsible business conduct and respect for human rights, communicate and implement this.

The Government of Myanmar, numerous home governments of companies operating in the Myanmar O&G sector, and international and regional organisations have been explicit about their expectations that businesses conduct themselves responsibly in Myanmar. Delivery on those expectations will require a specific commitment. Several large, international O&G companies operating or awarded blocks in Myanmar already have public statements or policies on human rights at the global level. These and other policy commitments to other areas of responsible business conduct could be repeated locally and contextualised. A few Myanmar operators are also adopting human rights commitments. These can provide useful examples to build on for other local companies in the sector.

<sup>474</sup> As set out in Chapter 1, under the corporate responsibility to respect human rights companies are expected to: (i) adopt a policy commitment; (ii) carry out human rights due diligence which includes assessing, integrating and acting on assessment findings, tracking responses, and communicating with stakeholders; and (iii) remedying, including through operational level grievance mechanisms.

### Key Points for Implementation:

- **Make clear** in the commitment the expectation that the business, its staff and **business partners will respect human rights**.
- Consider whether the commitment should reflect **more specific guidance** for staff and business partners on key risks in operating in Myanmar including:
  - Appropriate community engagement and handling of grievances (see further Part 4.1)
  - land acquisition and use; compensation, resettlement (see further Parts 4.2 and 4.3)
  - the rights of workers to organise and collectively bargain; contracting temporary workers (see further Part 4.4)
  - the rights of ethnic minorities / indigenous peoples (see further Part 4.5)
  - challenges on ensuring non-discrimination, to both workers and communities, particularly to groups at risk (see further Part 4.6)
  - protection and security of operations (see further Part 4.7)
- **Embed** these commitments into company operational policies and procedures and business relationships, including through relevant contractual requirements, to ensure that the commitments are implemented.
- **Communicate** this commitment pro-actively within the company and to business partners, and make it publicly available..

## 2. Commit to applying international standards of responsible business conduct in the absence of developed national legal frameworks.

This SWIA has highlighted the current gaps in the Myanmar's evolving legal framework. Due to the rapid pace of change, lack of capacity and experience among legislators and Government ministries, there is no guarantee that once adopted, national laws will fully reflect the standards of responsible business conduct expected of companies operating in Myanmar. Nor will they necessarily protect workers, communities and the businesses themselves from the risks highlighted in the "Key Human Rights Implications for the O&G Sector" sections within the Project-Level Impacts ([Part 4](#)).

In addition to providing companies certainty at a time when the national legal landscape is in flux, using international standards also provides confidence to local and international stakeholders. This SWIA has identified several international standards of responsible business conduct; in particular the IFC Performance Standards and WBG Environmental, Health and Safety Guidelines (which provide detailed guidance on assessing and managing key environmental and social risks, including human rights) and the UN Guiding Principles on Business and Human Rights, that should be applied to operations in Myanmar. Companies based in the OECD are also expected to apply the OECD Guidelines on Multinational Enterprises, which are aligned with these other standards.

### Key Points for Implementation:

- Commit to applying international standards for responsible business conduct. This could be as part of the policy commitment (see Recommendation 1 above) and could

also be included in commitments made in, or as a side-letter to, the PSC signed with MOGE, and in the standards applied in conducting ESIA.

### 3. Take account of local complexities and legacies when assessing the impacts operations may have, and integrate and act on these findings

The forthcoming E(S)IA Procedure will require O&G operators to cover some but not all of the impacts relevant to understanding and managing the full impact of their operations in Myanmar. This SWIA has identified some key Myanmar-specific risks and some important upfront prevention and mitigation steps that should be relevant to companies' own due diligence and development of impact assessments and management plans (E(S)MP).

#### Key Points for Implementation:

- **Carry out ongoing, enhanced due diligence during the course of operations to understand the national, regional and local context and risks the company could pose, including to human rights.** This may include recognising that a situation may be considered a “legacy” issue from a company perspective, but could be very much “alive” from the perspective of affected stakeholders. It also requires understanding the makeup of the communities and the workforce, as a first step in identifying the potential for disproportional impacts or discrimination in community relations and employment conditions.
- **Design prevention and mitigation actions which reflect the local context, and take early steps to act on them.** These may include insisting on a consultative process for land acquisition, transparent and/or traceable process for any payment of compensation; establishing early contacts with local authorities, including police, to discuss security issues and responses in cases of disturbances; reviewing the use of, and working conditions for, temporary workers; ensuring that all workers (directly employed and in the value chain) have documented information on their employment status; and taking all necessary measures to ensure there is no benefit from any form of child or forced labour, including bonded labour, through sub-contractors.
- **Carry out enhanced due diligence on potential and existing business relationships.** Many of the services and goods for O&G operations will be provided by business partners (such as construction contractors, specialised technical services such as seismic, security and labour providers). It will be important to carefully assess the risk of business partners causing or contributing to impacts, including human rights impacts and their policies, systems and capacities for managing those impacts.
- **Ensure that the E(S)MP steps or supplemental management actions are also aligned with the process that will guide and bind business relationships.** This could include contracting arrangements, operational procedures, and additional supporting measures such training and capacity building for business partners.

## 4. Integrate consideration of conflict issues - latent, existing and potential - into all phases of operations.

This SWIA has highlighted the long history and interplay between extractive operations and conflict in Myanmar, and the continued possibility of inter-ethnic and inter-communal tensions and violence. Conflict sensitive business approaches will be needed, particularly in areas which have experienced armed conflict or which have ethnically diverse populations.

### Key Points for Implementation:

- **Take expert advice on how to engage with relevant ethnic armed groups, civil society groups, and other community leaders, including women leaders.** It should not be assumed that an armed group, or indeed any one group or organisation, is representative of the views of all of a community, and in some cases relations may be coercive.
- **Recognise the critical importance of land and natural resources issues in exacerbating conflict, or building peace.** They have a strong potential to contribute to grievances about economic exclusion.
- **Recognise that a key demand of ethnic groups** in the peace process is not only for constitutionally-enshrined **revenue-sharing arrangements** between the centre and the states/regions, but also much **greater local control of commercial activities in their areas.** Companies risk being caught in this dynamic if they are not proactive in trying to at least understand, if not managing conflicting requests.
- **Pursue a broader and more systemic response to the mitigating the risk of abuses by the military, police and other forces, rather than a narrow approach.** Avoid creating a “cordon sanitaire” around projects, which can have the effect of displacing abusive practices (such as demands for payments or labour) rather than addressing them.

## 5. Monitor and track responses to risks and impacts, involving workers and communities.

Given the rapidly changing situation in Myanmar, tracking performance will be important to understand whether adjustments need to be made to operating procedures by the company. Monitoring sub-contractors, including working conditions, will be particularly important. SWIA research showed that local communities are particularly interested in monitoring information on on-going operations and how companies are managing risks, including emergencies. The forthcoming E(S)IA Procedures will also require public disclosure of E(S)MP monitoring reports on the company website.

### Key Points for Implementation:

- **Consider carrying out joint monitoring of operational impacts with local communities.** To date this has not occurred in Myanmar, but models from other countries are available. Joint monitoring builds shared understanding of impacts and allows for more immediate resolution of disputes.

- **Consider sharing monitoring reports pro-actively with local communities, in an accessible form.** Even if joint monitoring is not carried out, companies can proactively share information with local communities (e.g. summaries, in local languages) as part of on-going engagement with local communities and to provide an evidence base for discussions.

## 6. Communicate with stakeholders, particularly workers and communities, to build understanding and demonstrate transparency and accountability.

Communication and engagement cuts across many recommendations but is integral to their success. Sincere, on-going two-way engagement with workers, workers representatives and communities is one of the most valuable things a company can do to prevent and mitigate risk. The SWIA field research highlighted that with a few exceptions, there was historically little interaction with communities around O&G operations, either by the Government or companies. This is now changing, including through the move to requiring ESIA's, and Myanmar's EITI candidacy. The SWIA also identified that communities wanted more direct contact with the companies running operations, rather than going through local authorities or MOGE. In particular, they wanted one focal point to turn to for information, covering the whole of the operations. There are some good examples of existing operators establishing community committees that serve as focal points for regular communication with other community members. In addition to this essential communication with stakeholders, some companies may also have specific reporting requirements to governments or investors.

### Key Points for Implementation:

- **Proactively invest in ongoing and meaningful engagement with workers, worker's representatives and communities throughout the project cycle.** Engagement should take place throughout the project cycle, including before the formal consultation required by the E(S)IA Procedure to enable stakeholders to engage effectively in that consultation and beyond. These formal consultations should be an important part, but only a part, of a broader strategy to engage workers, the local community, local government and civil society in on-going discussions about the changing face of operations and their impacts.
- **Communicate in a form and frequency that is accessible to local workers and communities, and does not put them at risk.** This will require an understanding of their ethnic makeup and identity, so as to be able to communicate in appropriate languages and channels as well as identify any literacy, cultural and physical barriers given the rudimentary infrastructure connecting most communities. Engaging with local civil society organisations will assist in understanding key risks, past mistakes and current practices.
- **Set up an accessible and local "one-stop shop" in the community for all issues concerning a project** e.g. basic information, emergencies, and grievances, whether the concern is about the company or other companies working on the project. Communities find it confusing and frustrating to be told to take their requests or complaints to others.

## 7. Be prepared for negative impacts by having mechanisms that can address grievances quickly and effectively.

One of the most systematic ways for a company to remediate impacts is through an operational-level grievance mechanism that is accessible directly to individuals and communities who may be adversely affected by the business. This may be administered by the company alone or in collaboration with others. Such a mechanism can provide an early warning system about issues that can be resolved directly if addressed early and effectively, but if ignored can escalate into protracted grievances. This SWIA identified few outlets in Myanmar for effective resolution of grievances either through judicial or non-judicial measures, thus making such alternatives all the more important.

### Key Points for Implementation:

- **Ensure that the “one stop shop” (see Recommendation 6) provides accessible and effective processes to address and resolve concerns** directly with the company, whether the grievance is about company or subcontractor operations. The UN Guiding Principles on Business and Human Rights set out criteria of an effective operational grievance mechanism.
- **Ensure that complainants are free to choose whether to use the company’s mechanism or remediation processes by state or third-party institutions.** Companies should be careful not to undermine the role of nascent Myanmar trade unions. Relevant state-based mechanisms for remedy may also evolve in coming years, such as Myanmar’s National Human Rights Commission or more effective local courts.
- **Prevent retaliation against complainants inside and outside the company.** Companies should respond to complaints, including demonstrations, in a manner that respects freedom of expression and assembly and other human rights. This includes raising cases with the authorities where individuals peacefully protesting against O&G operations are suppressed or mistreated.

## 8. Develop strategies for creating positive impacts at the local, regional and national level.

It is well recognised that in addition to longer-term contributions to national revenue, the extractives sector can create positive impacts in the shorter term, in local area of operations if planned carefully and with sufficient internal company support. There are a range of opportunities for companies operating in the O&G sector to contribute to more immediate positive impacts in Myanmar beyond the longer term payment of revenue that will take years to materialise for many of the new onshore and offshore blocks.

### Key Points for Implementation:

- **Develop immediate-, medium- and long-term strategies for addressing communities’ desire for jobs.** These may include supporting basic education and vocational training programmes for skills needed in the sector. They should also address increasing the participation in the sector of women and other ‘at risk’ groups.



- **Develop social investment programmes with, for and by communities** that will support them in developing their capacity to choose and manage small-scale developments. These programmes should maintain the strategic link between the social investment programme and the O&G operations, increase participation of at risk and excluded groups, and avoid philanthropy. Consider international good practices for resource extraction projects which increasingly involves some form of a “**Community Development Agreement**” (CDA).
- **Develop more systematic planning of quality project infrastructure**, together with local authorities, that can improve host community livelihoods while also serving the project.
- **Promote small business and entrepreneurship programmes** to improve the ability of local businesses to meet O&G operator requirements to provide goods and services to operators and their sub-contractors.
- **Work with financial institutions to provide banking facilities** supporting transparent and traceable compensation processes and support basic skills in financial management.

## 9. Take collective action where appropriate to address environmental, social and human rights issues.

Myanmar does not yet have a sector wide O&G industry association<sup>475</sup> that includes both foreign and domestic companies, but there is a strong case for creating one. In the meantime, some issues may be better addressed collectively, including those relating to the environmental, social and human rights dimensions of operations in Myanmar. In addition to promoting a level playing field and reducing the risk that ‘bad apples’ will spoil the reputation of the sector, approaching sensitive topics collectively, and sharing lessons learned on applying international standards in other comparable countries, can be more effective, less labour intensive for Government, and reduce exposure for individual companies. There are a number of areas where companies may find it relevant to act collectively in discussions with the Government and other stakeholders.

### Key Points for Collective Implementation:

- **Support the MEITI process.** Cooperation with the MEITI is already a requirement on companies under the model PSC. Companies with EITI experience from elsewhere, should support the O&G Multi-Stakeholders Group and help build knowledge of the sector and its financial performance. They should support the adoption of ‘encouraged’ and ‘recommended’ requirements under the 2013 EITI Standard, including disclosure of contracts and beneficial ownership as a part of MEITI.
- **Work with MOECA, MOGE and the Myanmar Investment Commission (MIC) to improve the E(S)IA process.** Given scarce in-country resources to conduct ESAs and manage the process within the Government, collective business input could help the Government to improve the process and ensure it prioritises operations with the highest potential negative impacts.

<sup>475</sup> The one industry association, the [Myanmar Oil and Gas Services Society](#), currently has approximately 20 Myanmar companies and one foreign company.

- **Work together to encourage the Government to require all contractors from any country to meet the same environmental, social and human rights standards.** This could be addressed through changes to the PSCs, and would level the playing field. Since the PSC binds both the O&G operators and MOGE, bringing in international standards would build MOGE's capacity in the application of international standards as well. (See Recommendation 2 for Government above).
- **Promote learning between foreign and Myanmar companies.** This could build on an initiative previously taken by TOTAL to promote discussion and build capacity among O&G companies including of Myanmar companies, of best practices on issues such as safety,. A sector-wide industry association, once established, could take on this role and when it does, the positions it takes on future policy or law that can support or undermine responsible business practices, and the transparency of its positions, will be an important indicator of the potential aggregate impact of the sector.
- **Approach the Government regarding training for police and military on applying international human rights and humanitarian standards.** A number of the O&G blocks awarded in 2013-2014 went to companies who participate in the Voluntary Principles on Security and Human Rights (the VPs).<sup>476</sup> These companies could work with governments supporting the VPs to propose training and capacity building on human rights for the military and local authorities, based on the VPs. The EU has already begun training to the Myanmar Police Force in safe crowd control techniques, and this experience might be built on.
- **Work with development partners to adapt education and vocational training programmes to build skills for the O&G sector, and programmes to support SMEs.** Existing educational and vocational training programmes are not targeted at the O&G sector (See Recommendation 3 for Development Partners/Home Governments). Cooperation between companies, Government and development partners would help address skills shortages over the medium term, through education, technical education and certification programmes and could eventually lead to a more institutionalised structure for the sector.<sup>477</sup> SME programmes could focus on developing local company capacity to be able to provide relevant goods and services to O&G operations. These would help O&G operators to achieve local content requirements and increase local economic benefits. See Boxes 17-23 throughout this Report for Linked Initiatives that could serve as partners.

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<sup>476</sup> See [The Voluntary Principles on Security and Human Rights](#).

<sup>477</sup> See as an example the [Petroleum Institute of Thailand](#).

# Recommendations to Civil Society

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## **1. Engage actively in ESIA consultations and disclosure processes, analyse and comment on the documents and hold companies to account.**

There is a risk that thousands of pages of ESIA reports will be written simply to meet government requirements, but never read. Since their purpose is to facilitate monitoring of performance, and promote corporate accountability, CSOs need to develop the expertise to study ESIA and ESMPs and invest time in engaging on them with companies and the Government to ensure that companies are held to account in operating according to commitments made.

## **2. Continue to engage actively in the Myanmar Extractives Industries Transparency Initiative (MEITI) and press for MEITI to adopt the full range of options under the 2013 EITI Standard.**

Myanmar CSOs have organised themselves throughout the country to participate in the MEITI process, which is impressive in a country with limited internet and telecommunications access or experience in interaction with international agendas. With the candidacy application and work programme now completed, there is now a long road of choices and difficult negotiations ahead to keep the Initiative on track to deliver on its promises of much needed improvements in governance of the O&G sector that will require continued commitment and perseverance of CSO participants. The 2013 EITI Standard includes a number of 'encouraged' or recommended 'options' such as disclosure of contracts and disclosure of beneficial ownership, which if included in MEITI will build confidence in the sector.

## **3. Encourage companies and Government to engage in multi-stakeholder discussions on other extractive sector issues that are not part of the EITI mandate.**

Given the previous absence of engagement between companies, Government and civil society on the problems associated with the extractives industries in the country, some CSOs are keen to expand the remit of MEITI to address other sectors and a wider range of issues beyond revenue transparency, such as respect for human rights and the environment. Although the 2013 EITI reforms encouraged local multi-stakeholder groups

to identify local priorities, for a new candidate country like Myanmar, implementing EITI's basic revenue transparency agenda for O&G, and mining, is likely to prove challenging in itself. Instead, other avenues for multi-stakeholder dialogues are needed to address the broader issues of concern to civil society, many of which are covered in this SWIA. The Myanmar Centre for Responsible Business (MCRB) stands ready to support such dialogues.

#### **4. Increase media reporting on the O&G sector.**

Given the importance of the O&G sector to Myanmar, Myanmar media outlets should step up informed reporting of the sector and its impacts to improve transparency, company and government accountability, and public understanding.

# Recommendations to Development Partners / Home Governments

## 1. Support better governance and management of the O&G sector and programmes to ensure potential positive impacts are realised.

### Key Points for Implementation:

- **Support the MEITI process and encourage it to adopt the full range of transparency options under the 2013 EITI Standard.**
- **Support civil society in promoting transparency, including through MEITI.** This includes adoption of a Freedom of Information Law and an end to the criminalisation of protests under the Law Relating to Peaceful Assembly and Peaceful Procession so that those affected by potential and actual O&G operations and their representatives can protest without fear of retribution or imprisonment.
- **Coordinate guidance and capacity-building to help prepare Myanmar for the next stages of O&G development** to avoid confusion and duplication of efforts.<sup>478</sup> This includes work on an energy policy framework by ADB and JICA that should be grounded in a sustainable development approach and is coordinated and coherent with UNDP's forthcoming work on a natural resource policy framework.
- **Provide funding for professional international legal support to the Government** to update its model contracts for the sector in line with international standards and best practice as set out in the recommendations in this SWIA (see [Part 7.1](#) and the [Annex to the Recommendations](#)) and to support negotiations with O&G companies.
- **Support work to develop comprehensive land policies.** This includes support for Government capacity to do strategic, long-term land use planning that protects small holder farmers and helps balance multiple uses of land, including for O&G extraction.
- **Support private sector development** programmes to improve the capacity of local companies to provide supplies and services to the extractive industries in order to maximise the benefits of the sector.
- **Support educational and vocational training reform that will develop the range of skills necessary for the country to benefit more fully from the sector.** This could build on the work of the Comprehensive Education Sector Review (CESR) technical and vocational education and training (TVET) sector group and the existing ILO programme to enhance the employment generation content of new investment strategies.

<sup>478</sup> See further: Chatham House, "[Guidelines for Good Governance in Emerging Oil Producers](#)" (2013).

## 2. Support the strengthening of environmental, social and human rights policy and legal frameworks.

### Key Points for Implementation:

- **Support the Government in the introduction of an effective framework for ESIA.** A number of partners including the ADB, JICA, and the World Bank are working on the E(S)IA Procedure.
- **Increase support for the preparation of environmental and social laws necessary to regulate O&G operations and other business activity.** This should include public consultation with experts, civil society and business on options before laws are drafted.
- **In the interim, development partners should encourage the government to include references to international standards (for example IFC Performance Standards and WBG Environmental, Health and Safety Guidelines) in investment contracts.**
- Support the Government, including through the ILO, to **strengthen its inspection capacity for labour and environmental protection.**
- Support rule of law changes that also have some “**quick wins**” for the population **through better grievance mechanisms**, especially around land.
- Support programmes to **develop civil society capacity** to engage effectively with O&G companies and media capacity to report on O&G operations, including implementation of ESIA.

## 3. Support implementation of the corporate responsibility to respect human rights in Myanmar by international companies.

### Key Points for Implementation:

- **Home country governments should proactively express their expectations of companies domiciled in their country which invest in Myanmar.** This should include clear expectations that they should apply the UN Guiding Principles on Business and Human Rights and, where relevant, the OECD Guidelines on Multinational Enterprises, including the on disclosure. They should encourage companies to apply the IFC Performance Standards and WBG Environmental, Health and Safety Guidelines in the absence of Myanmar laws that provide for a higher standard.
- **Consider adopting reporting requirements modeled on the US Reporting Requirements on Responsible Investment in Burma.**

#### 4. Ensure investment and free trade agreements negotiated with the Government of Myanmar reinforce responsible business practices.

##### Key Points for Implementation:

- **Ensure that investment/free trade agreements are coherent** with each country's international obligations (including its international human rights treaty obligations) and makes reference to the UN Guiding Principles on Business and Human Rights.
- **Ensure that each side has preserved sufficient policy space** for further changes to domestic policy that can improve environment, social and human rights protection. Governments should ensure that those agreements reinforce rather than restrict responsible business practices.

## Part 7.5

# Recommendations to Investors

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### **1. Conduct enhanced due diligence on companies in their portfolios that are involved in the O&G sector in Myanmar.**

This should include **enhanced due diligence** regarding their policies, systems, reporting and responses to specific human rights challenges in Myanmar.

### **2. Engage with investee companies involved in the O&G sector in Myanmar to ensure that these companies meet or exceed international standards on responsible business conduct relevant to their business in Myanmar.**

This might involve **direct engagement** or participation in shareholder actions.

### **3. Urge companies doing business in the O&G sector in Myanmar to report robustly on how they manage risks and impacts associated with investments and operations in the country.**

The **US Government's Reporting Requirements on Responsible Investment in Burma** could be used as a **framework** for such disclosures.



# Recommendations to all Stakeholder Groups on Cumulative Impacts

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## 1. Regional/State governments, companies and relevant national ministries should work together to plan for and prevent or mitigate potential cumulative impacts.

As this SWIA has highlighted, a range of cumulative impacts are anticipated in Myanmar due to the development of the O&G sector. They may also occur through O&G investments interaction with other developments at the national and local level, such as increased foreign investment in other sectors, and Special Economic Zones. The risk of cumulative impacts from natural resource projects should be acknowledged and addressed in the forthcoming Energy Policy, Energy Master Plan and Natural Resource Policy. Cumulative impacts need to be proactively prevented and mitigated. This requires collective action from the multiple companies involved, preferably in collaboration with – and where relevant led by - Regional/State Governments, MOECAAF and other national ministries.

### Key Points for Implementation:

- **Collaboration** between companies, MOECAAF (and other national ministries as relevant) and relevant Region/State governments **to identify and map areas of potential cumulative impact.**
- **Commission joint baseline studies** in key areas where there will be multiple O&G activities, such as offshore seismic activities, and provide relevant data to Government in a standardised format to allow for easy consolidation.
- **Share plans for project-level ESIA in related areas.** This would facilitate the identification of key concerns highlighted in several ESIA. Such concerns could be an indicator of potential cumulative impacts. A joint ESIA, or closely coordinated ESIA, might be one option to ensure that cumulative impacts are effectively addressed in the assessment. It would also facilitate the ability of government agencies at national and regional/state level to manage their parts of the process.
- **Adopt a coordinated approach to consultation with relevant stakeholders to avoid repeating consultations with the same stakeholders.** This should include a coordinated response to the cumulative impacts of highest concern to stakeholders, including, potentially, a social joint investment programme.

## Annex to the Recommendations

# Suggested Changes to the Model Production Sharing Contract (PSC)

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The suggestions below cover proposed revisions to the Myanmar model Production Sharing Contracts (PSC) to strengthen environmental, social and human rights requirements in order to achieve the Myanmar Government's desire for investment to meet international standards. They are presented in two groups – high priority and lower priority in the order in which they appear in the PSC. Within each group the suggestions are presented in the order in which they appear in the model PSC. The capitalised terms below are defined in the PSC.

### High Priority Changes

#### 1. Require more specific standards on employment. (PSC clauses 15 & 17.2 u)

- Require that all workers hired or employed by the Contractor or its sub-contractors in connection with the Petroleum Operations, including temporary workers, are employed in accordance with relevant Myanmar law and relevant international standards (or their equivalent) – i.e. [IFC Performance Standard 2](#) (which is aligned with relevant ILO and UN conventions) and WBG Environmental, Health and Safety Guidelines for [Offshore Oil & Gas Development](#) or [Onshore Oil & Gas Development](#).

#### 2. Revise the provision on security so that MOGE is not arranging or requiring payment for security protection. (PSC clause 17.1 c)

- Security protection will be a very sensitive subject for most O&G companies. The PSC should provide flexibility on how security protection is arranged, and to do so in a way that permits companies some control over the arrangements for security protection where needed. Companies should be explicitly permitted to have their own security guards. Ideally the PSC should also refer to the [Voluntary Principles on Security and Human Rights](#).

#### 3. Require compliance with recognised and identified international standards on environmental and social performance. (PSC clause 17.2)

The PSC currently contains numerous references to “international petroleum industry practices” without specifying a source organisation(s) (international organisation or industry association). References to more specific standards will assist the parties to clearly understand what is required of the Contractor.

- Require adherence to identifiable standards, namely: [IFC Performance Standards](#) and WBG Environmental, Health and Safety Guidelines for [Offshore Oil & Gas Development](#) and [Onshore Oil & Gas Development](#) (as appropriate).<sup>479</sup>

#### 4. Require Contractors to commit to applying the UN Guiding Principles on Business and Human Rights and where applicable, the OECD Guidelines on Multinational Enterprises (see also the OECD Recommendations below). (PSC clause 17.2 e)

- It should be clear from the PSC provisions that MOGE is equally bound by those same standards.

#### 5. Revise the local content provisions to provide for more specificity. (PSC clause 17.2 o)

The PSC requires Contractors to give preference to goods and services which are available in Myanmar and from Myanmar nationals as a method of spreading the economic benefits of Petroleum Operations. Given the need to build the capacity of local businesses to meet appropriate quality, environmental, health and safety standards and to provide incentives to Contractors to restructure procurement over time, more targeted provisions are required.

- Include realistic but specific targets over time on local content.
- The current (informal) practice of providing Contractors with a list of MOGE-approved companies for certain services e.g. food and beverages, should be abandoned as it is a barrier to entry to the market for new food and beverage companies, and reduces transparency.

#### 6. Include clear allocations of responsibility and assignment of liability. (PSC clause 17.2 w)

The PSC currently only *excludes* certain types of liability for the Contractor but does not clearly specify what the Contractor is liable for. Existing laws do not provide a clear basis for holding companies responsible for environmental damage, nor does the PSC. In the interim, until an appropriate regulatory framework, is in place, the PSC should address these issues, and can be made applicable on a transitional basis until the relevant national laws are in place.

- Clearly state that the Contractor is responsible for the actions or omissions of its sub-contractors.
- Exclude costs to remedy non-compliance with relevant standards or laws or compensation for harm to third parties as a recoverable cost.

<sup>479</sup> Note that the 24 December 2013 draft of the EIA Procedure makes a similar suggestion with respect to addressing indigenous peoples and involuntary resettlement: “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.” (clause 7)(emphasis added).

- Ensure that costs to restore the environment, individuals, communities or workers to baseline conditions are not included as part of the social investment costs.
- Provide for specific penalties for non-compliance with the IFC Performance Standards highlighted above and indicate conditions in which serious or repeated non-compliance would be considered a material breach of the PSC.

**7. Include references to specific international standards on ESIA, ensure that social issues are covered in the EMP and that ESIA and ESMPs are updated where relevant. (PSC clause 17.2 bb)**

- Revise the PSC to require that the EIA, SIA and the development of the EMP as specified in the PSC are carried out in accordance with the [IFC Performance Standards](#).
- Clarify that social issues should be included in the Environmental Management Plan.
- As conditions can change over the course of operations, require that ESIA are conducted (or updated) when there are major changes in operations, which may include moving from one phase of operations to another; at the moment, the PSC seems to require only a 1-time EIA, completed in the Preparation Period (clause 3.2).

**8. Revise the “CSR” requirements of the PSC, requiring a social investment programme within the Work Programme. (PSC clause 17.2 dd)**

- Allow expenditure on social investment programmes to be cost recoverable but on condition that it is specified in the Work Programme budget.
- Specify that social investment programmes, or relevant elements of them, should be developed together with the local communities impacted by exploration and development.
- Require an annual budget that is communicated to the local communities and is clearly identified in its reports to MOGE and that does not include expenditures to remedy environmental and social harms which should be met separately by the Contractor..
- The social investment programme should include capacity building for the community in managing their participation in the social investment programme – such as prioritising, administering, budgeting, planning.
- Include clear provisions for when a Contractor fails to live up to its social obligations. This might include a specific grievance mechanism that is accessible to the community. One option for structuring this is through a separate “community development agreement” that specifies obligations of both sides – the Contractor and the community - which provides some recourse for failure or poor performance.<sup>480</sup>

**9. Exclude identifiable changes in the social and environmental legal framework from coverage under the stabilisation clause. (PSC clause 27.7)**

The PSC currently contains an economic equilibrium stabilisation clause that permits adjustments to maintain the economic benefit if laws, decrees, rules and regulations, amendments or reinterpretations affect the economic benefit of the PSC. Myanmar is in the process of a very wide ranging revision of its legal framework (some of it dating back to the last century), with a whole list of laws relevant to the O&G sector that will shortly be

<sup>480</sup> EI Sourcebook, “[Good Practice Note on Community Development Agreements](#)” (2011).

adopted, including in particular new laws in the environmental area, new health and safety laws, and other social laws. Compliance with such laws should be an expected and normal cost of business in an extractive operation.

- Exempt current and forthcoming environmental, social and human rights laws from the scope of the stabilisation provision; or
- At a minimum, set a floor on the stabilisation commitments stating that they apply only to the extent that the new Myanmar laws impose requirements that are stricter than accepted international environmental and social standards – i.e. [IFC Performance Standards](#) and WBG Environmental, Health and Safety Guidelines for [Offshore Oil & Gas Development](#) and [Onshore Oil & Gas Development](#) (as appropriate).

#### **10. Require that all arbitration hearings and decisions concerning PSCs are open to the public, that decisions are made publicly available and third party interventions will be permitted. (PSC clause 22.2)**

The model PSC provides for UNCITRAL arbitration. The new UNCITRAL Rules on Transparency, which came into effect on April 1, 2014, provide for a significant degree of openness throughout the arbitral proceedings.

- Specify that the Government wishes to opt-in to the new UNCITRAL Rules on Transparency to ensure that any arbitral proceedings under a PSC are open to the public, in the public interest.

#### **11. Require environmental insurance to bring the PSC in line with the Environmental Conservation Law (2012).**

The Environmental Conservation Law (Chapter XI) requires that any business that requires prior permission, (which includes O&G operations), must have insurance cover for impacts on the environment.

- The PSC should cross-reference this requirement from the Environmental Conservation Law and make it an explicit requirement of the PSC.

#### **12. Strengthen the anti-bribery and corruption provisions in accordance with the newly adopted law on anti-bribery and corruption**

- The Government recently ratified the UN Convention against Corruption (UNCAC) and adopted an Anti-Corruption Law. The current PSC has only very limited provisions on bribery and corruption; these should be strengthened to bring them in line with UNCAC and the EITI Standard. For example, clause 17.2 q) permits the parties to waive international tendering requirements, without any limitations on what procedures should be used to replace international tendering or how transparent they must be.

### 13. Add provisions on monitoring and reporting on environmental, social and human rights issues.

The model PSC does not require the Contractor to specifically monitor and report on its environmental, social and human rights performance, apart from what might be generally covered in the Work Programme.

- Require reporting on a regular e.g. annual basis against the E(S)MP (which should cover both environmental and social issues and incorporate human rights issues), including relevant activities of sub-contractors that provide goods and services as part of the Petroleum Operations.
- Require that the reports are made available in an accessible way to the local communities and wider general public.

### 14. Require that companies put operational level grievance mechanisms in place.

In the short term, Myanmar will have neither regulatory / inspection authorities throughout the country nor a readily accessible and well-functioning judicial system in place to hear complaints about O&G operations.

- Require Contractors to put in place operational level grievance mechanisms that provide an early warning system that should permit actual or potential adverse impacts to be addressed and remediated early. They should guarantee non-retaliation and be based on relevant international standards – i.e. [UN Guiding Principles on Business and Human Rights](#) (principles 29-31).

## Further suggestions

### 15. Permit the training funds to be spent on a wider group of Government departments involved with Petroleum Operations. (PSC clause 15.2)

The model PSC contains useful requirements on training to improve the skills of Myanmar national staff and MOGE personnel.

- A certain percentage of funds should be allocated to providing training for the wider range of Government personnel who are involved in regulating Petroleum Operations, including MOECAAF and regional/state and local government authorities.

### 16. Require clear and specific limits on use of other resources within the Contract Area.

- The Work Programme should specify the proposed quantities of resources to be used in the Contract Area – eg water, land and construction materials and should be in line with predicted use and impacts covered in the EMP. Where additional use is made of local resources, these should be compensated for. Where the EMP has indicated that these resources are used by local communities, specific mitigation measures should be put in place to ensure that local communities retain access to necessary resources.

**17. Specify the access to and use by the public to non-operation specific infrastructure.**

- The PSC should specify what types of infrastructure will be accessible to local communities and the terms for their use -- eg free and unfettered, at a cost, none, who regulates access, etc.

**18. Exclude strikes by the employees of the Contractor or its subcontractors from the definition of force majeure. (PSC clause 20.2)**

- Force majeure provisions should only deal with unpredictable issues genuinely beyond the Contractor's control; the clause should not deal with employer-employee disputes and strikes involving the Contractor as this does not provide any incentive to resolve such disputes quickly and effectively.