

## Gap-Equivalence Analysis on IP Safeguards

There are no laws specifically related to IP safeguards. Table below provides a gap-equivalence analysis of laws that may impinge on IPs safeguards.

### Gap Analysis on Indigenous Peoples between ADB Safeguards and Government of Myanmar

ADB SPS 2009	GOM Policy	Gap – Equivalence
<p><b>Principle 1:</b> Screen early on to determine (i) whether Indigenous Peoples are present in, or have collective attachment to, the project area; and (ii) whether project impacts on Indigenous Peoples are likely.</p>	<p><b>The Constitution of the Republic of the Union of Myanmar (2008), Chapter I, Section 22b.</b> The Union shall assist to promote solidarity, mutual amity and respect and mutual assistance among the National races.</p> <p><b>The Constitution of the Republic of the Union of Myanmar (2008), Chapter I, Section 27</b> The Union shall assist development, consolidation and preservation of National Culture.</p> <p><b>The Development of Border Areas and National Races Law (1993), Chapter II, Section 3.</b> The objectives of this Law are as follows:</p> <p>(b) to cherish and preserve the culture, literature and customs of the national races;</p> <p>(e) to preserve and maintain the security, prevalence of law and order and regional, peace and tranquility of the border areas.</p> <p>The orientation of the ministry based on its historical context is perceived to be different from the perspective of known IP safeguard principles.</p> <p><b>Myanmar National Human Rights Commission Mandate of the Commission</b></p> <p>Under Notification No. 34/2011 dated 5 September 2011 of the Government of the Republic of the Union of Myanmar, the Myanmar National Human Rights Commission is vested with the following responsibilities and competence;</p> <ol style="list-style-type: none"> <li>(1) To receive communications on the violations of the fundamental rights of citizens enshrined in the Constitution of the Republic of the Union of Myanmar, to investigate them and to convey the findings to the relevant departments and bodies for necessary action.</li> <li>(2) On receipt of information on violation of the fundamentals rights of citizens, to verify the information and to convey the findings of the investigation to the relevant giver</li> <li>(3) To examine whether the rights under the international human rights instruments to which Myanmar is a State party are fully enjoyed and to advise on the reports of Myanmar submitted to the international human rights treaty bodies.</li> <li>(4) To, study international instruments on human rights to which Myanmar has not yet been a party to, and to submit recommendations on signing of and accession to appropriate instruments.</li> <li>(5) To communicate with the UN organizations</li> </ol>	<p>Gap noted in that GOM policies suggest protection of interests of “national races” who are not necessarily IPs per ADB’s SPS (2009)</p> <p>Screening is not present to determine likely impacts on IPs.</p> <p>With the implementation of The Vacant, Fallow, and Virgin Land Law, screening for IPs is not conducted especially with those who do not have an official title to lands.</p>

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	<p>and foreign and domestic bodies engaged in the promotion and protection of human rights.</p> <p>(6) To extend thematic assistance in promotion of and research into human rights.</p> <p>(7) To provide leadership assistance in the activities on enhancing the public awareness and knowledge of human rights promotion and protection.</p> <p>(8) To carry out tasks occasionally assigned by the President in connection with promotion and protection of human rights.</p> <p>(9) To submit annual reports to the President on the activities of the Myanmar National Human Rights Commission and developments in the field of human rights.</p> <p>In 2014, the GoM enacted <b>The Myanmar National Human Rights Commission Law with the following objectives:</b></p> <p>(a) to safeguard the fundamental rights of citizens enshrined in the Constitution of the Republic of the Union of Myanmar effectively;</p> <p>(b) to create a society where human rights are respected and protected in recognition of the Universal Declaration of Human Rights adopted by the United Nations;</p> <p>(c) to effectively promote and protect the human rights contained in the international conventions, decisions, regional agreements and declarations related to human rights accepted by the State;</p> <p>(d) to coordinate and cooperate with the international organizations, regional organizations, national statutory institutions, civil society and non-governmental organizations related to human rights.</p> <p><b>Vacant, Fallow and Virgin Lands Management Law (2012), Chapter III, Section 4.</b> The Central Committee shall permit the right to do, (and) right to utilize land of vacant, fallow and virgin land in the country, for the following purposes:</p> <p>(a) Agriculture;</p> <p>(b) Livestock Poultry Farming and Aquaculture;</p> <p>(c) Mining;</p> <p>(d) Government allowable other purposes in line with law;</p>	
<p><b>Principle 2:</b> Undertake a culturally appropriate and gender-sensitive social impact assessment or use similar methods to assess potential project impacts, both positive and adverse, on Indigenous Peoples. Give full consideration to options the affected Indigenous Peoples prefer in relation to the provision of</p>	<p><b>The Constitution of the Republic of the Union of Myanmar (2008), Chapter VIII, Section 348.</b> The Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth.</p> <p><b>Environmental Conservation Law (2012), Chapter IV, Section 7.</b> The duties and powers relating to the environmental conservation of the Ministry are as follows:</p> <p>(f). facilitating for the settlement of environmental disputes and, if necessary, forming bodies to negotiate such</p>	<p>Partial equivalence is noted. Environmental Conservation Law and MIC require SIAs for the following: exploration and production of minerals, oil and natural gas, construction of large dams, hydropower and other large scale electricity production,</p>

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<p>project benefits and the design of mitigation measures. Identify social and economic benefits for affected Indigenous Peoples that are culturally appropriate and gender and intergenerationally inclusive and develop measures to avoid, minimize, and/or mitigate adverse impacts on Indigenous Peoples.</p>	<p>disputes; (m) causing to lay down and carry out a system of environmental impact assessment and social impact assessment as to whether or not a project or activity to be undertaken by any Government department, organization or person may cause a significant impact on the environment</p> <p><b>Foreign Investment Rules (2014). Chapter 5-33.</b> Proposals for the economic activities that are considered capital intensive by the Commission, and that are prescribed to undergo environmental impact assessment by the Ministry of Environmental Protection and Forestry have to be submitted along with Environmental and Social Impact Assessment.</p> <p><b>The Ward or Village Tract Administration Law (2012), Chapter VII, Section 13.</b> The ward or village tract administrator shall carry out the following functions and duties in accord with the relevant laws, rules, and procedures: (a) Security, prevalence of law and order, community peace and tranquility and carrying out the benefit of the public; (c) Safeguarding the right of persons who live in the ward or village tract;</p> <p><b>Vacant, Fallow and Virgin Lands Management Rules (2012), Chapter II, Section 10.</b> During the period of notification in accordance with Section 9, Sub-section (b), the Township Department Office shall examine the following points and fill in the Inspection Form for the Right to Work on and Utilize Vacant, Fallow and Virgin Lands (Form – 7): (b) regarding the applied vacant, fallow and virgin lands – (1) whether the lands are in fact vacant, fallow and virgin lands (2) whether there is a holder currently utilizing the land (3) whether there is any encroachment on the land (4) whether the right to work on or utilize the land had been granted in the past. (5) whether more than one applicant has applied for the vacant, fallow and virgin land or a part of the land. (e) whether the environment will be affected</p> <p><b>Vacant, Fallow and Virgin Lands Management Rules (2012), Chapter VI, Section 49.</b> Those who were granted the right to work on and utilize land through the authority of the Vacant, Fallow and Virgin Lands Management Central Organization before the enactment of the Vacant, Fallow and Virgin Lands Management Law, must submit a report to the Central Committee regarding the practical implementation of the project, with the date and document number of the document granting the rights to utilize the land, together with supporting documents such as photo records of the actual area of land utilized, and of the remaining areas.</p>	<p>large scale agricultural activities, large scale manufacturing and construction activities; SIA is required as per MIC guidelines but it does not specify culturally appropriate and gender-sensitive SIAs for IPs.</p> <p>Other laws refer to activities related to SIA and/or screening.</p> <p>There are no specific rules or procedures on what are considered acceptable, culturally and gender-sensitive SIAs especially to assess potential project impacts on Vulnerable Groups or IPs.</p>
<b>Principle 3: Undertake meaningful</b>	<b>The Constitution of the Republic of the Union of</b>	Gap with respect to

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<p>consultations with affected Indigenous Peoples communities and concerned Indigenous Peoples organizations to solicit their participation (i) in designing, implementing, and monitoring measures to avoid adverse impacts or, when avoidance is not possible, to minimize, mitigate, or compensate for such effects; and (ii) in tailoring project benefits for affected Indigenous Peoples communities in a culturally appropriate manner. To enhance Indigenous Peoples' active participation, projects affecting them will provide for culturally appropriate and gender inclusive capacity development. Establish a culturally appropriate and gender inclusive grievance mechanism to receive and facilitate resolution of the Indigenous Peoples' concerns.</p>	<p><b>Myanmar (2008), Chapter VIII, Section 390.</b> Every citizen has the duty to assist the Union in carrying out the following matters:</p> <ul style="list-style-type: none"> <li>(a) preservation and safeguarding of cultural heritage;</li> <li>(b) environmental conservation;</li> <li>(c) striving for development of human resources;</li> <li>(d) protection and preservation of public property</li> </ul> <p><b>Vacant, Fallow and Virgin Management Rules (2012), Chapter II, Section 12.</b> With respect to the application for the rights to work on and utilize vacant, fallow and virgin lands:</p> <ul style="list-style-type: none"> <li>(a) If there is any objection -             <ul style="list-style-type: none"> <li>(1) the Township Department Office shall examine the objection together with the submitted evidence, within 7 days from the date of receiving the objection, and report the findings together with the case file to the respective Naypyidaw Council or Regional or State task force through the respective District Department Office and Regional or State Department Office.</li> <li>(2) upon receiving the case file and objection submitted according to Sub-section (1), the Naypyidaw Council or Regional or State task force shall submit the objection, together with relevant remarks or notes, to a Separate Board formed and delegated by the Central Committee, with instructions to carry out an inquiry and report findings.</li> <li>(3) upon receiving the instructions in accordance with Sub-section (2), the Separate Board shall within 7 days from receipt of the instructions, make a field trip to the location of the vacant, fallow and virgin lands to carry out an inspection, and submit a report with findings, together with photo records as evidence, to the respective Naypyidaw Council or Regional or State task force.</li> </ul> </li> </ul> <p><b>Farmland Management Rules (2012), Chapter VII, Section 59.</b> The disputes arising in connection with the right on farm land shall be inquired and heard by the ward/village tract farm land management committee by opening the original case.</p> <p><b>Chapter VIII, Section 64.</b> In the farm land is requisitioned under farm land law for the interest of the state or the public the grievance and compensation for improving the farm land with buildings on the said farm land by the person who get the right to work farm land in the improvement made by the original person who get the right to work farm land, without delay from the concern, the central farm land management committee shall conduct as necessary.</p> <p><b>Farmland Law (2012). Chapter VIII. Deciding Land Disputes In Respect Of The Right For Farming And Appeal</b></p> <p>22. Land disputes in respect of the right for farming shall be</p>	<p>meaningful consultation and participation with IPs in project design, implementation and monitoring plans to avert negative impacts. Only broad statements in the Constitution that allude to responsibility to assist the country.</p> <p>In the recent draft on National Land Use Policy (October 2014) by the Land Use Allocation and Scrutinizing Committee, leaders of the ethnic nationalities and local leaders shall be included in the decision making related to land tenure including ancestral land as well as in the dispute settlement mechanisms.</p> <p>The draft land use policy also calls for the participation of men and women who are respected and have influence in their communities in the settlement practice.</p>

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	<p>decided by the Ward or Village Tract Farmland Management Body, after opening the case file and making actions such as enquiry and hearing about the land disputes.</p> <p>23.                      (a) Whosoever may appeal to the respective Township Farmland Management Body against within 30 days from the date of decision made by the Ward or Village Tract Farmland Management Body in accordance with the section 22 of this law;                      (b) Township Farmland Management Body may approve (or) revise (or) cancel the decision made by the Ward or Village Tract Farmland Management Body;</p> <p>24.                      (a) Whosoever may appeal to the respective District Farmland Management Body against within 30 days from the date of decision made by the Township Farmland Management Body in accordance with the section 23 subsection (b) of this law;                      (b) District Farmland Management Body may approve (or) revise (or) cancel the decision made by the Township Farmland Management Body;</p> <p>25                      (a) Whosoever may appeal to the respective Region or State Farmland Management Body against within 60 days from the date of decision made by the District Farmland Management Body in accordance with the section 24 subsection (b) of this law;                      (b) Region or State Farmland Management Body may approve (or) revise (or) cancel the decision made by the District Farmland Management Body;                      (c) the decision made by the Region or State Farmland Management Body is final;</p>	
<p><b>Principle 4:</b> Ascertain the consent of affected Indigenous Peoples communities to the following project activities: (i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical displacement from traditional or customary lands; and (iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples. For the purposes of policy application, the consent of affected Indigenous Peoples communities refers to a collective expression by the affected Indigenous Peoples communities, through individuals</p>	<p><b>The Constitution of the Republic of the Union of Myanmar (2008), Chapter I, Section 22b.</b> The Union shall assist to promote solidarity, mutual amity and respect and mutual assistance among the National races.</p> <p><b>The Constitution of the Republic of the Union of Myanmar (2008), Chapter VIII, Section 347.</b> The Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection.</p> <p><b>Rural Development Measures Taken by The Department of Rural Development (2013)</b></p> <p><b>Objectives</b></p> <p>9. The objectives of the establishment of Department of Rural Development are as below:</p> <p>(a) To assist the National Rural Development and Poverty Alleviation Program;</p> <p>(b) To improve socioeconomic life of rural populace and to narrow down the development gap between urban and rural areas; and</p> <p>(c) To preserve Myanmar’s rural cultures.</p>	<p>Gap noted as consent of affected IPs and broad community support are not explicit in laws that intend to protect the interests of national races.</p> <p>In the case of the Development of Border Areas and National Races Law (1993), Chapter V, Section 8, the move is merely towards information dissemination but does not strive for consent or broad community support.</p> <p>However, the recent draft on National Land Use Policy (October 2014) by the Land Use Allocation and Scrutinizing Committee</p>

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<p>and/or their recognized representatives, of broad community support for such project activities. Broad community support may exist even if some individuals or groups object to the project activities.</p>	<p><b>The Development of Border Areas and National Races Law (1993), Chapter V, Section 8</b> The duties and powers of the Ministry in respect of the implementation of the development works of the border areas and national races are as follows:</p> <p>g) laying down programmes for disseminating knowledge and exchanging culture for the national races in the Development Areas;</p>	<p>specifically prescribes the traditional ethnic nationalities dispute settlement practices to settle land disputes concerning their land use rights.</p>
<p><b>Principle 5:</b> Avoid, to the maximum extent possible, any restricted access to and physical displacement from protected areas and natural resources. Where avoidance is not possible, ensure that the affected Indigenous Peoples communities participate in the design, implementation, and monitoring and evaluation of management arrangements for such areas and natural resources and that their benefits are equitably shared.</p>	<p><b>The Constitution of the Republic of the Union of Myanmar (2008), Chapter VIII, Section 390.</b> Every citizen has the duty to assist the Union in carrying out the following matters:</p> <p>(a) preservation and safeguarding of cultural heritage;</p> <p>(b) environmental conservation;</p> <p>(c) striving for development of human resources;</p> <p>(d) protection and preservation of public property</p> <p><b>Environmental Conservation Law (2012), Chapter IX, Section 19.</b> The Ministry shall cooperate with the relevant Government departments and Government organizations in the matters of environment conservation for perpetual existence of cultural heritage sites and natural heritage sites, cultural monuments and natural areas stipulated under any existing law.</p>	<p>There is partial equivalence since the constitution and the Environmental Conservation Law (2012) call for preservation, protection, and safeguarding of these areas and natural resources. However, in cases where avoidance is not possible, the laws are silent on participation of IPs in the design, implementation, and monitoring and evaluation of management arrangements for such restricted areas. .</p>
<p><b>Principle 6:</b> Prepare an Indigenous Peoples Plan (IPP) that is based on the social impact assessment with the assistance of qualified and experienced experts and that draw on indigenous knowledge and participation by the affected Indigenous Peoples communities. The IPP includes a framework for continued consultation with the affected Indigenous Peoples communities during project implementation; specifies measures to ensure that Indigenous Peoples receive culturally appropriate benefits; identifies measures to avoid, minimize, mitigate, or compensate for any adverse project impacts; and includes culturally appropriate grievance procedures, monitoring and evaluation arrangements, and a budget and time-bound actions for implementing the planned measures</p>		<p>No laws, policies, or guidelines requiring the preparation of IPPs.</p>

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<p><b>Principle 7:</b> Disclose a draft IPP, including documentation of the consultation process and the results of the social impact assessment in a timely manner, before project appraisal, in an accessible place and in a form and language(s) understandable to affected Indigenous Peoples communities and other stakeholders. The final IPP and its updates will also be disclosed to the affected Indigenous Peoples communities and other stakeholders.</p>	<p><b>Foreign Investment Rules (2014), Chapter 22, Services-8.</b> Publishing and publication of periodicals in ethnic languages including Myanmar;</p>	<p>Gap noted. No laws, policies, or guidelines requiring disclosure of consultation process, results of SIA, IPPs and its updates to affected IPs and other stakeholders.</p>
<p><b>Principle 8:</b> Prepare an action plan for legal recognition of customary rights to lands and territories or ancestral domains when the project involves (i) activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied, or (ii) involuntary acquisition of such lands.</p>	<p><b>Farmland Law (2011), Chapter III, Section 9.</b> The following rights shall be enjoyed in connection with the right for farming:</p> <ul style="list-style-type: none"> <li>(a) right to have such land in hand, right for farming and gain benefit of such farm;</li> <li>(b) right to sell, pawn, lease, exchange, or donate, in whole or in part of the right for farming in accord with prescribed disciplines;</li> <li>(c) disputes arising out of inheritance of farmland shall be decided upon by the law respective court in accord with existing law;</li> <li>(d) the duration of the right for farming shall continue so long as the stipulated conditions are not breached;</li> <li>(e) land development operation are to be carried out by doing joint-venture with the investment of rural cooperative association or private investors;</li> <li>(f) in accordance with Foreign Investment Law, foreigner or organization containing foreigner are to be carried out by doing joint-venture;</li> </ul> <p>4. The Central Committee shall permit the right to do, (and) right to utilize land of vacant, fallow and virgin land in the country, for the following purposes:</p> <ul style="list-style-type: none"> <li>(a) Agriculture;</li> <li>(b) Livestock Poultry Farming and Aquaculture;</li> <li>(c) Mining;</li> <li>(d) Government allowable other purposes in line with law;</li> </ul> <p>5. The following persons and organizations may apply to Central Committee in accordance with the prescribed conditions for carry out the purposes which are stated in Section 4:</p> <ul style="list-style-type: none"> <li>(a) Myanmar citizen investors;</li> <li>(b) Department, Government Organization, and Non Government Organizations;</li> <li>(c) Exemption persons who are eligible in accordance with Section 4 of the Transfer of Immovable Property Restriction Law, 1987;</li> <li>(d) Joint-Venture of Investors who have right to carry out with Department (and) Government' Organization in accordance with Foreign Investment Law</li> </ul>	<p>Gap can be noted with Myanmar's laws and ADB: procedures for land recognition are provided by the Farmland Law and the VFVLM Law but not specific to IPs - that require preparation for legal recognition of customary rights to lands and territories or ancestral domains for identified activities contingent on establishing legally recognized rights to lands and territories owned or customarily used or occupied by IPs or involuntary acquisition of such lands.</p> <p>Majority of Myanmar's uplands farmers do not have an official entitlement for their land resulting to labeling their areas to be "vacant" or "wastelands"</p> <p>However, land use rights of the ethnic nationalities were included in the draft National Land Use Policy (October 2014) by the Land Use Allocation and Scrutinizing Committee.</p>

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	<p>(e) Joint-Venture of Investors who have right to carry out with Myanmar Citizen Investors , in accordance with Foreign Investment Law;</p> <p><b>The Vacant, Fallow and Virgin Lands Management Law (2012) Chapter III, Section 4.</b> The Central Committee shall permit the right to do, (and) right to utilize land of vacant, fallow and virgin land in the country, for the following purposes:</p> <p>(a) Agriculture;</p> <p>(b) Livestock Poultry Farming and Aquaculture;</p> <p>(c) Mining;</p> <p>(d) Government allowable other purposes in line with law;</p>	
<p><b>Principle 9:</b> Monitor implementation of the IPP using qualified and experienced experts; adopt a participatory monitoring approach, wherever possible; and assess whether the IPP’s objective and desired outcome have been achieved, taking into account the baseline conditions and the results of IPP monitoring. Disclose monitoring reports</p>	<p><b>Foreign Investment Rules (2014), Chapter 22, Services-8.</b> Publishing and publication of periodicals in ethnic languages including Myanmar;</p>	<p>Gap is noted as no specific laws can be found in the GoM that pertain to such principle.</p>

Source: Final Report, February 2015, TA 7566 Subproject (Capacity Building for Implementing Environment and Social Safeguards in Myanmar), pages 50 - 58