

25 January 2016

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

Reporting Requirements for Responsible Investment in Burma (Myanmar)

OMB Control Number: 1405-0209, Docket Number: DOS-2015-0070

The Institute for Human Rights and Business (IHRB) 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

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 negative human rights impacts, and in fact lead to positive outcomes.

This submission builds on our two earlier submissions. In October 2012² and again in March 2013³ IHRB provided submissions to the State Department on the *US Reporting Requirements on Responsible Investment in Burma (US Reporting Requirements)*, welcoming this unprecedented initiative. We continue to believe that the *US Reporting Requirements* 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. They can also serve as a model for other jurisdictions in the world newly opened to international investment where a cautious welcome for international engagement and investment, accompanied by similar reporting requirements, is appropriate.

At the time of writing, 32 reports from companies responding to the *US Reporting Requirements* with investments of \$500,000 or more or investments in the oil and gas sector in Myanmar appear on the US Embassy Rangoon website.⁴

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

² IHRB Submission to the US State Department on the US Reporting Requirements on Responsible Investment in Burma, IHRB, 4 October 2012, <http://www.ihrb.org/pdf/submissions/2012-10-04-IHRB-Submission-to-US-Dept-of-State-on-US-Reporting-Req-for-Burma.pdf>.

³ IHRB Submission to the US State Department Reporting Requirements for Responsible Investment in Burma (Myanmar), 23 March 2013, <http://www.ihrb.org/pdf/submissions/2013-03-25-IHRB-Submission-OMB-on-Myanmar-Burma.pdf>.

⁴ US Embassy Rangoon, <http://burma.usembassy.gov/reporting-requirements.html>.

These companies are from the manufacturing, oil and gas, and services sectors. We expect to see reports issued soon from additional US companies investing in the oil and gas sector.

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

IHRB broadly welcomes the *US Reporting Requirements*, which, if complied with fully and in good faith by all eligible companies, will lead to increased transparency and accountability concerning US investments in Myanmar. Equally importantly the responses to the *US Reporting Requirements* set precedents for transparency from other companies operating in the country from all nations. The disclosures made pursuant to the *Requirements* are particularly useful in Myanmar itself, for companies, civil society, and the government as elaborated on below.

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 2015.⁵ These three reports can serve as models not only for how other US companies should respond to the *US Reporting Requirements*, but also for companies based in other jurisdictions seeking to ensure that their investments in Myanmar are transparent and well understood by all stakeholders.

The Coca Cola Company submitted one of the first reports under the *Reporting Requirements*, which was considerably more substantive than other company submissions. The report is an example of an appropriate response to the requirements, but more importantly, demonstrates that this kind of thoughtful and well-structured due diligence process is necessary for companies doing business in high risk environments such as Myanmar. Such enhanced due diligence is necessary to be able to understand the key challenges and responses necessary to align operations with their own codes of conduct, legally binding requirements under US law that apply extraterritorially and international expectations as set out in the UN Guiding Principles on Business and Human Rights. The Coca Cola Company's transparency concerning the challenges they encountered and the steps they took to improve the situation in the two bottling plants they acquired has provided useful information and approaches for other companies coming into or operating in the country, thus demonstrating the value

⁵ 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>.

of the *US Reporting Requirements* in promoting lessons learned among companies.⁶

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 (SEZ) near Yangon, where previous involuntary relocation of residents to unsatisfactory resettlement sites and loss of their livelihoods and education have presented predictable challenges for companies operating in the SEZ.⁷ Ball's report has *inter alia* covered the efforts the company has made to employ members of resettled communities in their operations, which has served as a good example to other companies investing in the SEZ and again demonstrates the value of the *US Reporting Requirements* in putting this kind of information which is not competitively sensitive but instead is a simple documentation of good practice into the public domain. This transparency has provided for a more constructive engagement between the company, the resettled communities and those working with them to defend their rights, which has ultimately benefited the company.

GAP Inc. has taken the welcome step of submitting two comprehensive and detailed reports under the *Reporting Requirements* on a voluntary basis. They currently source garments from two third party factories in Myanmar, and are thus exempt from the requirements, as their activities are limited to sourcing finished outerwear and do not constitute 'New Investment' under the *Reporting Requirements*. Given the value of GAP's reporting to other companies considering sourcing from Myanmar, we invite the State Department to consider how to incentivise other such companies to file similar reports. Our assumption is that GAP has also gained a benefit by putting this information on their due diligence into the public domain, which they have done anyway to understand these sourcing relationships. This is another example of the kind of due diligence covered in the *US Reporting Requirements* that is and should be done by companies entering high-risk environments like Myanmar. The *Reporting Requirements* are therefore better viewed as a safeguard than as a burden.

The *US Reporting Requirements* have also played a valuable role in prompting awareness of and discussions about responsible business conduct in multiple ways. Our partner organization in Yangon, the Myanmar Centre for Responsible Business (MCRB), which was established by and is a continuing partner of IHRB and the Danish Institute for Human Rights, has used the *US Reporting Requirements* and the reports produced pursuant to them in a number of ways:

⁶ 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>.

⁷ 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>.

- in its engagement with both US companies and those from other jurisdictions with Myanmar operations, including Asian companies.
- in its engagement with Myanmar companies - particularly those on the US SDN list – as a benchmark to encourage greater transparency.
- in building capacity with local civil society and government about responsible business conduct standards and what the application of those standards looks like in real life in a Myanmar context.
- in multi-stakeholder discussions between companies and Myanmar communities, civil society and government.
- in spreading knowledge about responsible business conduct through panel discussions, blogs and media commentary.
- as a source for some of the questions in 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 and has sparked a race to the top among some of the largest Myanmar companies to become the most transparent.⁸
- in cooperation with the Business and Human Rights Resource Centre (BHRRC)'s Myanmar Foreign Investment Tracking Project which sent questionnaires to 120 companies, asking them *inter alia* questions about their human rights policies and practices in Myanmar.⁹ US companies which 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.
- Along with IHRB, in its engagement with investors interested in understanding the risks for companies investing in Myanmar.

In summary, the value of the reports in promoting good governance and responsible business conduct in Myanmar therefore extends beyond the reporting company itself to assisting in improving due diligence and responsible business practice among other investors in Myanmar, including companies – both from the US and elsewhere – and thus contributes to leveling the playing field. The *Reporting Requirements* has served as an important and practical example for building the capacity of Myanmar government officials and civil society on responsible business conduct standards and importantly, what the application of those standards look like in the Myanmar situation. They have had a multiplier effect in sparking other initiatives on transparency about business practices among Myanmar businesses as well as businesses from a wide range of other countries. And finally, they have helped improve the knowledge of Myanmar society about the benefits of rejoining the international community, by highlighting the benefits that international investment can bring to the country when conducted in line with international standards.

The *Reporting Requirements* are still necessary and will remain so for some time to come. Although Myanmar has made significant progress on human rights and

⁸ Myanmar Centre for Responsible Business, <http://www.myanmar-responsiblebusiness.org/pwint-thit-sa/>.

⁹ Business and Human Rights Resource Centre, <http://business-humanrights.org/en/myanmar-foreign-investment-tracking-project>.

made greater efforts to improve good governance, these processes will take years to come to fruition after 50 years of military governments. Human rights abuses involving the private sector still occur, notably in the extractives sector but also in other industries. These include arbitrary expropriation of land; excessive use of force against peaceful protestors; and labour rights abuses. Moreover, development of rigorous regulatory frameworks for the private sector and capacity building for civil servants have just begun and will take time. The *Reporting Requirements* are necessary for companies in this high-risk environment in the absence of more robust policies, laws and practices in Myanmar.

II. Responding to Key Questions in the Federal Register Notice

- ***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 – during the beginning of the reform process in 2011, and in continuing to support and deepen a shift to democracy following the latest elections in 2015. Promoting responsible investment supports this objective, as responsible investment promotes not only the reflex of transparency but also continues to ingrain a far more open involvement of all its stakeholders, including affected communities and civil society, in rebuilding their country.

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 objectives.

- ***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 information requested in the *Reporting Requirements* should be collected as a matter of standard risk management by companies, particularly those operating in high risks contexts such as Myanmar to understand the risks of entering and operating in the country.

The *US Reporting Requirements* are clearly based on and aligned with international standards that US companies are already expected to apply anyway. The UN Guiding Principles on Business and Human Rights,¹⁰ and the

¹⁰ Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights, 2011, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

revised OECD Guidelines on Multinational Enterprises,¹¹ from which the *US Reporting Requirements* draw, have now been in place for five years. There is extensive international guidance and support available on the processes set out which also reduce the need for businesses to start from scratch.

In addition, the burden of reporting is decreasing rapidly with the increasing range of relevant information available on Myanmar to help supplement company due diligence. Along with our partner MCRB, IHRB conducted and published a sector-wide impact assessment (SWIA) on the oil and gas sector already in 2014.¹² The SWIA report provides background and field research findings on many of the issues which require reporting in the *US Reporting Requirements*, together with recommendations to business and other stakeholders. Many oil and gas companies have informed us that they have made use of this report. This SWIA should therefore facilitate the due diligence which companies in Myanmar need to conduct, reduce the burden on individual companies, including US companies, and facilitate the production of quality reports under the *US Reporting Requirements*. IHRB, MCRB and our partner the Danish Institute of Human Rights, have continued to provide such in-depth reports on the tourism,¹³ ICT¹⁴ and now mining¹⁵ sectors in the country, in addition to other topics relevant to the *US Reporting Requirements* such as a briefing for business on land.¹⁶ Since the *US Reporting Requirements* were first adopted, a wide range of other organisations from NGOs to commercial research services have published widely on Myanmar, making information far more readily available.

In conclusion, these requirements are therefore not a significant extra burden to US businesses.

- ***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 allow for comparison. 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. There should be feedback by the State Department or a third party to incentivise more comprehensive and better reporting.

As elaborated below, there is no requirement to report for companies making significant sales to Myanmar, particularly in sectors with a history of poor governance and human rights abuses such as mining, most notably jade. This

¹¹ OECD, *OECD Guidelines for Multinational Enterprises*, 2011 edition, <http://www.oecd.org/daf/inv/mne/48004323.pdf>

¹² <http://www.myanmar-responsiblebusiness.org/swia/oil-and-gas.html>

¹³ <http://www.myanmar-responsiblebusiness.org/swia/tourism.html>

¹⁴ <http://www.myanmar-responsiblebusiness.org/swia/ict.html>

¹⁵ <http://www.myanmar-responsiblebusiness.org/swia/mining.html>

¹⁶ <http://www.myanmar-responsiblebusiness.org/news/briefing-paper-land-issues-myanmar.html>

means that there are gaps in the information being collected about US companies' business practices such as the provision of heavy mining machinery to the jade industry, whose use could contribute to 'corruption and misuse of public funds, the erosion of public trust, and social unrest in ethnic minority areas or further human rights abuses and repression by the government and military'.¹⁷ Huge jade deposits in Myanmar are mostly located in Kachin State, which is an ethnic minority area.

- ***Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.***

IHRB is conscious of the need to ensure the reporting burden is proportionate. However given the value of the reporting, we propose that if the burden on SMEs is of concern, one option could be to raise the minimum threshold investment for required reporting, for example to \$1million rather than \$500,000. Given that even an SME may cumulatively invest \$1million over many years, we suggest that the *Requirements* could also include a time-frame for calculating the threshold amount to be invested e.g. at least \$1 million during a period of two years.

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

The recommendations below are provided in the order and according to the heading in which they appear in the *US Reporting Requirements*.

1. Expanding the Scope of Transactions Subject to the Reporting Requirements

➤ **Reporting on Significant Sales Activity and Customers:** We invite the State Department to consider introducing a reporting requirement for US companies selling to Myanmar that have sales above a significant sales revenue threshold. This could include information about significant sales, significant customers and use of products or services sold. We note that several US companies are selling capital equipment, for example in the mining sector, and that the consequences of the use of this equipment have resulted in human rights and governance concerns, particularly in the jade industry. This could be either a general requirement for companies with sales revenue above a certain threshold (for example over \$500,000 in sales revenue for the year or purchases by Myanmar based customers of over \$500,000), or operating in selected sectors. This would improve transparency in significant sales and also would be consistent with the Know Your Customer due diligence which such companies should be undertaking anyway.

¹⁷ US Federal Register, '60-day Notice of Proposed Information Collection: Reporting Requirements for Responsible Investment in Burma', A Notice by the State Department 25 November 2015, <https://www.federalregister.gov/articles/2015/11/25/2015-30054/60-day-notice-of-proposed-information-collection-reporting-requirements-for-responsible-investment>.

For example, Caterpillar Inc has not submitted a report, presumably as it does not have on-the-ground investment in Myanmar and works with independent dealerships. 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 Specially Designated Nationals, 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 the United Wa State Party (UWSP, the most powerful ethnic nationality armed group and on the US sanctions list), with substantial interests in Kachin State's lucrative jade mines.¹⁸

➤ **Including other types of business relationships:** The *Reporting Requirements* should also take into account the complex nature of business relationships, and in particular some of the examples of relationships that have now become evident in Myanmar. 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 \$500,000 per year, or a Myanmar purchaser buys more than \$500,000 from the US supplier.

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

➤ **Include a "comply or explain" requirement:** As highlighted in IHRB's 2012 submission, companies are not required to explain why they do not have or whether they will develop policies and procedures on the topics covered by the *Reporting Requirements* -- human rights, worker rights, anti-corruption, and environmental policies and procedures. Given the country's history of human rights abuses related to the private sector, 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 operations in Myanmar. 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, as noted above, the *US Reporting Requirements* are based on the UN Guiding Principles on Business and Human Rights which were new at the time 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

¹⁸ 'Lords of Jade', Global Witness, pp 22 – 25, December 2015.

international standards. Therefore, the expectation that companies adopt such commitments and implement them has become much more a part of international practice for US companies operating abroad than it was when the *US Reporting Requirements* were first adopted. 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 requirements on the issue of business and human rights. 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

➤ **Revise Question 7a as follows:** ‘A concise summary of any policies, procedures used to ascertain land or other real property ownership, use rights, dislocation, resettlement, or other claims, ***including the history of land ownership, use and acquisition in the area of operations***, and an explanation of how those policies were implemented for each land purchase, use, or lease transaction’. If needed, the section could provide additional guidance on the need to conduct enhanced due diligence when acquiring land; not to rely solely on land titles; to pay particular attention to land expropriated by the government as this is where land disputes most commonly arise; and establish a relationship with the affected community at an early stage.

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,¹⁹ 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 out-dated policies and laws have made them difficult to resolve.

Companies should ensure that they have policies and procedures to obtain accurate information about the history of land ownership and acquisition in their areas of operation. This is particularly important because establishing valid land user rights in Myanmar is very difficult, leading to disputes and protests. Companies also need to put effective accessible operational grievance mechanisms in place, so that workers and communities can register their complaints with no fear of retaliation and with resolution within a reasonable timeframe.²⁰

¹⁹ ‘Land, Myanmar Centre for Responsible Business Briefing Paper’, March 2015, <http://www.myanmar-responsiblebusiness.org/pdf/2015-04-02-LAND-Briefing.pdf>.

²⁰ For details about recommendations to companies on land acquisition, see Myanmar Centre for Responsible Business, ‘Land Briefing Paper’ pp 25 – 29, March 2015, <http://www.myanmar-responsiblebusiness.org/pdf/2015-04-02-LAND-Briefing.pdf>.

4. Reporting Requirement 10, Military Communications

➤ **Clarifying and limiting the scope of “meeting” to focus on more significant interactions with the military:** The wording of Question 10 is potentially wide-ranging and could capture routine contacts: ‘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?’ As an example, company drivers of delivery trucks may be stopped at checkpoints, and interact with armed groups or the armed forces. It is not clear whether this constitutes a ‘meeting’ or not. This language should be revised, so as to focus on agreements, partnerships and support to the military, and the meaning of ‘meeting’ made more clear, e.g. meetings at managerial level.

We would be happy to answer any additional questions about our submission. We thank the US Government for its leadership on this issue and remain committed to supporting responsible business in Myanmar.

Sincerely,

A handwritten signature in black ink, appearing to read "John Morrison", with a horizontal line extending to the right.

John Morrison
Executive Director