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From: Lisa Misol [misoll@hrw.org]
Sent: Thursday, October 04, 2012 11:44 PM
To: BurmaPRA
Subject: Human Rights Watch submission: Requirements on Responsible Investment in Burma
Attachments: HRW_Submission_BurmaReportingRequirements.doc

Dear Ms. May,

I am pleased to enclose Human Rights Watch's comment on the "Reporting Requirements on Responsible Investment in Burma." This submission supplements a joint comment by United States and international nongovernmental organizations and a coalition comment by the International Corporate Accountability Roundtable, which Human Rights Watch also endorses.

Thank you for the opportunity to provide our views. We look forward to continued engagement in this process.

Sincerely,
Lisa Misol

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Public Comment on the US Reporting Requirements for Investment in Burma

October 4, 2012

Human Rights Watch welcomes the opportunity to comment on the “Reporting Requirements on Responsible Investment in Burma.” This submission supplements a joint comment by United States and international nongovernmental organizations (NGOs) and a coalition comment by the International Corporate Accountability Roundtable (ICAR), which Human Rights Watch also endorses.

The reporting requirements are intended to help the US government address and mitigate the ongoing human rights abuses and other key concerns that led it to declare a continuation of a “national emergency” in Burma.¹ Various factors make Burma a particularly difficult context in which to do business without causing harm or contributing to negative impacts caused by others. This submission identifies several human rights-related risk factors for business in Burma that justify the need for the US government to mandate public reporting on company activities. In particular, we stress the following:

- Repression
- Ethnic armed conflict
- Land rights
- Labor rights
- Discrimination
- Rampant corruption
- Military-business ties
- Opaque finances
- Poor community engagement
- Absent rule of law

Given the risky context and the centrality of rights protection to US foreign policy in Burma, mandatory reporting by companies is crucial to US government efforts. Reporting on its own does not provide a sufficient deterrent to prevent businesses from becoming involved in human rights abuses or corruption, but public disclosures will serve a valuable purpose. This submission describes how mandatory reporting can serve to help companies and others recognize and respond to the various risk factors. As noted in the other submissions we have endorsed, we urge that the US government clarify and improve the reporting requirements in several respects to better serve their intended purpose; nothing in this submission should be read as undercutting the need for those recommendations to be adopted to address weaknesses in the reporting requirements.

¹ The president has declared that the conduct and policies of Burma’s government, despite improving in some regards, continue to threaten US national security and the US government’s foreign policy. White House, “Notice -- Continuation of the National Emergency with Respect to Burma,” May 17, 2012, at <http://www.whitehouse.gov/the-press-office/2012/05/17/notice-continuation-national-emergency-respect-burma>.

1) Widespread Repression

Burma has undergone notable changes since 2011, including to open up space for dissent, engage the opposition, and release political prisoners, but in many respects the framework for repression remains in place and rights continue to be violated. For example, a large number of political prisoners remain behind bars, those freed have been released conditionally—meaning they could be returned to prison—and the repressive laws used to convict them remain on the books. Recent charges against peaceful protesters in Rangoon showcase the degree to which repression remains an active concern.²

Generally, recent improvements in Burma have been concentrated in Rangoon and other urban centers, while for people in much of the country little has changed. The military continues to exert authority over villagers, often in an arbitrary and abusive manner. The extent of military autonomy and the limits of civilian control are particularly evident in areas of armed conflict and ethnic minority areas of Burma.

By requiring that companies disclose their policies and procedures in relation to human rights and related issues, the reporting requirements acknowledge the existence of such risks. They also indirectly encourage companies to take them into account through due diligence processes.

2) Ethnic Armed Conflict

Although Burmese President Thein Sein officially ordered a halt to hostilities, the armed forces have continued to carry out military campaigns in some areas of the country with the same brutality for which they have long been notorious. Ceasefire negotiations have started with armed ethnic minority groups but none to date have resulted in peace agreements. Many business opportunities that US companies might wish to explore are located in contested areas.

The Burmese government and the Kachin Independence Organization (KIO) are currently engaged in armed conflict in northern Kachin State. The Burmese army renewed hostilities against the Kachin Independence Army (KIA) in June 2011 in a contested area surrounding a hydropower dam being built by a Chinese company, ending 17 years of ceasefire between the government and Kachin insurgents.

The Burmese army has been implicated in numerous violations of the laws of war, including attacks on Kachin villages, where they have burned homes, destroyed property, and committed looting. Soldiers have tortured civilians during interrogations and raped women. The army has also used antipersonnel mines and conscripted forced laborers, including children, on the front lines. The KIA has also perpetrated serious abuses, including using child soldiers and deploying antipersonnel mines.³

The reporting requirements help to focus companies' attention on the human rights issues at stake, in part through disclosures on security arrangements and contacts with military forces.

3) Land Rights

Land confiscations by the government of Burma and some private interests are ongoing in Burma, perpetuating patterns of human rights abuses. Consultation and compensation are frequently absent or inadequate, particularly those that include women and farmers, and in many cases the land seizures are arbitrary and not justified by an overriding government interest. Two land reform

² Human Rights Watch, "Burma: Peaceful Protest Organizers Charged," October 1, 2012, at <http://www.hrw.org/news/2012/10/01/burma-peaceful-protest-organizers-charged>.

³ Human Rights Watch, *Burma – "Untold Miseries": Wartime Abuses and Forced Displacement in Burma's Kachin State*, ISBN: 1-56432-874-0, March 20, 2012, <http://www.hrw.org/reports/2012/03/20/untold-miseries>.

bills were passed by parliament in early 2012 – the Farmland Law and the Vacant, Fallow and Virgin Lands Management Law. There was no meaningful public consultation on either of the draft laws. Local civil society and public interest lawyers are concerned the laws do not adequately ensure security of tenure, including for female-headed households or female farmers, or provide adequate appeal mechanisms in cases of land acquisition. As a result, land disputes continue to go unresolved throughout the country. This greatly affects the large proportion of the population living in rural areas and dependent on subsistence farming, but land disputes can also arise in urban settings.

Mandatory disclosures on policies and procedures, including due diligence, as well as specific disclosures related to property acquisition—including, as NGOs have proposed, regarding the process of public consultation and details of those consulted, as well as resettlement plans, and compensation—are a useful means to help encourage greater attention to and scrutiny of land issues that are often a flashpoint for abuses in Burma.

4) Labor Rights

Although there have been encouraging developments with regard to the right to freedom of association and the elimination of forced labor in Burma, concerns remain. Additional reform is needed to ensure Burma's labor laws fully comply with international labor standards set out in the core International Labor Organization (ILO) conventions.

The Labor Organizations Law, which took effect in March 2012, created a new framework for the establishment, registration and operation of trade unions. A new Settlement of Labor Dispute Law, enacted on March 28, 2012, provides rules for collective bargaining and the resolution of industrial disputes. These laws are an important, if imperfect, step forward, but in practice trade unionists, especially in industrial zones, are still being fired for exercising these rights. Workers and workers' organizations are inhibited in their right to organize unions, collectively bargain, and take industrial action, including the rights to peaceful assembly and to strike.

Sweatshop labor conditions, including excessive hours, low wages and health and safety violations, are reportedly common in manufacturing industries. Child labor is also alleged. There are very few labor inspectors, and workers allege corruption among the inspectors.

In 2012, the Villages Act and the Towns Act were amended, bringing the definition of forced labor in line with ILO Convention No. 29. A joint action plan to end the use and recruitment of child soldiers was signed in June 2012 between the government and the country task force on monitoring and reporting. However, forced labor continues today, with credible reports of various forms of unpaid forced labor conscripted primarily by the military in 2012, including in Arakan, Chin, Kachin, Karen, and Shan States. Impunity remains high for those who exact forced labor, and penalties applied to date have been very light.

The inclusion in the reporting requirements of provisions related to labor rights is thus well-justified.

5) Discrimination

Burma's 1982 Citizenship Law effectively denies citizenship to the Muslim minority Rohingya, a population estimated at 800,000 to 1 million people in Burma, rendering them stateless and resulting in their being denied other human rights, including freedom of movement, access to freely chosen employment, right to marriage and having a family, and access to education and health services. The Citizenship Law also discriminates against ethnic Indians, Chinese, Gurkhas, and other groups long resident in Burma.

More generally, non-Burmans across the country frequently suffer discrimination that, among other effects, makes it more difficult for them to access education and employment. Discrimination against women in employment, sexual harassment at the workplace, and unfair wages are also a problem. People have faced job discrimination in retaliation for their actual or perceived political affiliation. Unless businesses are attuned to these problems and take adequate measures, they may perpetuate practices that fail to respect human rights.

Provisions in the reporting related to human rights will help to encourage due attention to discrimination risks.

6) Corruption

Corruption is rampant in Burma. The country is tied with Afghanistan for the second-worst ranking in the 2011 Transparency International Corruption Perception Index. Only North Korea and Somalia fared worse. The widespread and entrenched nature of corruption in Burma raises human rights risks, including by fostering unequal economic opportunities that undermine the potential for inclusive growth and, in some cases, by fueling environmental degradation that negatively impacts human rights and hinders prospects for sustainable development. Corruption also directly affects business activity. Bribes are commonplace and extortion is practiced, simultaneously raising human rights concerns and business risks.

The mandated disclosure, under the reporting requirements, of US company policies and procedures in relation to anti-corruption, as well as company payments to Burmese government authorities, help respond to this risk.

7) Military-Linked Business Actors

In many ways, the people who are best-placed to benefit from new foreign investment and trade are private individuals with close ties to the military. By virtue of these relationships, they have gained access to capital, equipment, government licenses and experience that at first glance may make them appealing business partners. But a number of these individuals and their companies are associated with controversies over alleged corruption, money-laundering, sanctions-busting and other illicit activities as well as human rights abuses. In addition, foreign business alliances with them would serve to entrench Burma's pro-military business elite rather than help create opportunities for the emergence of new private sector actors that could support broad-based economic development that supports the economic and social rights of the country's population.

The reporting requirement will encourage companies to take special care to avoid bolstering those who cultivated close ties to military authorities and gained privileged access to state resources.

Another risk is presented by the fact that Burma's armed forces have two powerful business conglomerates that own stakes in companies or derive important profits from alliances with private business partners. Its business ties are opaque and continue to shift over time. US targeted sanctions—which prohibit doing business with the military or its companies—do not provide sufficient, updated information to ensure US businesses avoid inadvertent ties.

In this difficult context, company due diligence reviews and public reporting on partners will help US businesses determine if a potential or actual partner in Burma is affiliated with one of the military's conglomerates or otherwise part of the military-business complex. The disclosure of payments to the Burmese government also will be of value in helping to mitigate such risks.

8) Opaque Finances

A related problem is that public financial management in Burma is extremely poor. Under military government, Burma's rulers grossly mismanaged resources, keeping vast revenues from exports of natural gas off-budget and dedicating a huge proportion of the budget to the military and to building a new capital while spending very little on health, education and other social needs. The current government has committed to undertake economic reforms, including as of April 1 gradually revising an exchange-rate system that has had the effect of hiding all but a tiny portion of Burma's gas revenues and increasing the country's astoundingly low social spending levels, but it has much further to go to create mechanisms to support fiscal accountability and to demonstrate that it will use public resources wisely.

Until measures are in place to ensure that government revenues are fully and properly channeled to public accounts and that the funds are used appropriately in the public interest—such as full parliamentary scrutiny of budgets and spending, an independent audit authority, and publication of budgets and audits—there is no assurance that government funds derived from foreign business activity will be used for public benefit. To the contrary, funds businesses provide to the government in the form of taxes, profit-sharing in joint ventures, royalties, and the like may risk fueling mismanagement by government authorities.

The disclosure of payments to the Burmese government will be of significant value in helping to mitigate such risks.

9) Poor Community Engagement

Burma also suffers from a troubling lack of community consultation, consent, or benefit in government-approved projects, including those involving foreign investment. Local communities, especially women, in Burma have little or no say in how land and natural resources are used by businesses. Although these communities bear the costs of such projects, for example in terms of displacement and lost livelihoods, they have no effective means to secure adequate compensation or to advocate for the government to channel proceeds to promote socio-economic development and poverty alleviation.

Disclosures under the reporting requirements provide a tool that will help affected communities raise concerns and seek effective resolution of their claims.

10) Absence of the rule of law

The judiciary in Burma lacks independence and does not act impartially. For decades, it was entirely controlled by Burma's military government and has not been reformed since the advent of a civilian-led government in 2011. It will take some time and considerable effort for the courts to serve as a credible means of assuring the rule of law, including human rights and other basic guarantees. This poses numerous risks for companies and also for human rights. For example, there is inadequate domestic regulation and enforcement on key issues such as environmental protection, resulting in business activity that has harmful consequences for human rights. Moreover, in the absence of legal reforms, those facing land confiscations do not have an effective legal means to contest such seizures.

The US reporting requirements rightly help respond to this risk.