

Addendum to Joint Submission on Draft Investment Rules by EarthRights International, Myanmar Centre for Responsible Business, WWF and Oxfam International

20 February 2017

The following commentary on the Myanmar Draft Investment Rules corresponds with **Tranche 3** of the Draft Rules. It should be read together with the Joint Submissions submitted by the named organizations on Tuesday 7 February 2017 (appended below).

We note that the following chapters in our Joint Submission have not been addressed in tranche 3, and we would like them still be taken into account when revising the Draft Rules (with appropriate adjustments made for specific rule numbers that have changed between versions).

- Chapter 2: Investment Permit Procedure
- Chapter 3: Endorsement Procedures
- Chapter 4: Land Rights Incentives (now Land Rights Authorisations)
- Chapter 6: Public Input on Investment Submissions
- Chapter 8: One Stop Service Centre
- Chapter 9: Proposal Assessment Team
- Chapter 11: Grievances from Communities
- Chapter 12: Company-level Operational Grievance Mechanism
- Chapter 13: Additional commentary
- Annex 1: Draft Guidelines on Responsible Investment in Myanmar
- Annex 2: Suggested content for Responsible Investment Report

We note that the issue of co-ordination with Environmental Laws and Procedures have been properly addressed in tranche 3 (rule 203). As such, Chapter 7 of the Joint Submission may be disregarded. However the language could usefully be clarified further in English (and presumably in Myanmar) to make clear that, when issued prior to the completion of any assessments under the ECL, a MIC Permit is conditional on receipt of appropriate environmental clearances.

Chapter 1, which provided feedback on the consultation rounds, may also be disregarded insofar as consultation rounds did take place regarding Restricted Investments, Prohibited Investments, and Promoted Sector Investments. We would like to highlight, however, that at the time of the second consultation, the third tranche of Rules was not made available in the Myanmar language - once again undermining the consultation process, especially for local groups.

Specific textual amendments for the finalisation of Tranche 3 are proposed below.

JOINT SUBMISSION: PROPOSALS FOR INCLUSION IN THE FINAL DRAFT

Indigenous Peoples

In order to highlight the important of Investors complying with existing Myanmar law and respecting the rights of Indigenous Peoples, we ask that the following points be added to the Comments column concerning **Types of Investment and Proposal Assessment**

Suggested language for COMMENTS column:

Rule 11 *In relation to Rule 11 (c), the Investment shall also be considered according to Article 5 of the 2015 Law on the Rights of Protection of Ethnic Nationalities.*

Rule 69 *These guidelines shall inter alia take into account the Law on the Rights of Ethnic Nationalities, and Article 5 thereof*

Environmental Protection

Rule 13(b)

The types of areas in 13 (b) should be amended to include the following areas:

- “the project is located within a designated or proposed protected area, forest reserve area, Key Biodiversity Area or any other area that has been identified as important for the provision of ecosystem services as well as cultural heritage sites and natural heritage sites, cultural monuments and natural areas stipulated under any existing law, including the Environmental Conservation Law;

Chapter 5: Transparency Provisions

Summary of proposals (rule 39)

- Rule 39(a) states that as part of the proposal summary, 'the investor' must be specified. Without further direction, there is a risk that this would not include specific information about the identity of the investor. This type of information is crucial for CSOs and local communities so that they may conduct stakeholder analyses and understand the nature of the project in the early stages of investment. It will also allow civil society to undertake research about the investor, which can be submitted to MIC for consideration before any approval is given (see chapter 6: Public Input on Investment Submissions). Therefore, under subsection 39(a), investors should be directed to include information regarding:
 - whether the investor (or its parent company) is domiciled/incorporated in a foreign country (and specify that country);
 - details of any substantial shareholders (>10%) / the parent company of the investor;
 - the contact information of a point person for the proposed investment.
- The term 'significant interest' in rule 39(a) is also not defined: The Rules should give a specific percentage ownership stake that classifies as 'substantial' (our suggestions is any interest in the investment over 10%).

We welcome that the language in Rule 56 has changed from 'may' to 'will' regarding MIC's obligation to publish proposal summaries (though noting that 'shall' would be the strongest language to use in that provision). Rule 56 should also specify that this public disclosure must take place before any decisions are made with regard to the proposed investment.

Suggested language

Rule 56interests of the Union to publish. **This information shall be published within 5 working days of Proposal being accepted under Rule 60.** The Commission may also....

Assessing Proposals

Rule 70(d) In assessing proposals and in order to clarify adverse impacts,

- **"the Investor has demonstrated a commitment to carry out the Investment in a responsible and sustainable manner including by, as relevant, limiting any potentially adverse environmental and social impacts by avoiding and minimizing environmental and social impacts. A demonstrated commitment should include, but not be limited to, provision of evidence of past environmental performance; environmental policies; respect for human rights; and adoption of resource efficient technology and waste management strategies."**

Chapter 10: Reporting Requirements

(i) Report content: We welcome the introduction of Annual Reporting Requirements in rule 210. While it is encouraging to see that a permitted investor must now specify "how it has demonstrated its commitment to carry out the Investment in a responsible and sustainable manner", this is vague and could lead to investors giving only a cursory annual report. The Commission should provide guidelines on the detailed content to be included in the report (see annex 2: Suggested content for Responsible Investment Report). This could either be incorporated into the Rules, or else released by Notification shortly after their issuance.

(ii) Report transparency: the current Draft Rules do not include any obligation to publish Investors' Annual Reports. The Rules must specify that Annual Reports are to be made publicly available on the website of the Investor, with the hyperlink to be provided to the Commission at the time of their submission to enable the DICA website to link through.

It was noted in the second consultation that the Annual Reports would serve as an important tool for allowing the MIC, as well as communities, to monitor investments. An important part of this public accountability function is monitoring how investors are complying with the conditions of their Permit. This cannot be done unless the Permits (and any conditions attached thereto) as well as Annual Reports are both disclosed to the public (with appropriate provisions for withholding commercially sensitive information).

Additionally, the Draft Rules require certain matters to be disclosed to the MIC by investors holding Land rights Authorisations (per rule 211). These matters include land/building lease agreements, lease extensions, and approvals for changes of land use. The Rules should specify that these matters must also be publicly disclosed by the MIC, recognizing that enhanced transparency in land governance is a critical area of concern for land-holders throughout this country.

Suggested language

Rule 210: [additional]submit annual report to the Commission and simultaneously publish the report on their website, notifying the Commission of the relevant links. The report shall be in the prescribed form and give details of:

Myanmar Investment Rules: Commentary on Draft for Consultation [Second Tranche]

Joint Submission by EarthRights International, Oxfam International, the International
Commission of Jurists and the Myanmar Centre for Responsible Business

Tuesday February 7, 2017

1. Commentary on consultation rounds	4
2. Investment Permit Procedure	5
3. Endorsement Procedures	9
4. Land Rights Incentives	9
5. Transparency Provisions	11
6. Public Input on Investment Submissions	11
7. Co-ordination with Environmental Laws and Procedures	12
8. One Stop Service Centre	13
9. Proposal Assessment Team	15
10. Responsible Investment Reporting Requirements	16
11. Grievances from Communities	17
12. Company-Level Operational Grievance Mechanism	19
13. Additional commentary	20
Annex 1: Draft Guidelines on Responsible Investment in Myanmar	21
Annex 2: Suggested content for Responsible Investment Report (based on U.S. State Department Reporting Requirements)	23

1. Commentary on consultation rounds

EarthRights International, Oxfam International, the International Commission of Jurists and the Myanmar Centre for Responsible Business welcome the opportunity to provide written submissions on the first and second tranches of the 2017 Draft Rules.¹

While we are mindful of DICA's commitment to expediting the passage of Investment Rules, we do not believe that the prompt release of new Rules should come at the expense of meaningful consultation rounds and ensuring that civil society comments are incorporated into the Rules.

We also note that the release of the first draft of the Investment Rules were seemingly released online, in Myanmar language, on Thursday 19 January 2017, just four business days before the

¹ While the authors all share the primary objective of wanting to ensure that the new Investment Rules integrate and embed respect for human rights and the environment in Myanmar, they and their organisations may have differences of emphasis in approach or priorities. Inclusion in this paper therefore it does not mean that each of the organisations have taken a position on all of the suggestions made.

public consultation on Tuesday 24 January 2017. This is a short period of time for CSOs and other groups (especially those based outside of Yangon) to read, process and prepare to comment on the Draft Rules.

We would also like to be informed as to whether there will be any public consultation on the issuance of notifications regarding Restricted Investments, Prohibited Investments, and Promoted Sector Investments. We urge for public consultation to take place on these important matters of public interest.

2. Investment Permit Procedure

a. Investments where a permit is required

Rule 11 - Strategic Investments

Rule 11 lists six investment types which are taken to be 'strategic for the union'. The first four investment types (r11(a)-(d)) each contain a threshold expected investment value before they require an MIC permit. For example, as per r 11(c), investments to be made in a border region or conflict affected area will require an MIC Permit, only if the expected investment value exceeds \$10 million. There is a critical concern that reliance on the expected investment value, in this context, is a concept inherently open to manipulation. Investment value is not defined in the Rules, and there is no reference to standardized accounting principles which would insure that investors provide an accurate, consistent and transparent calculation of their expected investment value. There is a risk that investors could calculate their investment value in a way that deliberately places the value under the threshold amount required by the Rules, and therefore outside the scope of investments requiring an MIC Permit. It is recommended that references to 'expected investment values' be further defined in the law, and for the calculation methods to be made transparent and consistent across Investment Proposals.

Furthermore, the Rules should specify that the value of the investment (triggering the MIC Permit requirement) is the sum total of the investments within a Proposal/Project irrespective of the number of investors involved. It should also address the concern that investors may intentionally divide up their investment over time to fall under the Rule 13 thresholds.

Rule 11(c): Investments in Conflict and Border Areas

Firstly, the figure of USD \$10 million in relation to investment in conflict and border areas (r 11(c)) seems to have been reached arbitrarily. Given the importance of this provision, it is necessary that the threshold figure be based on best available data to ensure that the majority of large investments in conflict and border areas require a permit. For example, if the average investment value of large investments in conflict and border areas is \$5 million, then the figure should be modified to capture that average.

Secondly, the Rules do not expressly require any further scrutiny of investments in conflict and border areas, or consider the role of other non-government actors, including Ethnic Armed Organizations, that may be operating in proposed investment areas. This risks allowing investments in conflict and border areas that may exacerbate and fuel conflict in these areas and jeopardize the peace process.²

² For example, see <http://khrgh.org/2016/08/beautiful-words-ugly-actions-0> regarding investment in the Asian Highway

We recommend that the MIC use the Transition Period (24 months after the Rules come into effect) to undertake robust national consultations, including with Ethnic Armed Organizations (parties and non-parties to the Nationwide Ceasefire Agreement), about the extent of the MIC's power to award permits in such areas or the type of scrutiny the MIC should give to large investments undertaken in conflict and border areas. This is an area of democratic governance in Myanmar that is of utmost importance - and should be subject to national debate and participatory reform as part of the comprehensive peace process currently underway.

For example, the Rules could be amended to require a comprehensive peace and conflict assessment to be undertaken before a large scale investment is given a Permit in a conflict or border area.

To respect this peace process, we recommend a section be incorporated into the Rules, as follows:

- Permits shall not be awarded in border regions or conflict affected areas until an amendment to the Rules or the issuance of a notification has set out a process governing such awards in border regions or conflict affected areas, following an inclusive political dialogue process involving all relevant stakeholders.

The Rules should also provide that investments falling under this category may be subject to a longer period of review, given the depth and scope of inquiry that will need to be made before any investments are given a Permit in these areas.

- Rule 61 should be amended to read "the time period for the assessment of the proposal under rule 59 may be extended for investments in border regions and/or conflict affected areas."

Rule 13 - Investments with Large Potential Impacts on the Environment and Local Community

Rule 13 specifies the type of investments which are taken to have a large potential impact on the environment and the local community. The investment types listed under r13(a)-(b) are welcomed.

- The text at the beginning of Rule 13 should read: "For the purposes of section 36 (c) of the Law, an Investment is taken to have a large potential impact the environment or local community if:

The list of investment types under r13(c), which involve the rights to occupy or use land, should be strengthened to align with the 2016 National Land Use Policy, and better protect the rights of both legal and customary landholders and land-users in Myanmar:

- The threshold requirements under Rule 13(c)(a), that the compulsory acquisition cause the relocation of more than 100 individuals permanently residing on such land or comprise an area of more than 100 acres, should be lowered substantially (and should include a commentary as to how this number was reached).
- Rule 13(c)(b) should be amended to read "comprises an area of more than [100] acres and would be likely to cause involuntary restrictions on land use and access to natural resources to any person having a legal or customary right to such land use or access."
- Rule 13(c)(d) should be amended to read "comprises an area of more than [100] acres, any of which is the subject of a pre-existing bona fide claim or dispute by a person regarding legal or customary rights to occupy or use such land in a way which would conflict with the proposed investment;

- Rule 13(c)(d) should be amended to read 'would otherwise adversely impact the legal or customary right of at least [100] individuals occupying or using such land to continue to occupy or use such land.'
- In order to safeguard the rights and interests of indigenous peoples, Rule 13 should require a Permit in circumstances where the investment is "planned to be carried out on the lands or territories inhabited or used by indigenous peoples, or that will use the natural resources on those lands or territories, without reference to the number of indigenous people affected or the area of land used or occupied."³
- Rule 13(c) should contain an additional subsection, reading "investments which will potentially cause adverse cumulative impacts on the environment (including ecosystem services) and local communities, having regard to existing and future public and private projects and developments in the proposed investment area."⁴

b. Proposal Assessment Criteria

Rules 69 - 71 cover the criteria under which the MIC is to base the substantive review of investment Proposals. These are a welcome first step but could be strengthened considerably.

i. Responsible Investment

In scrutinizing the investment Proposal, Rule 69(d) directs the Commission to consider whether the investor 'has demonstrated a commitment to carry out the Investment in a responsible and sustainable manner, included by, as relevant, limiting any potentially adverse environmental and social impacts'.

- In order to further embed respect for human rights within the concept of 'responsible business', this subsection should be amended to also require that the business has "demonstrated a commitment to carry out the proposed Investment in a manner that respects human rights." (For example, whether the investor or its parent company has a stated human rights policy applicable to its global investments).

We also recommend that the Rules be amended to include 'Guidelines on Responsible Investment', which should provide a set of benchmarks on responsible and sustainable business practices to which investors must adhere. It should be made clear to investors that, in receiving a permit, they are also required to respect and uphold these guidelines, and failure to do so can be the subject of complaints submitted via the Investment Monitoring Mechanism.

The Responsible Investment Guidelines contained in Annex 1 to this submission replicate the Guidelines issued by the Thilawa SEZ Management Committee, which are provided for all companies, Myanmar and foreign, who are investing and doing business in the Thilawa Special Economic Zone, including subcontractors of investor companies (Notice No. 04/2015).

ii. Good Character and Business Reputation

In scrutinizing proposed investments, Rule 69(g) directs the Commission to consider whether the Investor is of good character and business reputation. Under the current Draft Rules, this is to be determined with regard to the matters in rule 71, which requires the Commission to consider "whether the Investor or any Associate with an involvement or interest in the Investment has committed an offence or other contravention of the law of the Union or another jurisdiction, including any environmental, labour, anti-bribery and corruption or human rights law."

³ See the legal requirement contained in article 5 of the 2015 Protection of the Rights of National Races Law.

⁴ This definition accords with the approach taken to cumulative impacts in the 2015 EIA Procedures, s63 (part 7.0).

We strongly endorse the inclusion of this Rule, and believe it is essential to protecting Myanmar against harmful investment types. It should remain in the final iteration of the Rules. It would be strengthened in practice by allowing the Commission to receive information and briefs from third parties (such as civil society) on such matters (see part 6 on Public Input below).

iii. State and Regional Preliminary Approval

While the Draft Rules contemplate some measure of decentralization to state or regional commissions, the decision-making which may be given to such commissions under the Rules is incomplete and limited to narrow circumstances (investments valued under \$5 million, e.g.).

Although one consideration under the proposal assessment criteria (r 69(h)) is whether the proposed investment accords with 'the development, security, economic, social and cultural policy objectives announced by the Government of any state or region affected by the investment', this does not require any active input from the state or regional government concerned.

Therefore, it is recommended that for all proposed investments requiring a Permit under section 36 of the Law, state and regional level governments (or state and regional Commissions) should provide a Letter of Opinion to MIC regarding the proposed investment, prior to any Permit being granted by the MIC. This Opinion should only be provided by the state and regional governments after appropriate preliminary local consultation, involving providing information to, and allowing adequate time for response from affected local populations. This safeguard would help to avoid situations in which MIC Permits are granted to investors in areas where there is significant local opposition to the project.

Establishing this Opinion framework could also help to operationalize article 5 of the 2015 Protection of the Rights of National Races Law, which states that where Indigenous Peoples (hta-nay tain-yin-tha) are impacted by a project, they shall receive complete, accurate and precise information about the Project proposed for their areas. State and regional level governments (or relevant state or regional level commissions, as established) should be required to fulfil these requirements applicable to indigenous peoples as part of the process under which they issue an Opinion on the proposed investment.

If the Opinion takes a negative view on the proposed investment, the MIC should be directed to reconsider the issuance of a Permit (or, perhaps be directed to submit the proposed investment to Cabinet).

iv. Indigenous Rights Protections

As noted in Part 2 above, we suggest that a Permit should be required in circumstances where the proposed investment is planned to be carried out on the lands and territories of indigenous peoples, or will affect the natural resources on those lands or territories.

This was a critical issue raised by local CSOs during public consultations on 24 January 2017, and should be addressed in the rules.

The Proposal Assessment Criteria should be amended to ensure that any such investments will be carried out with due respect for indigenous rights and adherence to the principle of Free, Prior and Informed Consent. An additional subsection should be added to rule 69, reading:

- 'If the proposed investment is likely to affect the land, territories or natural resources traditionally owned, used or occupied by indigenous peoples, the Commission shall consider whether the investor has demonstrated a commitment to respecting the rights

of indigenous peoples, including adherence to the principle of Free, Prior and Informed Consent.⁵

The inclusion of this important language would help to give substantive meaning to section 65(a) of the Law, that requires investors to 'respect and comply with the traditions and culture of the national races in the Union'.

In addition, any Permit issued for an investment that is likely to affect Indigenous Peoples should be made expressly conditional on the investor's adherence to FPIC at all stages of the life cycle of the investment. This should be implemented by amending Rule 139(c), which states that 'every Approval is granted subject to continuing compliance with all applicable laws'. A subsection should be added, to read:

- 'If the proposed investment is likely to affect the land, territories or natural resources traditionally owned, used or occupied by indigenous peoples, the Approval is granted subject to the investor's adherence to the principle of Free, Prior and Informed Consent at all stages of the investment.'

3. Endorsement Procedures

a. Endorsement Application Assessment Criteria

It is well noted that the Endorsement assessment procedure is intended to be 'streamlined' under the new framework (and potentially subject to further de-centralization and delegation within MIC). Despite this, the endorsement application assessment procedure should still incorporate minimum safeguards to ensure that only responsible and sustainable investments receive land and tax incentives. It would be contradictory for the Rules to create a system that provides incentives to investments that do not meet even the most basic standards regarding responsible business conduct given that this is one of the three principle objectives of the Law.

The Endorsement application assessment criteria should mirror the core elements in the Permit Application Assessment Criteria (rr. 69 - 71) that work to ensure responsible business conduct. Rule 89 should be amended to include:

- 'whether the investor has demonstrated a commitment to carry out the investment in a responsible and sustainable manner, including by, as relevant, limiting any potentially adverse environmental and social impacts, and has demonstrated a commitment to carry out the proposed Investment in a manner that respects human rights.'
- 'whether the investor is of good character and business reputation, having regard to the considerations in Rule 71.'

4. Land Rights Incentives

a. Clarifications

Firstly, it is recommended that the 'Land Rights Incentive' nomenclature be changed to "Permission to lease land on a long-term basis" (or similar) to avoid confusion with other Laws, concepts and rights in Myanmar.

Secondly, it is important to clarify whether investors who receive grants and land use rights under the 2012 Farmland Law and VFV Law are required to obtain a 'land rights incentive' under the

⁵ See the legal requirement contained in article 5 of the 2015 Protection of the Rights of National Races Law.

Rules. It is recommended that investors *should* be required to obtain an endorsement and land rights incentive *before* undertaking any investment pursuant to grants of land under the 2012 land laws. This should be made clear in the Rules through an express provision.

Rule 122(c) also requires investors to submit, where available, a recommendation letter from a state or regional government or other authority endorsing any proposed land change in use of the land to allow it to be used as contemplated in the investment. The Rules should specify (non-exhaustively, if appropriate) the circumstances under which this would apply, such as grants given under by the Central Committee for the Management of Vacant Fallow and Virgin Lands.⁶

Additionally, it would be helpful to clarify the wording and procedures contained under Rule 130, as the current phrasing is convoluted and the circumstances in which the Rule would apply are unclear.

It is clear, from anecdotal experiences of land disputes, and also from comments raised in the January 24th consultation, that there remains some confusion about which rights the MIC can allocate with a permit, and which rights it cannot allocate (even if the rules state that investments also remain subject to other relevant legislation). The Rules should clearly state that with respect to land, an investor must follow any applicable land laws and that MIC does not have the mandate to apply, change or waive land law requirements.

b. Land Rights Incentive Application

The Land Rights Incentive Application should be amended to require further information from the investor. It is important that the investor is able to show a preliminary understanding of the relevant environmental and social issues related to the use of its proposed land, prior to obtaining the land rights incentive. Requiring further information from the investor regarding its land use may also help avoid investor-community disputes, and to enhance the due diligence practices of investors seeking to obtain long-term land leases in the country. The following subsections should be added to rule 122:

- 'To the extent known, whether the proposed land is subject to any pre-existing bona fide claims or disputes by a person regarding legal or customary rights to occupy or use such land in a way which would conflict with the proposed Investment'
- 'To the extent known, whether the proposed investment will or may be likely to affect land or natural resources that are traditionally owned, used or occupied by indigenous peoples.'

c. Land Rights Incentive Assessment Criteria

The Land Rights Incentive Application should be broadened to include a consideration of important environmental and social issues related to the use of the proposed land. The following subsections should be added to rule 126:

- 'If the proposed land is subject to any pre-existing bona fide claims or disputes, whether the investor has shown a demonstrated commitment to resolving such disputes, including

⁶ Note that 2012 VFV Law [s 4(e)] contemplates foreign investors to be given the right to cultivate or utilize VFV land after they have 'obtained permission to carry out the business of mutual benefit with investors of Myanmar citizen under the Foreign Investment Law.' This legal framework therefore rests on foreign investors having been given MIC permission prior to using land granted under that Act.

any resettlement, in accordance with the laws of the Union and good international practice.⁷

- 'If the investors proposed use of the land will or may be likely to affect land or natural resources that are traditionally owned, used or occupied by indigenous peoples, whether the investor has made a demonstrated commitment to adhering to the principle of Free, Prior and Informed Consent in respect of the indigenous peoples concerned.'

5. Transparency Provisions

The Draft Rules do not contain any meaningful transparency provisions, creating a serious lack of public accountability and undermining democratic participation for the people of Myanmar. It is a serious issue for locally affected communities when they hear reports that an investment may be established in the area, and they do not have any way to find out the company name, let alone information about the proposed investment. This type of information black-out breeds suspicion mistrust, and sows the seeds for company-community conflicts further down the track.

Rule 58 states that the Commission *may* publish a summary of Investment Proposals. In light of the above, this is wholly inadequate. While there is no doubt that DICA is committed to publishing summaries of investment proposals as a matter of course, this should be a matter of law.

We respect the point made during public consultations that this was a 'policy decision' to be made by DICA, but strongly urge that the overarching policy imperative here should be transparency and public accountability.

- The Rules must place a mandatory obligation on the MIC to make all investment submissions and supporting documentation publicly available on its website, prior to the MIC's determination of the Submission. A redaction of confidential information could be provided for in the Rules. At the very least, the duty of MIC to publicize 'summary information' should be enacted as a rule and drafted in mandatory terms (using 'must' or 'shall', rather than 'may'). The Rules should also specify that the information should be made public within 10 days of receipt of the Application, in both English and Myanmar language.
- This mandatory public disclosure provision should be mirrored in respect of endorsement applications, tax exemption applications, land rights incentive applications, and any decisions regarding approvals issued by MIC.
- It is also crucially important for transparency and accountability that the terms of the Permits, Endorsements, Land Rights Incentives and Tax Exemptions (including any conditions placed thereon) are made publicly available in both English and Myanmar language.

6. Public Input on Investment Submissions

⁷ This language accords with 2015 EIA Procedures, section 7, which reads "Projects that involve Involuntary Resettlement or which may potentially have an Adverse Impact on Indigenous People shall comply with specific procedures separately issued by the responsible ministries. Prior to the issuance of any such specific procedures, all such Projects shall adhere to international good practice (as accepted by international financial institutions including the World Bank Group and Asian Development Bank) on Involuntary Resettlement and Indigenous Peoples."

Rule 40 currently provides that the Commission 'may consult with and obtain information which it considers relevant to its determination from other stakeholders and persons affected by the determination'. While broader participation and public input on investment decisions is welcomed, this Rule should be enhanced to allow unsolicited briefs to be submitted to the Commission as well.

This may help to imbue a culture of public participation and robust consultation within the MIC. Without proactively fostering such a culture, there is a risk that the Commission would not solicit the advice of stakeholders and affected parties, as contemplated by the Rules. Rule 40 should be amended to include:

- 'The Commission shall accept and consider unsolicited comments about the proposed investment from persons affected by the determination and other stakeholders.'

Requiring the Commission to accept and consider public input about investment submissions would help to bring to life to other provisions in the Investment Rules, and broaden the MIC's knowledge base when scrutinizing investments. For example, when the MIC is called upon to determine whether the investor is of good character and business reputation (r 69(g)), it would be naive to assume that the investor would provide all relevant and impartial information to the Commission on that point.

Civil society stakeholders are well placed to submit briefs or refer the Commission to relevant information regarding the business reputation of proposed investors, and the MIC may not proactively solicit information in all cases. For these reasons, it is essential that the MIC be required to accept and consider unsolicited briefs from stakeholders and potentially affected persons, *prior* to the determinations of Proposals.

The proper functioning of this suggested provision is also linked with adequate transparency provisions, which also need to be incorporated into the Rules (See part 5 above). In order to facilitate meaningful participation by stakeholders and persons affected by an MIC determination, they must receive timely notification about the proposed investment and its details, in both English and Myanmar language.

7. Co-ordination with Environmental Laws and Procedures

The Draft Rules do not address the problematic timing issue that exists between the MIC process for investments that require a Permit and investors' responsibility to obtain an Environmental Compliance Certificate as per the EIA Procedures.

This could be clarified by amending Rule 139(c), which states that 'every Approval is granted subject to continuing compliance with all applicable laws'. A subsection should be added, to read:

- 'Where applicable, the Approval is granted subject to the attainment of, and continued compliance with, an Environmental Compliance Certificate in accordance with the EIA Procedures.'

The Rules should also establish a system which enhances communication and co-ordination between the MIC and the ECD, to ensure that investors cannot retain their MIC Permit if they are violating Myanmar's environmental law and procedures. While the ECD has exclusive authority to monitor and enforce compliance with the conditions set forth an investor's ECC and enforce

the implementation of Environmental Management Plans,⁸ the ECD should be made to convey any pertinent information about violations by investors to the MIC. For example, the 2015 EIA Procedures state that, 'if, upon inspection, the Ministry identifies any non-compliance with the conditions in the ECC, the Ministry may require the Project Proponent to undertake remedial measures and/or may impose penalties as provided for in this Procedure'. Any remedial measures ordered or penalties imposed under this part should be communicated immediately to the MIC. Information about standard environmental monitoring of EIA-type investments by the ECD should also be sent to the MIC at regular intervals,⁹ to ensure that investments are in compliance with the Union's environmental laws at all times.

8. One Stop Service Centre

Recommendations

1. Amend Draft Rule 168 to state that the OSSC's powers are limited to receiving applications and submissions, as well as forwarding any applications and submissions received on to the relevant authority. The Rule must clarify that all powers of approval on procedural and regulatory matters stay with the relevant authorities.
2. Amend Draft Rule 170 to allow the MIC Chairperson to request authorities to appoint representatives to the OSSC to assist with the performance of the MIC's duties, while ensuring that OSSC arrangements do not unlawfully interfere with the determination powers of relevant authorities.

Overview of OSSC arrangements

The Draft Rules envision the creation of a One Stop Service Centre (OSSC) [Rule 167]. Among its duties would be to "accept... applications and submissions as may be required under an applicable law in relation to the implementation of an Investment" [Rule 167]. The OSSC would be housed within the MIC [Rule 173]. The proposed OSSC would include representatives of ten Government departments, including the Environmental Conservation Department of MONREC [Rule 171].

Rule 168

Rule 168 allows investors to submit applications and submissions to the OSSC, and empowers the OSSC to accept or not accept or subsequently reject the submission. Rule 168 does not contemplate empowering the OSSC to make any further determinations, and for clarity this should be included in the text.

It may be appropriate for OSSC representatives from authorities to receive and *accept* applications and submissions on behalf of Authorities, but those representatives should not be empowered to provide approvals on procedural or regulatory matters relevant to the investor (as proposed in Rule 170). The power of these representatives must be strictly limited to receiving applications and submissions, and then forwarding those on to the relevant department for consideration and approval. The OSSC could also be empowered to ensure that any approvals given are communicated to the MIC. This would increase efficiency in the investment process

⁸ 2015 EIA Procedures, section 15(h).

⁹ Such as that undertaken Chapter IX of 2015 EIA Procedures.

without fundamentally undermining the object, purpose and implementation arrangements of applicable national laws.

Rule 168 should be amended to clarify these parameters: that the OSSC may accept and reject the submission, but does not have further determination powers.

Rule 170

Rule 170 states that "...Pursuant to section 25(j), the Chairman may also request that a relevant Authority assign one or more suitably experienced and duly authorised officers to the One Stop Service Centre to provide approvals on procedural or regulatory matters relevant to the Investor." This rule does not prescribe parameters on the authority of duly authorized officers (representatives from various Government bodies and departments) to provide approvals. This rule also does not define what is considered to be 'procedural and regulatory matters.'

The Investment Law states that the Commission's powers under Section 25(j) are limited to "requesting and obtaining assistance and information relating to the duties of the Commission from government departments... in order to perform the duties of the Commission under this Law." Plainly, that section only allows for requests for *assistance and information* from other relevant authorities. It does not give the MIC Chairman the power to order other government departments to authorize representatives for the purpose of providing approvals on procedural and regulatory matters. Furthermore, section 25(j) of the Law is limited to requests for assistance and information *'in order to perform the duties of the Commission under this Law.'* It is not one of the duties of the Commission to give procedural and regulatory approvals that arise under *other* laws, and falling under the exclusive authority of *other* departments. Rule 170 is almost certainly unconstitutional on the grounds that it is substantively ultra vires.

The doctrine of substantive ultra vires holds that subordinate legislation cannot extend beyond the powers conferred by the parent act. This doctrine is reflected in Article 97(b) of the 2008 Myanmar Constitution, which states that "the rules... issued under the power conferred by any law shall be in conformity with the provisions of the Constitution and the relevant law." The proposal in Rule 170 is unconstitutional on the grounds that it is substantively ultra vires.

The OSSC is designed to improve efficiency in investment processes; it must not undermine established national laws and standards. It is inappropriate for departmental representatives housed in the OSSC to undertake substantive approval processes beyond receiving submissions. Take, for example, the proposal that EIAs could be submitted and approved by an ECD representative at the OSSC (reading together rules 167(b), 170, 171(i)). No other country in the region allows investors to bypass the relevant environmental authority and obtain environmental approvals directly from investment commissions.¹⁰ This is because environmental departments are intended to function as highly specialized teams, comprised of many individuals with different areas of expertise. Without support from the relevant ministry, it is doubtful that the OSSC would have the required technical capacity and human resources to make considered and lawful decisions on issuing permits and approvals. Assigning the power of approvals to the OSSC would lead to a substandard regulatory regime which, in the context of EIAs, undermines the critical environmental protections established in Myanmar's environmental conservation laws. Furthermore, it is widely understood that strengthening the capacity of the ECD is the linchpin

¹⁰ See EarthRights International, Environmental Impact Assessment in the Mekong Region, November 2016 (English language: https://www.earthrights.org/sites/default/files/documents/eia_manual_final_0.pdf) (Myanmar language: https://www.earthrights.org/sites/default/files/documents/burmese_online.pdf)

needed to improve environmental protections in Myanmar. Now is the time build the capacity of the ECD as a whole, rather than atomize its parts.

Extensive research conducted by civil society organizations in 2016 reveal that the administrative arrangements in SEZ-level OSSCs can enable derogation from national laws protecting human rights and the environment. The arrangement undermines accountability because, unlike the relevant Minister, OSSC representatives do not have clear legal or practical accountability for their decisions. There is evidence from the Thilawa OSSC that EIA approval has been tantamount to 'rubber stamping', whereby EIAs are not given meaningful scrutiny. An assessment of Myanmar's legal framework for Special Economic Zones found that this arrangement in the 2015 SEZ Rules undermines national laws, does not conform with the State's international human rights law obligations, and is unconstitutional.¹¹ The Investment Rules must be amended to safeguard against these regulatory failures being repeated.

Rule 170 must be amended, to: a) enable the MIC Chairperson to request authorities to assign representatives to the OSSC in line with Section 25(j) of the Law, in order to implement Rule 167; and b) ensure that governance arrangements for the OSSC are constitutional and do not interfere with the determination powers of other Ministries (particularly related to Environmental Impact Assessments).

9. Proposal Assessment Team

Rules 149-154, addressing the creation of a Proposal Assessment Team, require further safeguards and amendments.

- The Conflict of Interest provisions (MIL ss. 21-22, Rules 140-141) should be replicated for members of the Proposal Assessment Team, to ensure that members of the Team who are providing recommendation to the Commission about a proposal do not have direct or indirect interest in it.
- Rules 152 and 153 allow for the Proposal Assessment Team to request further information from investors, as well as the power to with Authorities. It should be amended to also give the Team the power to consult with stakeholders and persons affected by the determination (mirroring rule 40). An addition to this chapter of the Rules should read: "The Project Assessment Team may consult with and obtain information which it considers relevant to its recommendation from other stakeholders and persons affected by the determination."
- In addition, the Team should be empowered to receive and consider unsolicited information from stakeholders (including civil society) and potentially affected people (see Part 6 on Public Input above). This would allow for the Proposal Assessment Team to have all relevant information at its disposal when formulating its recommendation on the Proposal. Their decisions should not be based solely on one-sided information. An addition to this chapter of the Rules should read: 'The Project Assessment Team shall accept and consider unsolicited information about the proposed investment from stakeholders and persons affected by the determination'.

¹¹ See: International Commission of Jurists, "Special Economic Zones in Myanmar and the State Duty to Protect Human Rights," forthcoming (February 2017).

10. Responsible Investment Reporting Requirements

Rule 184(c) empowers the Investment Monitoring Department to receive Investor reports. The Rules should elaborate on the form and content of the Investor reports. They should establish a system of Responsible Investment Reporting Requirements. We believe this is essential to furthering the first objective of the Investment Law, which is to "develop responsible investment businesses which do not cause harm to the natural environment and the social environment for the interest of the Union and its citizens."

Strong annual Reporting Requirements would help to foster responsible investment practices, allow for increased transparency and enhance the accountability of investments to the MIC as well as the public. Reporting Requirements accord with section 65(g) of the MIL, which requires investors to abide by 'best standards practiced internationally'.¹²

Respectfully, we reject the counterargument that Responsible Investment Reporting Requirements are too onerous or too expensive for investors operating in Myanmar. Responsible Investment Reporting Requirements would only apply to Permitted Investments - which are only those which are categorically strategic and substantial - many with expected investment values over \$10 million. Investors sufficiently large to make a \$10 million investment in a risky environment such as Myanmar should have the type of risk management systems in place that can provide relevant information for reporting.

Enhanced transparency, through Reporting Requirements, would help to combat negative perceptions about corruption in Myanmar, and in fact could serve to attract foreign investments to Myanmar. Transparency International's 2016 Corruption Perceptions Index gave Myanmar a score of just 28 (where 0 denotes 'highly corrupt', and 100 denotes 'very clean'). While that number has increased over the last 4 years, it still represents a perception that the country suffers from endemic corruption: a perception that undermines Myanmar's ability to attract responsible foreign investment.

The Investor Report format would ideally replicate the U.S. Responsible Investment Reporting Requirements. Some of the long-standing investors such as Gap.inc and CocaCola already have experience reporting under US reporting requirements and have spoken up in support of them. During their existence, these Reporting Requirements helped to foster greater transparency and due diligence by US investments in Myanmar (See Annex 2). The U.S. Reporting Requirements had the benefit of requiring investors to provide information on a wide range of issues that go to the heart of responsible business, including human rights, labor rights, anti-corruption measures, transparency, property acquisition and military communications. In order to operationalise the highest objective of the MIL, all Permitted investors should be required to systematically collect and publicly disclose such information.

The Rules should be amended to include the following language:

¹² See, e.g. point 3.7.4 of the UNCTAD National Investment Policy Guidelines encourages governments to require corporate reporting standards which inter alia 'provide for disclosure by foreign-controlled firms on local ownership and control structures, finances and operations, and health, safety, social and environmental impacts, following international best practice'. The importance of the Global Reporting Initiative (GRI), was recognised in para 47 of the Rio+20 Outcome Document. The importance of sustainability reporting was also recognised throughout the process leading up the formation of the 2015 Sustainable Development Goals.

- Within 180 days of receiving a Permit from the Commission, investors shall submit a Responsible Investment Report to the Commission, and thereafter annually on July 1. Each investor may report on either a fiscal year basis or a calendar year basis, but should identify the time period covered by each report.
- The Investor shall submit a Responsible Investment Report, containing all the information contained in [Annex 1]. The investor shall submit the Responsible Investment Report to the Commission in both English and Myanmar language. The Report shall be made available on DICA's website and on the website of the Investor.

11. Grievances from Communities

The Investment Law and Rules must foster responsible investments that are responsive and accountable to the local communities they affect. The MIC and investors both have a role to play in ensuring that local grievances are heard and resolved effectively. The Rules should establish a Community Grievance Mechanism (CGM), which is capable of receiving and resolving complaints from people affected by Permitted (including endorsed) investments.¹³

The second tranche of Draft Rules contemplate an Investor Assistance Department (IAD) (r 174) which will be established to receive grievances and disputes from investors. In order to cultivate expertise and technical capacity on handling company-community grievances, we recommend that the CGM is established separately to the IAD.

(a) Legislative Basis for a CGM in the Investment Law

A CGM could be incorporated into the Rules pursuant to section 82 of the Investment Law, which states that the Commission "shall establish and manage a grievance mechanism to resolve, prevent the occurrence of disputes, and carry out the relevant inquiries for the investment issues before reaching the stage of legal disputes."

A CGM which is capable of receiving early warning signs from project affected people about poor investment practices would help the MIC to fulfil its duty under the MIL to "scrutiniz[e] whether or not the investor and its investment complies with the Law and its rules... and if not ... taking action against the investor that do not abide by such matters in accordance with the Laws" (section 24(k) MIL). Further, MIC has a power under s 25(n) to "establish and manage a system that is able to carry out activities such as systematically scrutinizing disputes, identifying the causes for disputes, responding, inquiring and settling losses before the stage of dispute resolution." There is no express provision in the Law that excludes people affected by investments from having recourse to any grievance mechanisms created by the MIC - providing space in the Rules for the creation of a CGM.

Importantly, operationalizing a CGM would also help to fulfil the central objective of the Investment Law, to 'develop responsible investment businesses which do not cause harm to the natural environment and social environment' (s3(a) MIL).

¹³ To ensure consistency across Myanmar's laws, 'project affected person' should be added to the definitions section and given the same meaning as article 2(f) 2015 EIA Procedures (616/2015), under which it is defined as: "a natural person, legal entity, or organization that is, or is likely to be, directly or indirectly affected by a Project [investment] or a proposed Project [investment], including without limitation effects in the nature of legal expropriation of land or real property, changes of land category, and impacts on the ecological and environmental systems in the settlement areas of such person, entity or organization."

(b) Potential Model for a Community Grievance Mechanism

*The following is only a preliminary outline of a potential CGM model, and does not purport to address the finer details of the suggested mechanism. The submitting organizations would be happy to prepare further information and suggestions about the operationalization of a rights-compliant CGM,¹⁴ upon request from DICA/IFC.

The CGM should adopt a two-part approach to addressing community grievances - namely mediation and compliance referrals.¹⁵

(i) Mediation function

The CGM should provide a mediation function, that can bring together investors and locally affected communities and engage in collaborative problem-solving of the issues raised in the complaint. This focus on problem-solving accords with the language in section 82 of the Investment Law, which contemplates a dispute resolution body focused on preventing the occurrence of legal disputes. Importantly, a widely-accessible dispute resolution mechanism would have the advantage of creating enhanced accountability relationships between communities and investors.

The Rules should provide that it is a condition of all Approvals issued by the MIC that the investor will engage in good faith in any mediation processes facilitated by the CGM. If the investor does not participate in the mediation in good faith, the matter should be referred on to the Investment Monitoring Department (IMD), which in turn has the power to make recommendations to the MIC regarding any administrative penalties which should be imposed under section 85 of the Law (rule 184(f)).

(ii) Compliance Referrals function

The CGM should have the capacity to refer cases to the Investment Monitoring Department (IMD) created by the Rules. If the CGM receives a complaint from a project affected person about a Permitted investment, it should be empowered to forward the matter onto the IMD for a compliance audit (or any other relevant authority, such as the ECD or the labour inspectorate). When the complaint is forwarded to the IMD, it will trigger an audit as to whether any act(s) or omission(s) of the investor constituted a breach of the Law, Rules or condition of the Approval.

This compliance referral function could be initiated in addition to the mediation function, or separately, depending on the preference of the complainant. (Complainants should not be forced to participate in the mediation function, but should be able to choose to trigger the compliance referral function only).

The IMD should co-ordinate closely with the CGM, providing regular updates on cases processed between the two arms. The IMD should provide detailed information about specific audits to the CGM, which can then be conveyed to the project affected people.

It must also be kept in mind, while designing the CGM, that the autonomy and impartiality of the head of the CGM is likely to be a key factor in the effectiveness of the grievance mechanism, just

¹⁴ See e.g. Rights-Compatible Grievance Mechanisms (2008) John F. Kennedy School of Government, Harvard University, p. 7. Human rights norms require that processes affecting the lives, well-being and dignity of individuals and groups should be based on inclusion, participation, empowerment, transparency and attention to vulnerable people

¹⁵ These suggested functions are drawn from the IFC CAO model (omitting the advisory function).

as it has proven to be in comparable mechanisms elsewhere. We therefore recommend that this position be given a high rank, and guaranteed independence.

Proposed language:

- A Community Grievance Mechanism shall be established within the Commission Office pursuant to section 82 of the Law. The functions and powers of the Community Grievance Mechanism shall be to:
 - receive complaints from project affected people who believe they have been adversely affected by a Permitted Investment;
 - facilitate mediation between the Investor and the complainant, the MIC, stakeholders and any other project affected people;
 - forward compliance matters onto the Investment Monitoring Department or any other relevant authority.
- A project affected person (or group of people) who believe that they have been adversely affected by a Permitted Investment may submit a complaint to the Community Grievance Mechanism. The complaint shall not have to comply with submission formalities contained in rule 38, and no Submission fee shall be charged for access to the Community Grievance Mechanism.
- Access to the Community Grievance Mechanism shall in no way prejudice the right of parties to seek legal redress or challenge MIC decisions through judicial means or otherwise settle disputes.
- The existence of the Community Grievance Mechanism shall in no way affect the responsibility of the investors in receipt of a Permit to establish an operational grievance mechanism.
- A subsection should be added to rule 184, giving the IMD the power to "receive notice from the Community Grievance Mechanism that a compliance audit is needed with respect to a Permitted Investment, and undertake an audit upon receipt of such notice."
- A subsection should be added to rule 139 that provides it is a condition of every Approval that "the Investor will participate in good faith mediation processes facilitated by the Community Grievance Mechanism".

12. Company-Level Operational Grievance Mechanism

Additionally, all Projects in receipt of a Permit should be required to establish an operational grievance mechanism(s) that is accessible (including in the local language) to individuals, workers, consumers, and communities. Companies should be directed to the UN Guiding Principles for Business and Human Rights for further information.¹⁶ Grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.

They should be designed in collaboration with potential users of the grievance mechanism, and ideally should be community-driven. As a bare minimum, the remedial mechanism should be the result of extensive and meaningful community participation, and should meet all eight of the UNGP's Effectiveness Criteria. Investors should understand that poorly designed and implemented OGM poses a number of operational, reputational, and legal risks.

¹⁶ http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

The following is a suggested text for the Rules:

- All Investments in receipt of a Permit shall establish, within six months, an effective grievance mechanism designed in collaboration with affected stakeholders, based on engagement and dialogue. This should be notified to DICA, and any relevant line ministry, together with the name and contact details of the responsible contact within the company. 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 should be included in the annual Responsible Investment Report.

13. Additional commentary

Rule 140	The rule related to conflicts of interest held by Commission members does not sufficiently define 'interest'. The language used in sections 21-22 of the Law are broader, covering both direct and indirect interests (though without defining those terms). The same language should be replicated in the Rules, and include further clarification on the scope of direct and indirect interests. For example, it should specify (non-exhaustively) that this includes beneficial interests, as well as interests in an associate of the applicant (such as where the Commission member has an interest in a parent, subsidiary or related corporate entity of the applicant). Further, the direct and indirect interest of Commission members' immediate family members (including spouse, parents, children and siblings) should be imputed to the relevant Commission member.
Rule 142	The Annual Investment Report, to be provided to Pyidaungsu Hluttaw by the MIC, should require further information to be disclosed. In addition to the summary of investment trends, it should be required to list: <ul style="list-style-type: none"> - Each Permitted and Endorsed investments including their amount, list of investors in each of those projects, decision date and start of the project - Disaggregated data on investment trends by sector. - Administration penalties issued to investors (r 142 (d)), and amounts paid. The summary of investor grievances (r 142 (c)) should be expanded to include a summary of community grievances.
Rule 143-148	There is a concern that the Commission's general power to delegate is very broad, which increases the risk of corruption. We recommend comparing these delegation powers to international best practice, and to delete the reference in the law that allows for the Commission's powers to be delegated or even sub-delegated to 'a specific person' (r 143(d)(i)) or 'the holder for the time being of a specific office or appointment'. Given that such powers can and should only be delegated to a holder of an office (another listed category), the two abovementioned categories are redundant and not necessary. Furthermore, such delegation should be attached to the time in office and automatically obsolete upon leaving or changing the office.
Rule 165	Rule 165 provides that state and regional commissions shall follow the same requirements governing the conduct of Commission Members under the Law and Rules. It should add rule 141 (expanding on conflict of interests) to the (non-exhaustive) list of applicable rules.

Rule 166	The Rules should explain the circumstances in which it is likely that the Commission would use a third party service provider to assist in performing its duties and functions. The Rules should specify that such assistance will be limited to discrete projects (e.g. setting up project databases) and will not amount to an actual performance of the public functions and decision making. We request further information about why this Rule is included.
Rule 184	The Investment Monitoring Department should institute Responsible Investment Reporting Requirements (detailed recommendations on such requirements are above part 10).
Rule 185	While the Investment Monitoring Department is limited to reviewing investors' compliance with the MIL and any Approval they have received, there should also be an affirmative duty placed on MIC to refer apparent or actual violations of other laws to relevant Authorities.

Annex 1: Draft Guidelines on Responsible Investment in Myanmar

We suggest that the following guidelines become an annex to the MIR. They replicate the Guidelines issued by the Thilawa SEZ Management Committee, that are provided for all companies, Myanmar and foreign, who are investing and doing business in the Thilawa Special Economic Zone, including subcontractors of investor companies. (Notice No. 04/2015)

These Guidelines are issued by Myanmar Investment Commission in accordance with Article 24(d) of the Myanmar Investment Law concerning the development of responsible and accountable businesses. They are directed at all Investors as defined in Section 2(o) of the Law, and not only those in receipt of a Permit or Endorsement from the Commission.

The Myanmar Government believes that trade and investment are vital to achieving sustainable economic growth and people centered-development. Companies investing in Myanmar have a crucial role to play by creating jobs, reinvesting profits, and paying taxes. The Government also encourages responsible investment and responsible business conduct, that is, business activities that work for the long-term interests of Myanmar and all its people.

The Myanmar Government therefore expects that businesses investing and doing business in Myanmar, in addition to fully meeting their obligations under applicable Myanmar laws, will:

- 1. Respect human rights:** Companies should ensure that their operations, conduct, and activities respect the human rights of workers, the communities where they operate, their consumers, and Myanmar society as a whole.
- 2. Engage with stakeholders:** Companies should consult with all those affected by their activities, operations, and impacts, be they workers, consumers, or communities, as well as other stakeholders, so that companies have access to accurate and useful information about their actions and can create a two-way dialogue.
- 3. Support the rights of workers:** Companies should familiarize themselves with, and fully respect, all Myanmar labour laws, including those which provide for independent trade unions,

collective bargaining and workplace coordination committees. Companies can play an important role in ensuring equal opportunity for employment by addressing discrimination in hiring and in working conditions.

4. **Build human capital:** The Government of Myanmar encourages companies to offer training programs to workers, and those entering the workforce, to improve their skills and to prepare them for supervisory, administrative, managerial or technical roles.
5. **Ensure effective grievance mechanisms:** Those affected adversely by a company's activities need access to effective remedies. This includes establishing grievance mechanism(s) that are accessible (including in the local language) to individuals, workers, consumers, and communities and the company's participation in and cooperation with the grievance mechanism. Companies can refer to Guiding Principles 29 and 31 of the UN Guiding Principles for Business and Human Rights for further information. Grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning. They should be designed in collaboration with potential users of the grievance mechanism. Companies in receipt of a Permit from the Myanmar Investment Commission are required by law to put such a mechanism in place and to report on its operation – see Regulations/DICA Notification xx/xxx.
6. **Be transparent:** The Government supports companies' initiatives to ensure that their conduct is as open and transparent as possible (subject to the need for commercial confidentiality). It also encourages companies to communicate with stakeholders about actions that affect them or about which they have raised concerns. It is important for companies to report publicly on the steps they have taken to ensure that their conduct respects and supports human rights in Myanmar.
7. **Create shared value:** The Government believes that creating shared value can address social needs in a way that is commercially viable for businesses. Creating shared value for communities, workers and consumers is not corporate philanthropy, but a way in which to achieve economic success and win-win situations for businesses and society, including the poor.
8. **Support the communities in which they operate:** Companies are encouraged to undertake or participate in activities beneficial to the communities in which they operate and Myanmar society as a whole, both through creating shared value and through philanthropic initiatives. In doing so companies should consult the intended beneficiaries about their needs, be transparent about what they are able to provide, be clear about how long the service will be provided or the project developed, and deliver what they have promised. If the company is not able to fulfill its promise, it should inform the community early and explain the reasons why. Companies can also include credible local organisations, including civil society groups, in designing, operating, and monitoring the progress of such projects and establish effective mechanisms to receive and act on feedback.

Annex 2: Suggested content for Responsible Investment Report (based on U.S. State Department Reporting Requirements)

1. Name: Name of submitter.
2. Point of Contact: Provide contact information for public inquiries regarding this report.
3. Overview of Operations in Myanmar
 - a. Name(s) of companies, including all subsidiaries, operating in Myanmar covered by this report.
 - b. Nature of business in Myanmar;
 - c. Location(s) of operations in Myanmar;
 - d. Approximate maximum number of employees in Myanmar during the reporting period (broken down by Myanmar citizen and foreign employees); and
 - e. Approximate number of project affected persons.
4. Human Rights, Workers Rights, Anti-Corruption and Environmental Policies and Procedures: Provide a concise summary or copies of the following policies and procedures as they relate to the submitter's operations and supply chain in Myanmar:
 - a. Due diligence policies and procedures (including those related to risk and impact assessments) that address operational impacts on human rights, worker rights, and/or the environment in Myanmar;
 - b. Policies and procedures that address anti-corruption in Myanmar;
 - c. Policies and procedures that address community and stakeholder engagement in Myanmar (if the submitter has undertaken any stakeholder engagement to date, also summarize);
 - d. Policies and procedures that address hearing grievances from employees and local communities, including whether grievance processes provide access to remedies, and how employees and local communities in Myanmar are made aware of said processes;
 - e. Global corporate social responsibility policies, including those that address human rights, sustainability, worker rights, anti-corruption, and/or the environment; and
 - f. Whether and the extent to which the policies and procedures described in Question 4(a) through 4(f) are applied to, required of, or otherwise communicated to related entities in Myanmar, including but not limited to subsidiaries, subcontractors, and other business partners.
5. Arrangements with Security Service Providers: Provide the below information regarding any arrangements the submitter has with security service providers:
 - a. Name(s) of security service provider(s);
 - b. Duties and responsibilities of security service provider(s); and
 - c. Whether security service providers are signatories to the International Code of

- Conduct for Private Security Service Providers, and/or whether they have been certified to any private security provider national or international standards; and
- d. A concise summary of due diligence policies or practices for engaging and utilizing security services providers including those focused on human rights and anti-corruption, e.g. oversight policies and procedures and whether security service providers are subject to third-party auditing.
6. Property Acquisition: For any purchase, use, or lease of land or other real property, or rights related thereto, by the submitter (including the submitter's subsidiaries) either (a) valued over [\$500,000] or (b) larger than [30 acres of land] or other real property, provide the information described below. For the purposes of this section, purchase, use, or lease of adjacent or otherwise related land or other real property shall be treated as a single transaction and must be reported where the cumulative value of the related transactions exceeds [\$500,000 or is over 30 acres].
- a. A concise summary of any policies procedures used to ascertain land or other real property ownership, use rights, dislocation, resettlement, or other claims and an explanation of how those policies were implemented for each land purchase, use, or lease transaction;
 - b. The region/state where the land or other real property was purchased, used, or leased (e.g., "Myitkyina, Kachin State")
 - c. A concise summary of any policies or procedures, including grievance mechanisms, related to the dislocation or resettlement of people with respect to land or other real property and an explanation of how those policies were implemented for each land purchase, use, or lease transaction.
 - d. Any financial/material arrangements made to compensate previous users/residents of such land or other real property (other than to the lessor/owner), of which the submitter is aware; and
 - e. Any information of which the submitter is aware related to any involuntary resettlement or dislocation of people on land that meets the criteria as specified in question 6.
7. Transparency: Report total payments made by submitter or on its behalf valued over \$10,000 during the reporting year to each Government of Myanmar entity and/or any sub-national or administrative governmental entity or non-state group that possesses or claims to possess governmental authority over the submitter's new investment activities in Myanmar. Payments to each entity should be reported by each separate payment type, including but not limited to, royalties, tax obligations, production-sharing arrangements, and fees. If the submitter's aggregate payments to a particular entity during the reporting year are valued at less than \$10,000, there is no need to report on payments to that entity. If no aggregate payments are valued over \$10,000, indicate by "none," "not applicable," or another appropriate response. This reporting requirement is in addition to any other legally required reporting on payments made to government entities.
8. Military Communications: Has the submitter, or any individual from or representing the submitter, had meetings or other communications, including written and telephone

communication, with the armed forces of Myanmar and/or other armed groups related to the submitter's investments in Myanmar? If so, indicate:

- a. Date(s) of meeting and/or communication;
- b. Name(s) of individual(s), rank, and group(s) affiliation; and
- c. Nature of and reason for meeting and/or communication. (Note: For frequent / regular meetings on similar topics, the submitter can provide one brief summary of issues discussed with a listing of dates under an appropriate header.)

9. Risk Prevention and Mitigation: With regard to human rights, worker rights, anti-corruption, and/or environmental issues, summarize any risks and/or impacts identified, any steps taken to minimize risk and to prevent and mitigate such impacts, and policies and practices on risk prevention and mitigation.