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Dear Director General

Submission on the drafting of Rules implementing the Myanmar Mining Law

Thank you for offering the possibility for stakeholders to input ideas into the drafting of the Rules to implement the Myanmar Mining Law and the rules for implementing the Myanmar Gems Law. We welcome the Mines Ministry's openness to comment.

While the following suggestions are made with the Mining Law in mind, they should be taken as suggestions also for the Rules on the Gems Law, where appropriate.

Myanmar Centre for Responsible Business (MCRB) is currently undertaking a sector-wide impact assessment (SWIA) on the mining sector in Myanmar. This involves field research at a number of mine sites (gold, artisanal gold, tin, tungsten, limestone) through Myanmar, as well as key informant interviews and analysis of Myanmar and international policies, laws and standards.

Our recommendations, which are attached in Annex, are based on emerging insights from this work, and international good practice.

They focus on the following four themes:

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We are referring in our recommendations to the International Labour Organisation (ILO) Conventions relevant to the mining sector, particularly Convention 176 (Safety and Health in Mines Convention, 1995) and Recommendation 183, (Safety and Health in Mines Recommendation, 1995). We have also relied on the IFC's Sustainability Framework, including the Environmental Health and Safety Guidelines, and the work of the International Council of Minerals and Metals (www.icmm.com),

Our suggestions are not exhaustive. We would also like to encourage you to take advice from organisations such as the Natural Resource Governance Institute for expertise in international best practice with regards to licensing and fiscal regimes and mining sector governance and transparency, and the World Bank/IFC.

We are available for follow-up discussions and would be happy to share the research we are currently conducting, which will result in the publication of the mining sector-wide impact assessment later this year. This SWIA will further build on these recommendations.

Yours sincerely,

Vicky Bowman

Director

MCRB RECOMMENDATIONS FOR INCLUSION IN THE MINING LAW RULES (AND WHERE APPROPRIATE THE GEMS LAW RULES)

1. Subsistence and artisanal mining

- There has been a lack of clear regulation and variable implementation with regards to the 'subsistence level' category of licensing over previous years. We recommend making licensing and taxation easy and accessible to artisanal miners to encourage increased formalisation of the sector while providing a more secure livelihood for some of the poorest communities. In particular, simplify the procedure (including limiting any travel required) to obtain subsistence-level licences needed to not create disincentive to apply for one. The onerous approach in the draft law for artisanal (hand-dig) oil wells should NOT be followed. Rather, modern rules for artisanal mining should be adopted which can then act as a model for licencing artisanal oil wells, or even explicitly include artisanal oil in their scope.
- Artisanal mining is often entered into as an alternative when other livelihoods (e.g. farming) become unviable, for various reasons such as drought, flooding, conflict or a loss of land. If the Rules were to increase barriers to practice artisanal mining in a safe, authorised and as sustainable way as possible, they would risk making the livelihood of already poor communities untenable.
- Applying harsh penalties such as prison sentences, fines and the confiscation of tools and livestock from artisanal miners may not yield increased levels of compliance with mining regulation, especially in communities where artisanal extraction is undertaken by necessity rather than by choice. Strict penalties on illicit extraction may instead serve to drive artisanal extraction and its wider value chain (downstream sales of tools and chemicals, upstream sales of ore) further underground, as well as challenging the livelihoods of poor artisanal miners and their families.
- While the Rules may not be the most appropriate place to do so, we encourage reference to be made to how best to provide alternative livelihoods in traditional mining areas where mining land is being awarded to companies.
- If the law is to make reference also to hand-dug artisanal oil extraction, this should be clarified. If this is the case, we recommend also easing the burden of obtaining permits for this activity.
- It is not uncommon for river dredging for alluvial deposits to be a form of artisanal extraction in Myanmar. The regulatory framework should reflect the reality that mining is often carried out in and under water, and account for the licensing, environmental and health and safety related conditions

this implies. Furthermore, given the issues related to flooding and landslides experienced in Myanmar, occasionally as a direct or partial result of mining activities the environmental impacts of water-based artisanal extraction should be assessed.

- Thought should be given as to how water-based artisanal mining may be allowed in a safe way which does not cause additional erosion of riverbanks with increased risk of flooding during the rainy season. The Rules may usefully indicate how the hydraulic practices currently used by artisanal and small-scale miners, and which are thought to cause increased siltation and soil erosion, could be restrained without undermining people's livelihoods, since that may have the unwanted effect of pushing them into other, potentially more dangerous and environmentally damaging forms of mining or other resource extraction.
- The Guide 'Working Together: **How large-scale mining can engage with artisanal and small-scale miners**' by the ICMM, World Bank/IFC, CommDev and Communities and Small-Scale Mining (CASMI) <http://www.icmm.com/document/789> is a useful source of good practice on artisanal mining.

2. Labour regulation and occupational health and safety

- The draft Mining Rules and Myanmar's current and planned legal framework on labour should be reviewed together to ensure that the emerging Labour Law framework can address the specific circumstances of mining. It should be carefully considered whether labour issues specific to the mining sector should be addressed in the Mines Rules, or should be addressed as sectoral requirements i mainstream labour law. Our preference is for the later so as to ensure consistency and clarity. If an approach of separate sectoral labour rules is followed, this should be made clear in the mainstream labour law, to avoid confusion.
- We advocate the inclusion of provisions which allow better enforcement of requirements to report. The current Rules do not require reporting on less serious accidents, occupational disease and dangerous occurrences. ILO Convention 176, art 5, 1.1 (d) encourages '*...the compilation and publication of statistics on accidents, occupational diseases and dangerous occurrences, each as defined by national laws or regulations*'. The new Rules could include a requirement to publish more health and safety statistics, subject to privacy concerns.
- Article 13 (c) of the current Mines Rules stipulates the need for the permit holder to make provisions "*...for safety and the prevention of accidents in a mine and their implementation*". This requirement could be expanded to include the need for a permit holder to also be directly responsible for the mine's safety management plan and to continuously monitor and report on its implementation, including reporting where accidents have occurred, how they were dealt with and steps taken after the occurrence to prevent re-occurrence.
- Connected to this, it may also be useful to specify whether the '*power of relevant authority to temporarily or permanently suspend mining activities*' also refers to bans made on health and safety grounds. If this provision extends to health and safety transgressions, it may also be helpful to clarify the point at which such action becomes legitimate i.e. after a first violation, continued non-compliance, intentional malpractice or other thresholds.
- ILO Convention 176, which deals specifically with health and safety in mining, reads "*Recognising that it is desirable to prevent any fatalities, injuries or ill health affecting workers **or members of the public**, or damage to the environment arising from mining operations;...*". The ILO Convention thereby extends to the protection of surrounding communities. In addition, Art 7 of C-176 stipulates that '*Employers shall take all necessary measures to eliminate or minimize the risks to safety and health in mines under their control, and in particular, (...) (b) ensure that the mine is commissioned, operated, maintained and decommissioned in such a way that workers can perform the work assigned to them without endangering their safety and health **or that of other persons.***'

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- While Article 13 (f) of the current Rules requires operators to report accidents, loss of life and bodily injury received due to such accidents in the mine. However, the clause remains silent on any accident or bodily injuries which relate to operations but do not occur in the mine. Such injuries may include accidents in worker residences or affecting support staff who do not work in the actual mine site. It may also include health and safety impacts building up over time, which have their origin not on the mine site but in, for example, handling downstream products, or which affect communities living in the vicinity. This clause in the revised Rules should therefore reflect the broader scope above.
- Article 33 of the current Rules stipulates that trespassing onto Mineral Reserve Area or Gemstone Tract '*...without permission shall on conviction be punished with imprisonment for a term which may extend to 6 months or with fine which may extend to kyats 5,000 or with both.*' In order to prevent instances of arbitrary arrests of trespassers, including violent apprehensions of children and minors, spelling out the enforcement standards and practices related to this clause is recommended. In practice, increased specificity may be especially important in areas where mine sites are adjacent to inhabited areas and where artisanal miners, including women and children, work near or on concession land, or have done so recently.
- Article 89 of the Rules currently stipulates that women should not be employed to work in the underground work sites of any mine except for health and social services. This discrimination in the regulation of women's role in the mining industry should be addressed. The underlying principle should be equal pay for equal work and equal access to jobs in mining, regardless of gender, ethnicity, race or similar. Women work in underground mines in other countries.
- The current Rules (Article 92) say that 'Children shall not be employed in any mine.' However the Myanmar definition of child (under-16) as contained in the 1993 Child Law is currently under revision to bring it in line with international standards (under-18). Under the current Article 94, no person under the age of 18 is currently allowed to work in a mine unless he is in possession of a certificate issued by the relevant Health Department certifying his fitness for the appointment and his age. It is noted that Myanmar is also in currently drawing up the Hazardous Work List under ILO Convention 182 on the Worst Forms of Child Labour which it is believe will be a part of a revised Child Law. In view of this, and to ensure conformity with international best practice and that no minors may be exposed to hazardous work in the mining sector, we suggest that the new Rules explicitly ban all employment of children under 18.
- Chapter XVIII, Article 95 (d) specifies the maximum time for which miners are allowed to work underground in a given day i.e. eight hours. The article states that a system of underground shifts may be used, due to the requirements of the work, and that each individual shift may be no longer

than the prescribed eight hours. The article does not, however, clearly stipulate the minimum period of rest required between 8 hour shifts. Total working hours and minimum amount of intervening rest time should be made explicit in line with international best practice for underground mine labour.

- Since work in riverways or other bodies of water is not uncommon in the Myanmar mining sector, the revised Rules should consider addressing this also, and imposing a maximum time limit on activities in water. When formulating this rule, drafters should be mindful of the chemicals to which workers are exposed while working in water, and the adequacy of training, equipment and general health and safety conditions in water-based mining, including that of divers and the general public where river dredges or other machinery interacts with barges in narrow waterways.
- In Chapter IX, which concerns the 'Taking of Action by Administrative Means', the article 28 stipulates that the licence of the permit holder and/or all or some of the activities carried out under the licence may be suspended if any worker fails to comply with “...*any of the of the orders or directives made under this Law*”. This appears to be so broad as to be unenforceable. The scope of employer and operator liability in this case seems potentially excessive to the point that it may discourage enforcement of the law. It may instead be more useful to have a more specific and targeted scope of liability for the permit holder and the person(s) managing it on their behalf, and to target certain strategic areas of non-compliance (e.g. egregious labour conditions, known transgressions of certain key provisions) rather than make any violation of any tenet of the law by any individual including junior workers potentially the cause for licence cancellation.
- ILO Recommendation 183, article 11 recommends for national law and regulation to specify that mining sector employers should 'take appropriate measures for the protection of workers working alone or in isolation'. In the context of the Myanmar mining sector, this wording and the responsibilities of the employer may be understood to extend to include sub-letters who mine concessions held by others and sell ore (processed or unprocessed) back to the permit holder. The increased formalisation of such ties of employment would be welcomed and would help protect the labour rights of sub-letters working independently on the sites held by third-party permit holders.
- The IFC's Environmental Health and Safety Guidelines also provide standards which could be referred to on Mining related EHS matters, and should be a reference point for national Mining Standards (see below)¹.

¹ IFC (2007) [Environmental, Health and Safety Guidelines for Mining](#)

3. Community Engagement and Development

a) Engagement and grievance handling

- Mines are a long-term business with a significant footprint in the community. A fundamental requirement for a successful mining operation is to obtain and retain a ‘social licence to operate’ (i.e. a ‘licence’ that goes beyond a legal and regulatory license to operate, and constitutes at least tolerance, if not acceptance, by local communities of mining operations). This is something which is best achieved by respecting the rights and culture of local communities; pursuing effective, consistent and transparent community engagement; and having in place an operational grievance mechanism which meets international standards. Further good practice guidance is available from the International Council of Mining and Metals (ICMM)².
- We therefore recommend that the Rules include an explicit requirement on the licence holder to respect human rights, including of workers and communities impacted by the mine, and the specific rights of indigenous peoples (ta-ne tain-yin-tha)³.
- Where mines are required by the Environmental Conservation Law and associated Environment Impact Assessment (EIA) Procedures to undertake EIAs and establish and implement an Environmental Management Plan (EMP), the mitigation of these adverse human rights impacts should be addressed in the EMP.
- To meet the need for transparency, we also recommend that the Rules include a requirement for an annual sustainability report.
- Furthermore, in view of the importance of ensuring that rights-holders have adequate remedy for adverse impacts on their human rights we recommend that the revised Rules include a specific requirement for all mines to have an operational grievance mechanism
- These two last points could be met by the inclusion in the Rules of language which requires licence holders to:
 - a) **Publish, within six months of the end of the company’s financial year, an annual sustainability report in Myanmar language**, (and other languages where appropriate). This report should address how the company has invested responsibly in Myanmar. It should be published on the company website. The web link for the report should be notified to the Mines Ministry and DICA.
 - b) **Establish, within six months of receipt of the licence, an effective grievance mechanism designed in collaboration with affected stakeholders**. This should be notified to DICA, and the Mines ministry, together with the name and contact details of the responsible officer. This mechanism should be publicised on the company’s website as well as being accessible to those who the company may affect. A short report on the implementation of the grievance mechanism

² ICMM (2015) [Understanding company-community relations toolkit](#)

³ See also ICMM (2015), [Indigenous Peoples and Mining Good Practice Guide](#) and MCRB’s Briefing Paper on [Indigenous Peoples’ Rights and Business in Myanmar](#) (2016, available in English and Burmese)

should be included in the annual sustainability report.

- b) Section 100 (j) of the Mines Rules currently in force states that prior to underground blasting, due warning should be given *'to any person in the vicinity and shall guard every entrance to the place where the blasting is about to be done'*. In addition to this prescription, MCRB interviews conducted with communities living in the vicinity of quarry sites has indicated that not only underground blasting, but also the surface blasting is disruptive to communities and that prior notice of blasts is desirable.

b) Community Development

- MCRB is aware that the Mines Ministry is interested in understanding more about **'corporate social responsibility' (CSR)**. We would like firstly to highlight that – because of confusion, and multiple understandings about what 'CSR' means - this term is not generally used by major international mining companies, such as those which are members of the International Council of Mining and Metals (www.icmm.com), the apex business body for responsible mining practices, or by the World Bank/IFC or United Nations.
- The term used by the ICMM to describe how mining companies engage with and invest in communities to create shared value is **Community Development** and we therefore recommend that any provisions in the Mining Rules relating to the issue are placed under the sub-heading 'Community Development'.
- Mining companies who undertake effective community development programmes can use these programmes to address impacts and build relations with local communities, as well as supporting their own business needs, for example for recruiting local employees. International good practice guidance is available on strategic investment in communities⁴.
- The Mining Rules should there encourage companies to implement community development programmes designed together with communities, to meet their shared needs.
- The rules should also facilitate the ability of company and communities to negotiate one or more 'community development agreements'⁵ (CDA), should both sides consider this appropriate. Such a CDA might also include provisions concerning community monitoring of impacts, and grievance handling procedures.
- We do not recommend repeating the approach taken in the renegotiated contract for the Letpadaung Copper Mine Project which requires '2% of net profits to be spent on community investment'⁶. Compulsory spending commitments can lead to misallocation of resources,

⁴ See for example ICMM (2012) [Community Development Toolkit](#), IFC, [Strategic Community Investment: A Good Practice Handbook for Companies Doing Business in Emerging Markets](#) and IIED, "[Shared Value, Shared Responsibility](#)" on opportunities in the extractive sector's complex supply chains

⁵ Best practice on CDAs can be found in the Extractives Industries Sourcebook, "[Good Practice Note on Community Development Agreements](#)".

⁶ It should be noted that such a compulsory 2% approach, in addition to being, in effect, an additional tax for companies, is significantly higher the average global spend on community development by mining majors such as AngloAmerican, BHP Billiton and Rio Tinto. These companies estimate they spend on average closer to 1% on Myanmar Centre for Responsible Business, 15 Shan Yeiktha Street, Sanchaung, Yangon, Myanmar

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corruption and waste. It can also drive conflict between company and communities, as well as between communities, if some areas benefit from significant spending and other more distant ones do not. It can drive inward migration into areas which are benefitting from community development, which in turn can drive conflict.

- Compulsory spending requirements can also put companies in a position where they are unable to make payments demanded of them by governments or communities because of their business integrity and governance rules. Alternatively, this money may drive corruption if companies fund activities which provide direct or indirect benefit to particular decision-makers.
- Companies may also attribute spending to this 2% which is actually for costs they are legally obliged to undertake under their Environmental Management Plan, to manage environmental and social impacts.
- Linking the compulsory spending to profits may discourage them from contributing to community development at the earlier stages of the mine life, at a stage where profits are not made, but investment in community infrastructure, skills development and supply chain development is desirable to build the social licence to operate.
- Compulsory spending requirements can also lead to companies being drawn into roles such as provision of health and education services. These services are the role of government which has a 'duty to protect' by providing services on the basis of full collection of revenue from the entire tax base, including the mining sector. Where communities become dependent on companies for such services, this presents a risk in situations where the mining company is not making a profit due to commodity cycles or other reasons, or withdraws or closes the mine leading to closure of schools and health facilities.
- Compulsory requirements for companies to spend money on community development should not be used as a substitute for national debate and decisions on extractives industries revenue sharing, and if there is any plan by the Myanmar government to introduce them, this should be the subject of a transparent and wide-ranging debate with business and civil society stakeholders.

community development. In some cases they make an explicit commit to a global figure, but the exact amounts will vary across their operations.

4. Environmental impact

- Articles 106/107 of the current Mining Rules are inadequate in view of the significant environmental impacts of mining, and require a complete revision.
- We recommend the drawing up by the Mines Ministry jointly with the Ministry of Environmental Conservation and Forestry (MOECF) a set of industry-specific Standards under Article 7 and 10 of the 2012 Environmental Conservation Law for mining-related environmental impacts including on Water use and quality, Wastes, Hazardous materials (including cyanide), Land use and biodiversity, Air quality, Noise and vibrations, Energy Use, and Visual Impacts
- These should be based on the IFC (2007) [Environmental, Health and Safety Guidelines for Mining](#). The focus should be on prevention.
- We note that the current Rules (Chapter V, articles 16 and 17) require the permit holder to coordinate with the relevant government department in order to use public water. During the course of our field work, MCRB has observed that there are currently issues when implementing this at the regional level, in particular in terms of ensuring that the entity extracting minerals is charged the appropriate rate for their water usage. The practical implementation of this requirement in the current Rules needs reviewing and addressing within the above-mentioned standards and EMPs.
- The new Rules should also ensure that licence holders are required to meet international standards for mining-specific processes such as tailings dams, management of spills, closure and post-closure, and rehabilitation, and that these will be monitored and the financial and criminal penalties for infractions will be an incentive to meet performance requirements.
- While Article 106 of the current Rules offers some guidance as to the responsible handling of liquids wastes, tailings and fumes, the Rules in their present form are silent on the prevention of spills. Over time, spills of various liquids and oils may cause soil erosion, which can result in landslides. While the laboratory tests mentioned may be helpful, daily conduct by workers on sites is also important and would in the case of spills of oils from machines etc. not be caught by this clause.
- MCRB recommends that for large/medium-sized mines, the environmental impacts of mining operations are primarily managed through the process of undertaking EIAs, the drawing up of Environmental Management Plans based on the above-mentioned standards, the issuance of Environmental Compliance Certificates, and the implementation and monitoring of Environmental Management Plans and the contractual commitments therein. The EIAs/EMPs should all be public documents, to facilitate self- and community monitoring. IEE/EIAs should be required at specific phases of the project cycle as the shape of the mine becomes clear. An IEE/EIA should NOT be a requirement in advance of applying for a licence. However licences which are granted should be conditional on activities meeting all environmental and other permitting requirements.