

## **Submission to the US State Department on US Reporting Requirements on Responsible Investment in Burma (Myanmar)**

The Institute for Human Rights and Business (IHRB) makes this submission pursuant to *A Notice by the State Department on 6 August 2012* as recorded in *the Federal Register*, regarding *Reporting Requirements on Responsible Investment in Burma* (77 FR 46786, [DOS-2012-0046](#)).

The Institute for Human Rights and Business (IHRB) is a global centre of excellence and expertise on the relationship between business and internationally proclaimed human rights standards. We seek to shape policy, advance practice and strengthen accountability, with a view to ensuring that the activities of companies do not contribute to human rights abuses, and in fact lead to positive outcomes.

IHRB warmly welcomes the US Government's *Reporting Requirements on Responsible Investment in Burma* and takes this opportunity to respond to the questions posed in the Federal Register Notice and to provide some limited recommendations on changes to the suggested text of the *Reporting Requirements* themselves. As a preliminary matter, we note that this unprecedented initiative by the State Department serves as a model for other governments and intergovernmental groupings to seriously consider similarly requiring companies in their jurisdictions to report on their investment activities in Burma.

Given Burma's past human rights record, the long period of sanctions, and the opportunity offered by political and economic reforms now underway in the country, Burma represents an important opportunity to test whether the newly endorsed UN Guiding Principles on Business and Human Rights have purchase on the way states and companies behave. We congratulate the US Government on this policy innovation to put the UN Guiding Principles on Business and Human Rights into practice and hope other governments and organisations will feel encouraged to follow suit. This would provide consistent expectations and a more level playing field for businesses investing in Burma, remind other governments' and organisations' of their human rights responsibilities, reinforce their stated commitments to responsible investment in Burma and provide more consistent assurance for the people of Burma that the opening of their country to outside investment brings the hoped for improvement in their daily lives.

### **I. Responding to Key Questions in the Federal Register Notice**

- ***Evaluate whether the proposed information collection is necessary for the proper performance of our [US State Department] functions***

Promoting responsible investment in Burma is a major priority consistent with US foreign policy goals and with the stated commitment of the Burmese government, opposition, its people and the aspirations of Burmese and international civil society. Given the human rights history of Burma, the *Reporting Requirements* create critical and necessary steps to ensure that companies engaged in the country demonstrate transparently to the US Government but equally as importantly, to stakeholders and shareholders, that they are acting in accordance with international human rights standards.

That a public version of each company's annual mandatory report to the State Department will be made available is noteworthy, and will be a valuable source of information for governments, other companies, stakeholders and the general public to ensure they are operating to necessary standards of responsible business conduct. This public version is particularly important for the Burmese government, businesses,

and civil society, though efforts to publicize such reports in local languages within Burma will be crucial to ensure that people there are aware of such reports and able to access them easily.

- ***Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.***

IHRB very much welcomes the *Reporting Requirements*' reference to the UN Guiding Principles on Business and Human Rights. In doing so the Reporting Requirements reaffirm the independent responsibility that every business has to respect human rights under the UN Guiding Principles, which includes conducting human rights due diligence. As such the *Reporting Requirements* asks companies to collect the type of information, which they should be gathering in any case, as part of their responsibility to respect. One of the core values of the UN Guiding Principles is their emphasis on engagement with affected people and other stakeholders as part of the human rights due diligence process, throughout the whole cycle of a company's operations. In order to account to affected stakeholders and others for how a business has addressed its human rights impacts, it should be prepared to communicate that externally. Communication can take many forms, but in a higher risk context such as Burma, more formal reporting about the company's impacts and action taken to address its impacts, is expected. Therefore the *Reporting Requirements* are not asking companies to go beyond what they should be doing to meet their responsibility to respect anyway.

- ***Enhance the quality, utility, and clarity of the information to be collected.***

The questions which form part of the Reporting Requirements can assist companies in identifying the kind of information they should be considering, and become a useful starting point enabling companies to report information in a succinct manner.

## **II. Key Recommendations on the Text of the Reporting Requirements**

*(These recommendations (indicated by a ☞) are provided in the order and according to the heading in which they appear in the Federal Register notice)*

### **Introduction:**

We note that there are two separate reporting requirements:

- \* ***For “any US person undertaking new investment pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with Myanmar Oil and Gas Enterprise (MOGE)”***

This requirement is critical, given the lack of transparency with regard to revenues received by MOGE in the past and human rights abuses associated with some extractive projects in Burma.

- \* ***For “any U.S. person whose aggregate investment in Burma exceeds \$500,000”.***

☞ We recognise that the threshold is set so as not to capture small investments. Nonetheless, even small and medium sized investments in some particularly high risk sectors in Burma can have significant human rights impacts. We suggest that the *Reporting Requirements* should include lower threshold amounts for investments in some industry sectors, which may not require high capital investment but which may have significant adverse human rights impacts. These may include, but are not limited to trade in commodities that may fuel conflict, mining specific minerals linked to conflict and human rights abuses, support services for larger industries like oil and gas, tourism, infrastructure development, and forestry and agribusiness.

### **Public Report:**

Under the Reporting Requirements a submitter who ***“determines in good faith that it considers any information covered in items 1 through 8...to be exempt from disclosure under FOIA Exemption 4.”***

☞ The criteria for deleting certain information from the public report, which is tied to standard FOIA exemptions, is reasonable. Another factor to consider in the *Reporting Requirements* as a ground for

exemption is the safety and security of the company's employees or the safety and security of communities near the company's operations.

***“(1) It shall ... provide a detailed explanation for withholding this information”***

This is a welcome requirement because it permits necessary exemptions but balances this with a requirement to justify the application of the exemption.

***Reporting Requirement 4(d): “Approximate maximum number of employees in Burma during the reporting period (broken down by Burmese and non-Burmese employees)”***

IHRB welcomes the requirement as job creation is an essential part of economic reforms in the country. It may also be useful for companies to segregate the data as per management levels and/or rank.

***Reporting Requirement 5: “Human Rights, Worker Rights, Anti-Corruption, and Environmental Policies and Procedures”***

IHRB welcomes the list of policies and procedures in Section 5 as each is extremely relevant for a company to develop its own thinking and guidance on the topics identified, which are appropriate and well-targeted to the operating context in Burma. Without policies and procedures in place, companies will not be prepared to deal properly with the challenges they will face in doing business in a responsible manner in Burma.

➡ However, IHRB remains concerned that companies are not required to explain why they do not have – or whether they will develop - such policies and procedures for Burma. Given Burma's poor human rights record, the *Reporting Requirements* should include a “comply or explain” provision that requires companies to explain why they do not think such policies and procedures are relevant as part of their public report. This would demonstrate that they have investigated and reflected on these issues and their relevance to their business and can provide a credible explanation for their non-applicability to their operating circumstances. In addition, the *Reporting Requirements* could provide that, where the State Department determined that the explanation is not credible, companies should be required to develop these policies and procedures.

➡ We would welcome clarification in the final version of the *Reporting Requirements* that the reference on the application of policies and procedures for supply chains in Burma applies to business relationships generally in Burma and that the reporting equally should cover these relationships in line with the UN Guiding Principles on Business and Human Rights.

➡ Linked to Section 11 on Risk Mitigation and our recommendations for that section, we strongly suggest that the *Reporting Requirements* should include reporting on implementation of the policies and procedures (that could be combined with the Section 11 reporting) as part of the public report.

***Reporting Requirement 6: “Arrangements with Security Service Providers”***

IHRB welcomes the questions about arrangements with security service providers. However it should be noted that in some cases the *tatmadaw*, or Burmese army, rather than private security companies, has provided security for companies' installations. The *tatmadaw* has committed widespread human rights violations against the civilian population in the context of counter-insurgency operations and otherwise in the last 25 years. They carried out these operations in all seven ethnic nationality states, where ethnic minority armed opposition groups fought against the central government.

➡ Companies will need to investigate if any private security firm with which they sign contracts has military links and they should also scrutinize the human rights records of any private security providers they use, to ascertain if there are credible allegations of past human rights abuse. Companies should ensure that the conduct of private security service providers is not only consistent with the International Code of Conduct for private security providers, but the underlying international legal standards, principles and norms. The *Reporting Requirements* should include a question on whether the company has investigated if its private sector security providers have military links, recognizing both that this is challenging but

necessary and that this would be an additional piece of information that would rarely be appropriate to include in the public report.

➤ For companies operating in the extractive and energy sectors, the *Reporting Requirements* should ask companies to report on whether they have applied the Voluntary Principles for Security and Human Rights and if not, why not. We recognize that only a limited number of companies are members of this important initiative but for those who are, this is a relevant framework for operating in Burma and could be reported on; for companies who are not members they nonetheless can apply the Voluntary Principles and their helpful, detailed implementation guidance.

#### **Reporting Requirement 7: “Property Acquisition”**

IHRB considers the question concerning land to be of critical importance. There are credible reports of forced evictions and land grabs in the context of companies acquiring land, which may have originally belonged to small farmers and vulnerable groups.

➤ Given the wide range of arrangements that may be put in place with respect to land and given that local laws may not permit land ownership or lease by foreigners in certain circumstances, the *Reporting Requirements* should extend to land *use* as well as land purchase or lease.

➤ Moreover the requirement to report purchase or lease of land or any rights related to land sets the bar too high, at \$500,000 or more than 30 acres of land. This is because many people in Burma occupy small plots of land, whether for farming, other business, or residence. As noted by land activists in Burma, rural land is inexpensive compared with other countries in the region, and land prices in general are unstable with significant regional variations within the country. Context becomes important, and therefore the threshold should be lowered to reflect more accurately the value in the area of routine land transactions in Burma.

➤ The specific questions under section 7a-e are crucial because they cover policies and procedures relating to “dislocation or resettlement” of people, any compensation to such people, and information about “any involuntary resettlement or dislocation”. *Question 7a of the Reporting Requirements* could be slightly reformulated to lead companies to ensure that they have policies and procedures that include obtaining accurate information about *the history of* land ownership and acquisition in their areas of operation.

➤ Similar to the recommendation for Section 5, we suggest that the *Reporting Requirements* include a “comply or explain” provision.

#### **Reporting Requirement 8: “Transparency”**

IHRB commends the inclusion of Question 8 requiring transparency in total payments to each Burmese government entity.

#### **Reporting Requirement 10: “Military Communications”**

IHRB also welcomes Question 10 regarding communications with the *tatmadaw* or any other armed groups and its requirement that submitters state the nature of and reasons for such communications. The fact that the question covers not only the *tatmadaw*, but also other armed groups, is significant because there are many such groups in Burma, including those who have agreed ceasefires with the government, those who are still fighting against the *tatmadaw*, most notably the Kachin Independence Organization (KIO), and local militias. Many ethnic minority-based armed groups control territory and populations, and have made business agreements in the past with companies. Bringing transparency in all these relationships is a major step forward in making investment more responsible.

### **Reporting Requirement 11: “Risk Mitigation”**

IHRB considers Question 11 to be significant. However, in summarising any risks or impacts identified, the *Reporting Requirements* should require reporting on any steps taken not just to mitigate the risks or impacts, but crucially to *prevent* them as prevention should be the key objective.

How companies implement their policies and procedures to prevent and mitigate potential negative human rights impacts on individuals, workers and communities is what will finally make a difference in the lives of the Burmese people – positively or negatively. The outcomes of responsible investment is at the core of the intent behind the *Reporting Requirements*. The Burmese people, the Burmese government and civil society require access to the reports in a timely manner, preferably in local languages so that they can engage with companies in an informed manner, so that they are well-placed to understand and analyse if companies are living up to the policies and procedures being made public, as well as how they are being implemented. Transparency is an important precursor to accountability. Without transparency it will not be clear whether business remains part of the problem as it has been in the past, or whether indeed a new page has been turned and business is becoming part of an important new solution in bringing Burma into the global economy in a way that respects the human rights of people in the country and leads to a more prosperous and robust economy.

☞ We recognize that in some situations it may be sensitive for the company or raise security concerns for individuals, workers or communities to report on the management of human rights issues. That is why we suggest that the *Reporting Requirements* include reporting on implementation, including prevention and mitigation as the default, with the possibility to report certain sensitive issues only in its report to the US Government.

☞ Similar to the recommendation for Section 5, we suggest that the *Reporting Requirements* include a “comply or explain” provision. It is important that companies explain why they have not conducted due diligence to prevent or mitigate risks.

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In conclusion, IHRB strongly welcomes the mandatory reporting requirements for US companies operating in Burma and again commends the United States Government in setting the standard for ensuring international investment into Burma is undertaken in adherence to international human rights standards. We believe they will serve their intended purpose even more effectively if they are strengthened along the lines suggested above.

Respectfully submitted,

John Morrison,  
Executive Director

**Institute for Human Rights and Business**  
**34b York Way, London, N1 9AB, United Kingdom**  
**www.ihrb.org**  
**T: +44 203 411 4333**