

Bureau of Democracy, Human Rights, and Labor
C/O Jennifer Stein
U.S. Department of State
2201 C Street NW

WILDERS PLADS 8K
DK-1403 COPENHAGEN K
PHONE +45 3269 8888
HUMANRIGHTS.DK
ELWR@HUMANRIGHTS.DK

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

Reporting Requirements for Responsible Investment in Burma (Myanmar)

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The Danish Institute for Human Rights (DIHR) makes this submission pursuant to a *Notice of Request for Public Comment by the State Department on 25 November 2015*, as recorded in the *Federal Register*, regarding *Reporting Requirements on Responsible Investment in Burma (Myanmar)* (Public Notice 9359).¹

DIHR is Denmark's National Human Rights Institution with a mandate to protect and promote human rights in Denmark and internationally. Since the 1990's, DIHR has been working in the area of business and human rights. In 2013, DIHR co-founded with the Institute for Human Rights and Business the Myanmar Centre for Responsible Business (MCRB).

I. Summary of the Positive Effects of the US Reporting Requirements

DIHR welcomes the US Reporting Requirements and believes that they can serve as a model for other governments and intergovernmental groupings to require companies under their jurisdictions to report on their investment activities in Myanmar and for other jurisdictions in the world newly opened to international investment or other high-risk environments. Those requirements are still relevant and should be maintained: although progress in the area of human rights has been occurring in Myanmar, significant challenges remain for companies operating in the country and human rights abuses involving business are still being reported in particular in the areas of land, labour rights, excessive use of force against protestors etc.

If complied with fully and in good faith by all eligible companies, the *US Reporting Requirements* will lead to increased transparency and accountability concerning US investments in Myanmar but equally important, set precedents for other companies operating in the country

¹ <https://www.federalregister.gov/articles/2015/11/25/2015-30054/60-day-notice-of-proposed-information-collection-reporting-requirements-for-responsible-investment>.

At the time of writing, [32] reports from companies with investments of \$500,000 or more or investments in the oil and gas sector in Myanmar appear on the US Embassy Rangoon website.² These companies are from the manufacturing, oil and gas, and services sectors.

Of the [32] reports on file to date, three companies stand out as having done a solid job on reporting their policies and practices in Myanmar: the Coca Cola Company in December 2013, June 2014 and June 2015; Gap Inc. in August 2014 and again in July 2015; and the Ball Corporation in July 2015.³ These three reports can serve as models not only for other US companies, but also for companies based in other jurisdictions.

The Coca Cola Company submitted one of the first reports under the requirements, which was considerably more substantive than other submissions. The report is an example not just of how to comply with these requirements, but most importantly a thoughtful and well-structured due diligence process that supports the company in doing business in high risk environments such as Myanmar in line with the content and spirit of the UN Guiding Principles on Business and Human Rights. Moreover the Coca Cola Company was transparent about providing information on the challenges it encountered and the steps the company took to improve the situation in the two bottling plants they acquired.

The Ball Corporation's first report is also informative and transparent. The company will manufacture and distribute aluminum cans, with early 2016 as the target date for initial production. Its factory is located in the Thilawa Special Economic Zone near Yangon, which has raised concern due to previous involuntary relocation of residents to unsatisfactory resettlement sites and loss of their livelihoods and education.⁴ The publication of the report has supported efforts of the company to engage with all stakeholders to find a solution to the problems experienced by the communities'.

Gap Inc. has taken the welcome step of submitting two comprehensive and detailed reports under the *Reporting Requirements* on a voluntary basis. Indeed, the Gap Inc. currently sources garments from two third party factories in Myanmar, and are thus exempt from the requirements, as their activities are limited to sourcing and do not constitute 'New Investment' under the *Reporting Requirements*. This shows how the Reporting Requirements may be encouraging transparency more broadly.

In its work with European companies, DIHR has systematically informed about the US Reporting Requirements and has referred to the above mentioned reports by Coca Cola and Gap Inc. to illustrate best practice regarding reporting. The reports have been used to encourage European companies from the food and beverage, oil and gas and garment sectors that DIHR has worked with on human rights due diligence in Myanmar and are not subject to

² US Embassy Rangoon, <http://burma.usembassy.gov/reporting-requirements.html>.

³ see US Embassy website,

<http://photos.state.gov/libraries/burma/895/pdf/TCCCStateDepartmentResponsibleInvestment%20in%20MyanmarReport121213.pdf> and <http://photos.state.gov/libraries/burma/895/pdf/20150630TCCCMyanmarDueDiligenceReport.pdf>;

http://photos.state.gov/libraries/burma/895/pdf/Gap_Inc_Myanmar_Public_Report-8_25_14FINAL.pdf

<http://photos.state.gov/libraries/burma/895/pdf/20150701GapIncMyanmarPublicReport.pdf>;

<http://photos.state.gov/libraries/burma/895/pdf/20150701BallCorporationPublicReport.pdf>.

⁴ See Myanmar Centre for Responsible Business, Background note on Thilawa SEZ, UN Forum on Business and Human Rights, 16 November 2015, <http://www.myanmar-responsiblebusiness.org/pdf/2015-11-Background-Note-UN-Forum-on-Business-and-Human-Rights.pdf>.

such requirements, to increase transparency and better report on their activities in Myanmar and the human rights due diligence steps they are taking.

Our partner organization the Myanmar Centre for Responsible Business (MCRB) in Yangon has found the reports from Coca Cola, Gap Inc., and Ball Corporation to be useful in its advocacy work with both US companies and those from other jurisdictions with Myanmar operations, including Asia. MCRB has used the *Reporting Requirements* in building capacity and spreading knowledge about responsible business include through facilitating multi-stakeholder discussions and on panel discussions, and referring to them in blogs and media commentary. The value of the reports in promoting good governance and responsible business conduct in Myanmar therefore extends beyond the reporting company to assisting in improving due diligence and responsible business practice among other investors in Myanmar, including those who are not required to report under the *Reporting Requirements*.

MCRB has also used questions in the Requirements as one of the bases to draw up the disclosure points for the third section (on human rights, health and safety, and transparency) of its ongoing project, Transparency in Myanmar Enterprises (TiME, *Pwint Thit Sa* in Burmese). TiME rates the top 100 Myanmar companies on the transparency of information on their websites.⁵ The fact that the US government requires such reporting from its companies has also served as a useful benchmark to further engage Myanmar companies - particularly those on the US Specially Designated Nationals (SDN) list - to encourage greater transparency.

II. Responding to Key Questions

- ***Evaluate whether the proposed information collection is necessary for the proper functions of the Department.***

The US State Department's key foreign policy goal is to help advance the democratisation of Burma including under the newly elected government. Promoting responsible investment in Myanmar indirectly supports this objective, as doing business responsibly means companies should consult with and allow participation of all stakeholders, including civil society and affected communities, and be transparent regarding their business conduct. Responsible business is also a stated commitment of the newly elected National League for Democracy (NLD), and in line with the aspirations of Burma's people, including local civil society. NLD leader Daw Aung San Suu Kyi has recently and regularly reiterated the importance of businesses being transparent. The *Reporting Requirements* therefore supports the new democratically elected government's own objective.

Furthermore, the US government is currently developing a National Action Plan (NAP) on Responsible Business Conduct which will "*address ways in which the U.S. government can promote and encourage established norms of responsible business conduct with respect, but not*

⁵ Myanmar Centre for Responsible Business, <http://www.myanmar-responsiblebusiness.org/pwint-thit-sa/>.

limited to, human rights, labor rights, land tenure, anti-corruption, and transparency”⁶. Through developing this National Action Plan, The US government is showing global leadership in the area of responsible business. The US Reporting Requirements are in line with the objective of promoting responsible business conduct and have been acknowledged as positive practice in the area of non-financial reporting requirements.

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

The UN Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council in 2011 establish that to meet their responsibility to respect human rights, business enterprises should carry out human rights due diligence to identify, prevent, mitigate and account for how they address their adverse human rights impacts⁷. The OECD Guidelines for Multinational Enterprises also request companies to conduct due diligence. The information requested in the Reporting Requirements should as a matter of standard practice be collected by and available from any company undertaking human rights due diligence. These requirements should therefore not represent an extra burden to US businesses.

Increased Myanmar and international stakeholder pressure for transparency by all companies investing in the country is illustrated by several initiatives by civil society and responsible investors to monitor business activities in the country. The Business and Human Rights Centre (BHRRC) has initiated the Myanmar Foreign Investment Tracking Project. It sent questions to 120 companies, asking them inter alia questions about their human rights policies and practices in Myanmar.⁸ US companies who have already submitted reports under the *Reporting Requirements* are well placed to refer stakeholders to these reports, whereas companies from other jurisdictions will have to produce a fresh report for BHRRC.

Moreover, those companies that have submitted the more qualitative reports have benefitted in term of reputation⁹

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

The fact that submissions by companies are posted on the US Embassy Rangoon website is helpful to stakeholders. To incentive more comprehensive and better reporting, we suggest there be feedback or rating by the State Department or a third party on the actual reports. As highlighted above, some of the submissions are solid and provide valuable information for other companies, civil society, and indeed governments. However some are cursory and give very little useful information.

⁶ USG National Action Plan on Responsible Business Conduct, Frequently Asked Questions, U.S. Department of State - Washington, D.C., 02-12-2015, available at: <http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/>

⁷ UN Guiding Principles on Business and Human Rights, Guiding Principles, Guiding Principles 15 to 22.

⁸ Business and Human Rights Resource Centre, <http://business-humanrights.org/en/myanmar-foreign-investment-tracking-project>.

⁹ Coca Cola's Report on its Myanmar Operations - a model for others? 13 January 2014, Institute for Human Rights and Business, <http://www.ihrb.org/commentary/coca-cola-report-myanmar-operations.html>, see also "Turning tables: NGOs commend multinational for transparency in Myanmar", 14 July 2014, <http://www.foodnavigator-asia.com/Business/NGOs-commend-Coca-Cola-for-its-human-rights-transparency-in-Myanmar>.

III. Recommendations for Changes in the Content of the Reporting Requirement

1. Scope of transactions subject to the Reporting Requirements

The Reporting Requirements currently only apply to companies whose aggregate investment in Burma exceeds \$500,000. US companies with significant business interests but no 'New Investment' in Myanmar have chosen not to submit a report.

One such company is Caterpillar Inc., which works with independent dealerships and does not have a presence there. In December 2015 Global Witness reported on the Myanmar activities of Caterpillar Inc., including its links to individuals on the official US sanctions list (including the SDN List). One of Caterpillar Inc.'s dealerships in Myanmar is Myan Shwe Pyi Tractors, which is a new corporate vehicle for Wei Hsueh Kang, previously indicted by US courts for drugs trafficking and on the SDN list. Wei Hsueh Kang is a funder and former financial affairs chief of United Wa State Party leader (UWSP, the most powerful ethnic nationality armed group and on the US sanctions list), with substantial interests in Kachin State's lucrative jade mines.¹⁰

We thus recommend that:

- For those involved in trading rather than investment, there should also be a requirement to report either based in revenue or purchases, or sectors. There should be an obligation to report where the revenue to the US company or its overseas subsidiary is for example more than \$500,000 per year, or the company purchases more than \$500,000 from the supplier. Alternatively the requirement could be sector-specific so that US companies involved in extractives and/or timber should be subject to reporting.

Furthermore, we suggest that the following types of relationships be brought within the scope of reporting:

- Activities by subsidiaries in Myanmar of reporting companies;
- Policies and activities with respect to a reporting company's first tier of its supply chain in Myanmar;
- The activities of Myanmar based companies in which the reporting company is a minority shareholder or a strategic partner;
- The identity and ownership of all dealer/distributor/supplier relationships where the revenue to the US company or its overseas subsidiary is more than a certain threshold amount or a Myanmar purchaser buys more than that amount from the US supplier

2. Reporting Requirement 5, Human Rights, Worker Rights, Anti-Corruption, and Environmental Policies and Procedures

Under the US Reporting Requirements, companies are not required to explain why they do not have – or whether they will develop - policies and procedures on human rights, worker rights, anti-corruption, and environmental policies and procedures in Myanmar. 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, a number of the US Reporting Requirements are based on the UN Guiding Principles on Business and Human Rights which were new at the time

¹⁰ 'Lords of Jade', Global Witness, pp 22 – 25, December 2015.

the US Reporting Requirements were first conceived, but have now been in existence for five years and have been widely adopted in a far greater range of international standards. Therefore, the expectation that companies adopt such commitments and implement them has become part of international practice for US companies operating abroad. US companies now have far more guidance and peers meeting these expectations which puts the *Reporting Requirements* into perspective. A comply or explain requirement would therefore be in line with current international practice.

- 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.
- 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.

3. Reporting Requirement 7, Property Acquisition

Property acquisition by companies is a key risk in Myanmar. Since the reform process began in 2011, land rights abuses have emerged as one of the most pressing problems in the country,¹¹ particularly given that an estimated 70% of Myanmar’s population depends on land for their livelihoods. Protests about land disputes, and past expropriations and forced evictions by the government characterize the current human rights landscape. Moreover many land rights activists have been arrested and imprisoned in the last two years. While the government has taken some steps to address these issues, complicated, contradictory and outdated policies and laws have made them difficult to resolve. Establishing valid land user rights in Myanmar is very difficult and supposes consultations with land users and local communities. The *Reporting Requirements* currently sets the threshold for reporting ‘For any purchase, use, or lease of land or other real property, or rights related thereto’, at \$500,000 or more than 30 acres of land. Most plots of land, including farmland and other rural land, are considerably smaller than 30 acres, and the US government could consider lowering this threshold and require from all companies that they exercise enhanced due diligence in the area of land acquisition.

- *Question 7a* 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, use and acquisition in their areas of operation, including through engagement with land users and local communities.

4. Reporting Requirement 10, Military Communications

- The wording of Question 10 is confusing: ‘Has the submitter...had meetings or other communications, including written and telephone communication, with the armed forces of Burma and/or other armed groups related to the submitter’s investments in Burma?’ For example, company drivers are frequently stopped at checkpoints, but it is not clear whether this constitutes a ‘meeting’ or not. This language should be revised, so as to refer to agreements, partnerships and support to the military and the meaning of ‘meeting’ made more clear.

¹¹ ‘Land, Myanmar Centre for Responsible Business Briefing Paper’, March 2015, <http://www.myanmar-responsiblebusiness.org/pdf/2015-04-02-LAND-Briefing.pdf>.