

Comment of EarthRights International on the Paperwork
Reduction Act Review for Proposed Reporting
Requirements on Responsible Investment in Burma

October 4, 2012



EARTHRIGHTS INTERNATIONAL



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EarthRights International (ERI) submits this comment as part of the Paperwork Reduction Act (PRA) review process for the proposed reporting requirements for U.S. persons investing in Burma. ERI endorses the Joint Comment submitted by non-profit and investor groups; this comment supplements that submission with insights from ERI's experience working with communities to mitigate the impacts of multinational corporate activities in Burma, and its expertise in the international and domestic standards on corporate accountability and disclosure.

Summary of Submission

This comment focuses on two of the central questions in the PRA review process: 1) the necessity of the proposed information collection for agency operations, and 2) ideas to improve the quality and clarity of the information collected. The disclosures will assist the State Department to manage the national emergency declared by the President with respect to Burma by enabling it to target investors whose operations and policies raise red flags for potential contribution to human rights abuses, corruption, and armed conflict. Moreover, ERI will use the disclosures in conjunction with Burmese groups for aims that are complementary to those of the government, i.e. to identify business practices that raise human rights concerns and to engage with and, where necessary, hold to account investors who contribute to human rights abuses.

The comment recommends that the State Department amend the reporting requirements in the following ways in order to improve the usability and comparability of the information collected: 1) Eliminate the provision allowing investors to choose without oversight or supervision to withhold information from public disclosure; 2) Make clear that investors must report on the operations of business partners and related entities over which they have significant influence; and 3) Require that investors report on their policies and procedures in a manner that reflects international best practice. Specifically, the comment recommends that investors report on their policies and procedures using a checklist that draws from U.S.-endorsed international standards and provides detailed Annexes to guide investors in their responses.

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Relevant Background on EarthRights International

ERI has been working since 1995 to assist communities in Burma to raise their concerns regarding the impact of corporate activities – particularly extractive operations – mitigate those impacts, and to seek justice and redress when those impacts affect their human rights and the environment. This work includes in-country fact-finding and research on corporate activities and impacts, policy advocacy, engagement with stakeholders (including the corporations themselves), training and capacity building for communities and local organizations, and, where necessary, litigation. ERI has deep and long-standing ties to communities and community-based organizations throughout Burma and on the Thai-Burma border. ERI is therefore all too familiar with the information gap that has historically made monitoring of corporate activities and engagement with investors difficult and, in many cases, impossible.

As part of its mission to empower communities with information about threats to their human and environmental rights, ERI has developed substantial expertise on environmental and human rights impact assessments, including the concept of due diligence. In addition, ERI participates in the Publish What You Pay US coalition and serves as legal counsel to Oxfam America in litigation aimed to secure and defend robust transparency rules implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. ERI is therefore well positioned to advise on many of the technical and legal aspects of disclosure.

I. Importance of Corporate Disclosures for Carrying Out U.S. Foreign Policy in Burma

In his May 17, 2012, communication to Congress, President Obama declared that a national emergency still exists with respect to Burma,¹ justifying an Executive Order continuing application of economic sanctions and investment restrictions. This Executive Order is based on the prevalence of human rights abuses and ethnic conflict, which pose an extraordinary threat to U.S. foreign policy.² Having made the policy decision to waive the investment restrictions *almost completely*, therefore, the government has a moral and legal imperative to take the necessary steps to ensure that investment in Burma contributes positively to the management of the national emergency or – at the very least – does not exacerbate the problems that underlie it. The State Department, as the chief government agency that carries out the foreign policy of the United States, therefore has a great need for effective tools that will enable it to assist the President in managing the national emergency.

There is no doubt that foreign investment – including U.S. investment – in Burma has the potential to exacerbate human rights abuses, ethnic conflict, and corruption. In 2010, for example, ERI disclosed that confidential sources indicated that hundreds of millions of dollars in revenues from state accounts – likely including foreign exchange reserves earned from Total and Chevron's Yadana Gas Project – had been diverted to bank accounts in two leading international banks in Singapore held personally by individuals closely associated with Burmese regime officials.³ Just last month, villagers protesting the illegal seizure of land for a Chinese-led

¹ President Barack Obama, *Notice – Continuation of the National Emergency with Respect to Burma*, May 17, 2012, at <http://www.whitehouse.gov/the-press-office/2012/05/17/notice-continuation-national-emergency-respect-burma>.

² Exec. Order 13,619, 77 Fed. Reg. 41,243 (July 11, 2012).

³ EarthRights International, *French Bank Involved in Trail of Funds to the Burmese Dictatorship*, July 7, 2010, at <http://www.earthrights.org/blog/french-bank-involved-trail-funds-burmese-dictatorship>.

copper mining project at Monywa (a project that was initially launched by Canadian mining giant Ivanhoe Mines Ltd.), were arbitrarily arrested and beaten by Burmese security forces.⁴ And large numbers of farmers continue to be displaced to make way for the Korean- and Chinese-owned Shwe Gas pipelines, often with little or no compensation and after inadequate or discriminatory consultation processes.⁵

ERI is concerned that many of these impacts are inevitable given the weak institutional development of Burma and the persistent tendency of the Burmese government and armed forces to suppress community opposition to corporate activity with violence and arbitrary detention. In particular, we do not believe that it is appropriate for U.S. investors to participate in extractive projects, activities in conflict zones or other activities that entail serious environmental impacts or the acquisition of significant quantities of land in Burma at this time. However, given that the decision has been made to waive investment restrictions in *all* sectors, ERI believes that the proposed disclosure regime will help the U.S. government, civil society, and Burmese communities themselves to mitigate the negative impacts of corporate activity.

A. Uses for Government

Perhaps most obviously, the disclosures will enable the State Department – particularly, the Bureau of Human Rights, Democracy, and Labor – to target investors for engagement. There are certain issues that should raise red flags for the government, indicating that a particular investment may pose greater risk of exacerbating the national emergency in Burma. Some sectors – notably, extractive industry, hydropower, and plantation agriculture – may be more commonly associated with abuse and corruption. Activities in certain geographical locations – ethnic minority areas, or zones of great environmental value and sensitivity – may contribute to conflict or the illegal trade in natural resources. The government properly seeks to prioritize investors who engage in such activities without robust policies and procedures for identifying, mitigating, and remedying the risks – a task that would be impossible without extensive information about investors’ activities in Burma.

Other bureaus – both within and outside the State Department – will engage with the Burmese government and seek to assist in the development of strong institutions and the resolution of conflict. These activities may not relate directly to human rights and conflict risks – for example, the State Department’s Energy Bureau is likely to work with Burma on strengthening governance in the energy sector – but could be equally important to the future stability of the country and the well-being of its people. But it is difficult to imagine how this work can progress without some understanding of the operation of foreign investment in various economic sectors and the Burmese government’s receipts from foreign investment.

Crucially, the information contained in these disclosures is not publicly available at present. Payments to the Myanma Oil and Gas Enterprise (MOGE), for example, are completely non-transparent, as Daw Aung San Suu Kyi has made clear in repeated public remarks. Burma has signaled interest in joining the Extractive Industries Transparency Initiative (EITI), under

⁴ Min Lwin, “Freed copper mine protesters assaulted by police,” *Democratic Voice of Burma*, Sept. 12, 2012, at <http://www.dvb.no/news/freed-copper-mine-protectors-assaulted-by-police/23711>.

⁵ See, e.g., Nyein Nyein, “NGOs Call for Suspension of Shwe Gas Project,” *The Irawaddy*, Oct. 3, 2012, at <http://www.irawaddy.org/archives/15668>; “Chinese Oil Firm ‘Ignores Land Rights’ with Burma Pipelines,” *Shwe Gas Movement*, Sept. 19, 2012, at <http://www.shwe.org/slide-show/chinese-oil-firm-ignores-land-rights-with-burma-pipelines/>.

which such payments would become subject to external audit, but the process of accession to EITI takes years and requires a sophisticated level of financial institutionalization and civil society participation that is not present in Burma. Information about security arrangements is likewise not publicly available. In ERI's experience, foreign companies operating in Burma decline to disclose information about security – not because they are contractually obligated to keep such arrangements confidential but for fear of embarrassment or of alienating the Burmese government. For example, Total has claimed that it cannot release its contracts or contractual terms, including on security, despite the fact that many of those contracts have become part of the public record as the result of discovery in human rights litigation against the company's former joint venture partner, Unocal.

Likewise, environmental, social, and human rights impact assessments, resettlement and land compensation policies are generally not made public. To ERI's knowledge, *no company operating in Burma has ever voluntarily disclosed an environmental, social, or human rights impact assessment*. Local communities and civil society groups have extremely limited access to critical project information upon which to safeguard their human rights, including their right to a healthy environment. Only one company, Daewoo International, has voluntarily disclosed a detailed land compensation policy to international civil society organizations, and only after years of pressure and discussion.

B. Uses for Civil Society

The State Department envisages that civil society organizations will utilize disclosures to engage with submitters on human rights and conflict issues, to monitor corporate activities, and to raise concerns with the government that will assist the State Department and other agencies to target particular investors for investigation and engagement. ERI can confirm that it will work with communities and Burmese civil society groups to engage with and, where necessary, seek to hold investors accountable. It will also use the disclosures to seek mitigation for the corruption and human rights abuses that may associated with U.S. investment and would exacerbate the national emergency that the President has declared in Burma, as it did when it raised evidence of the diversion of gas revenues to offshore bank accounts with the U.S. government.⁶

In Burma, local communities often have little information on the ownership structures of foreign investors, with a number of extractive companies registered in tax havens, including the British Virgin Islands and Cayman Islands. Often companies operate through local subsidiaries and through local partners, contractors, and subcontractors, increasing the challenges for local communities to identify those responsible for negative impacts. Reporting on operations, partners, subcontractors and suppliers will greatly assist local communities and civil society to engage with, and where necessary, hold corporate actors accountable for breaches of law and negative impacts. ERI works closely with fact-finders, attorneys and other community advocates in Myanmar to raise concerns about human rights and environmental abuses in national, regional, foreign, and international fora. We expect that in situations where the business partners and affiliates of U.S. investors are contributing to conflict, human rights, abuses, and corruption, the information disclosed will assist ERI and its partners to identify the investors and engage on policies and practices that would better prevent or mitigate such negative outcomes.

⁶ Importantly, ERI ability to estimate the diversion of funds and trace the payments was made possible in part by the documents disclosed in the Unocal litigation. Without the proposed disclosure requirements, such information is unlikely to be available in future cases.

II. Improving the Quality and Utility of Information Collected

A. Eliminate Self-Designation of Confidentiality

The provision allowing for submitters to withhold information from their public reports if they believe it would be exempt from FOIA disclosure should be eliminated. Under the current proposal, reporting entities have unfettered control over the designation of information as confidential and the decision to withhold such information from public reporting, and there is no mechanism by which the government can compel them to reveal inappropriately withheld information.

From ERI's experience, companies in Burma generally refuse to report on issues that touch on their relations with the government, either to avoid disclosing information that could cause them embarrassment, or based on a misguided belief that disclosure will disadvantage them in their access to commercial opportunities. In 2010, Chevron claimed it was unable to disclose payments to the Government of Burma, insisting, "Its contractual obligations related to the Yadana Project do not permit disclosure of payments or other confidential information relative to the Project."⁷ Likewise, French oil company Total claimed in 2010 it was unable to disclose these payments because "Total cannot disclose any financial or contractual information if the host country is opposed to such disclosure."⁸ These claims are made despite the absence of any express prohibition in the Yadana contracts prohibiting such disclosures, a fact we know because the contracts became public through the discovery process in a human rights lawsuit originally brought against Chevron's predecessor, Unocal, and Total in U.S. courts.

If the U.S. Government grants submitters complete discretion to withhold information, it gives credence to these false claims and empowers businesses to use them as an excuse to hide any information that might be seen as controversial. For civil society groups to play the integral role envisaged by the State Department of monitoring U.S. investment in Burma and raising concerns with the U.S. government, it is crucial that they be able to see all required disclosures, including information that submitters would prefer not to disclose.

B. Clarify Disclosure Requirements With Respect to Business Partners, Subsidiaries, and Other Related Entities

The proposed framework refers inconsistently and ambiguously to business partners, subsidiaries, affiliates, and other related entities of the investors who are subject to the reporting requirements. It should be made clear that investors are expected to provide all the required information for *all* related entities – including joint ventures, suppliers, and business associates – over which they have control or significant influence.

Under general U.S. securities law, the measure of control requires a fact-intensive, case-by-case inquiry to determine whether a company or investor possesses the "power to direct or

⁷ Chevron Corp., *Response to "A Call for Total, Chevron, and PTTEP to Practice Revenue Transparency in Burma (Myanmar)"* (May 24, 2010), at <http://www.reports-and-materials.org/Chevron-response-re-revenue-transparency-Burma-24-May-2010.pdf>.

⁸ Total, *Response to "A Call for Total, Chevron, and PTTEP to Practice revenue Transparency in Burma (Myanmar)"* (May 21, 2012), at <http://www.reports-and-materials.org/Total-response-re-revenue-transparency-Burma-21-May-2010.doc>.

cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.”⁹ “Significant influence” refers to the ability to participate in and therefore affect the operating and financial policies of another entity, either through representation on the Board of Directors, participation in decision making processes, material inter-company transactions, technological dependency, relative concentration of shareholding as compared to other shareholders, or other means.¹⁰ As the aim of the reporting requirements is to assist the U.S. government to manage the extent to which U.S. investment contributes to human rights abuses or exacerbates corruption or conflict in Burma, submitters should be required to report on entities over which they have significant influence, as these are the entities for whom they can be expected to take some responsibility for operating policies.¹¹

Moreover, for proposed Reporting Questions #5 and 7, all investors should be required to disclose the degree to which their due diligence and assessment policies and procedures cover the activities of business partners and related entities, and to identify specifically to which partners and entities (and, where applicable, to which activities of such partners and related entities) those policies and procedures extend, regardless of their influence or control.

C. Incorporate International Best Practices and Standards and Standardize Information for Each Reporting Category

The proposed reporting requirements touch on important categories of information that will assist both the U.S. government and civil society in evaluating corporate activity in Burma. We strongly urge, however, that disclosures be mandatorily based on internationally recognized and accepted standards that the U.S. government endorses to provide more meaningful information to both government and civil society. Instead of simply referring to such standards in footnotes, the reporting requirements should more clearly require submitters to report their own policies and practices in light of international standards that the U.S. government expects them to observe. By including more specific sets of questions based on these principles and standards, the reporting requirements can foster more comprehensive information disclosure, educate submitters on relevant international standards of conduct, provide for standardized reporting, and allow for comparability while better promoting respect for human rights.

This section presents an expanded set of disclosure questions based on relevant international frameworks and standards. It should be read in conjunction with the included Annexes, which present compiled checklists of questions based on U.S.-endorsed international best practices and standards that should serve as a reference for submitters to guide their disclosure. The sources primarily used to compile these checklists and questions include the OECD Guidelines for Multinational Enterprises, the 2012 edition of the IFC Performance Standards on Environmental and Social Sustainability and the corresponding Guidance Notes, the UN Guiding Principles for Business and Human Rights, the Voluntary Principles for Security and Human Rights, and the Extractive Industries Transparency Initiative (EITI).

⁹ See 17 CFR 240.12b-2.

¹⁰ See Accounting Principles Board, *Opinion 18: The Equity Method of Accounting for Investments in Common Stock* ¶ 17 (Mar. 1971). According to the APB, 20% ownership gives rise to a rebuttable presumption of significant influence.

¹¹ For example, in corporate joint ventures, the participants are generally subject to arrangements by “which venturers participate, directly or indirectly, in the overall management of the joint venture.” *Id.* ¶ 2(b). These arrangements do not necessarily correspond to percentage ownership.

In the lists that follow, the term “submitter” always incorporates the submitter’s partners and related entities.

Reporting Question 5(a). Human Rights Due Diligence Policies & Procedures

Business policies and procedures for due diligence regarding human rights, worker rights and the environment should be reported in a manner that is consistent with internationally recognized and accepted standards and principles from the OECD Guidelines for Multinational Enterprises, IFC Performance Standards, UN Guiding Principles on Business and Human Rights, and the Voluntary Principles on Security and Human Rights. This section should be read in conjunction with Annex A.

Questionnaire:

1. *Policy Commitment.* Does the submitter have a publicly available policy statement that expresses an explicit commitment to respect human rights? If so, please provide the policy and explain to whom it applies.
2. *Human Rights Risk & Impact Assessments.* What ongoing processes does the submitter have in place to identify potential and actual adverse impacts on human rights which the submitter may cause or contribute to through its activities, or which may be related to its products, operations or services?
3. *Preventing, Mitigating and Managing Impacts.* What processes does the submitter have in place for preventing and handling actual and potential impacts on human rights identified through human rights due diligence or other means, tracking and accounting for its mitigation measures, and communicating its impacts and responses to stakeholders?
4. *Grievance Mechanisms.* Does the submitter have an effective operational-level grievance mechanism for individuals and communities who may be adversely impacted? Describe the features of this mechanism in section 5(d).

Similar due diligence must be carried out with regard to the environment and workers’ rights and reported on consistent with the relevant international standards and best practices in the OECD Guidelines and IFC Performance Standards.¹² Due diligence approaches may vary based on differences between sectors. Internationally recognized sector-specific standards and principles have been developed and should be integrated into the reporting requirements.¹³

¹² For the environment, see OECD Guidelines for Multinational Enterprises, Ch. IV. Environment; IFC Performance Standard 1: Assessment and Management of Environmental and Social Impacts. *See also* IFC Performance Standard 2: Resource Efficiency and Pollution Prevention; IFC Performance Standard 4: Community Health, Safety, and Security; and IFC Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources. For workers’ rights, *see* OECD Guidelines Ch. V. Employment and Industrial Relations; IFC, Performance Standard 2: Labor and Working Conditions. *See also* IFC Guidance Notes 1, 2, 4, & 6.

¹³ Relevant examples include the International Council on Mining and Metals’ framework, “Integrating Human Rights Due Diligence into Corporate Risk Management Processes,” and the Voluntary Principles on Security and Human Rights.

Reporting Question 5(b). Policies and Procedures on Anti-Corruption

Submitters' policies relating to anti-corruption measures should be disclosed in light of the standards reflected in OECD Guidelines Ch. VII. Combating Bribery, Bribe Solicitation and Extortion.

Questionnaire:

1. *Company Policy & Commitment Against Corruption.* Does the submitter have a clearly articulated and visible corporate policy prohibiting foreign bribery and other forms of corruption? If so, please provide or describe the contents of the policy.
2. *Internal Controls, Ethics and Compliance Programs or Measures to Prevent Corruption.* Describe the submitter's internal controls, ethics and compliance programs or other measures in place for preventing and detecting foreign bribery and other forms of corruption, and any procedures for monitoring/and or re-assessing these programs over time.
3. *Transparency of Activities.* What measures, if any, does the submitter take (or has it taken) to enhance transparency of its efforts to combat corruption and promote public awareness?
4. *Employee Awareness & Compliance.* How does the submitter promote employee awareness of and compliance with policies and ethics and compliance programs against corruption?
5. *Properly Documented Due Diligence Pertaining to Agents.* What policies and procedures does the submitter have in place to ensure due diligence is conducted with respect to the hiring of and appropriate and regular oversight of agents? How is such due diligence documented?

While submitter's reports should reference the entirety of the OECD Guidelines' anti-corruption provisions, a concise checklist of best practices is provided in Annex B to facilitate comprehensive, meaningful and standardized reporting.

Reporting Question 5(c). Policies & Procedures for Community and Stakeholder Engagement

Stakeholder engagement is critical to all phases of a project. All current international standards and best practices stress the importance of meaningful stakeholder engagement. While the reporting requirements are right to acknowledge this as an important activity, we strongly urge that the requirements include a more detailed list of questions pertaining to engagement practices. In particular, when a project may affect indigenous people's communities,¹⁴ specific reference should be made to the requirement of Free, Prior, and Informed Consent (FPIC).¹⁵

¹⁴ There are a number of groups in Burma that self-identify as indigenous peoples, including the Shan and the Tavoyan. IFC Performance Standard 7 applies to groups that, in varying degrees, 1) self-identify as distinct indigenous peoples; 2) have a collective attachment to traditional territory and the natural resources in that territory;

A list of questions is provided here that takes into account the recognized standards and best practices for engaging with stakeholders. Submitters should answer the questions while referencing Annexes C (on stakeholder engagement) and D (on FPIC). The principles articulated in the questionnaire and checklist come from the EITI Rules, the IFC Performance Standards and relevant Guidance Notes, and the IFC Good Practice Handbook for Companies Doing Business in Emerging Markets. Companies should also be directed to consider more targeted stakeholder engagement practices and guidance tools that have been developed by sector-specific initiatives.

Questionnaire:

1. *Stakeholder Identification.* What policies and procedures does the submitter have in place for identifying legitimate stakeholders that may be directly or indirectly affected by planned business activities?
2. *Engagement Planning.* What are the elements and procedures for the submitter's engagement plans for each project?
3. *Information Disclosure.* What information is disclosed to affected communities and other stakeholders about the project, and how is that information communicated to ensure that communities are provided with relevant, transparent, objective, meaningful, and easily accessible information?
4. *Stakeholder Consultation.* What are the submitter's policies and procedures for exchange of views and consultation with stakeholders, and for ensuring the freedom of such consultation, including freedom for communities to select representatives of their choosing and freedom from intimidation and other risks to stakeholders? At what phase does consultation begin, and does it continue through all phases of the project?
5. *Informed Consultation and Participation.* What, if any, additional measures and processes are in place to ensure more in-depth and informed consultation and participation when there the potential for adverse impacts on communities is high? Does the submitter have special procedures for projects involving large-scale land acquisition, projects in ethnic areas and/or zones of active conflict, natural resource projects, and/or projects in Special Economic Zones?
6. *Grievance Mechanism.* Describe the process by which people affected by the project or the submitter's operations can bring their grievances to the submitter or its partners and related entities for consideration and redress.

3) maintain distinct social or cultural institutions; and 4) speak a distinct dialect or language from that of the mainstream culture.

¹⁵ Among other instruments, the United States has signed the United Nations Declaration on the Rights of Indigenous Peoples, which prescribes the application of FPIC before relocation of indigenous people from their traditional lands (Art. 10), when adopting regulatory or administrative measures (Art. 19), in the case that traditional lands or cultural property have been taken or damaged (Arts. 11.2 & 28), before storing hazardous materials on their land (Art. 29.2), and prior to approving development and resource utilization projects affecting their lands and territories (Art. 32.2). The right to FPIC can also be found in the IFC's Performance Standard 7.

7. *Ongoing Reporting to Stakeholders.* What are the submitter's policies and processes for providing affected communities with ongoing updates on the project and on other issues that arise that are of concern to communities?
8. *Management Functions.* Describe how, if at all, the submitter involves stakeholders and/or external monitors in the process of monitoring ongoing project impacts, mitigation efforts, and benefits.
9. *Local Capacity Building.* Does the submitter engage in efforts to encourage and/or contribute to local capacity building? If yes, please describe such efforts.
10. *Indigenous Peoples & Free, Prior, and Informed Consent (FPIC).* What are the submitter's policies and procedures in place for ensuring that when a project has the potential to impact communities of indigenous peoples that the Free, Prior and Informed Consent (FPIC) of the affected communities of indigenous peoples is obtained? When, according to the submitter's policies, does the FPIC requirement apply?
 - *Assessing and Avoiding Adverse Impacts.* Describe the process by which the submitter assesses projects for potential adverse impacts on indigenous people. Does the submitter avoid all possible adverse impacts and develop options for commensurate compensation where impacts are unavoidable?
 - *Agreement on the FPIC Process.* What is the submitter's process for consulting with affected communities of indigenous peoples to determine the best engagement and negotiation process? What is the process for negotiating and coming to an agreement, and how is the process documented?
 - *Documentation of the Outcome.* How are the FPIC negotiation process and the outcome documented and is it publicly available?
 - *Respecting FPIC.* If an indigenous community does not consent, what policies and practices does the submitter have in place to respect this decision?

In completing their reports, submitters should be directed to consult Annex C, which contains a checklist of best practices and standards for stakeholder engagement, and Annex D, which specifically focuses on engagement with Indigenous Peoples and obtaining FPIC.

Reporting Question 5(d). Policies and Procedures Relating to Grievance Procedures

The importance of effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted by investment activity is now widely accepted. To provide more useful and clearer information and assist government and civil society in evaluating whether such mechanisms are adequate, submitters should be required to describe their grievance mechanisms and procedures in terms of the criteria identified in Principle 31 of the UN Guiding Principles on Business and Human Rights.

Questionnaire:

1. Describe what mechanisms the submitter has in place for hearing individual and community grievances, including whether such mechanisms are subject to continuous

review and improvement and whether the their design is based on stakeholder consultation and dialogue.

2. Specifically describe how the submitter ensures the grievance mechanism meets each of the following “effectiveness criteria”: 1) legitimacy; 2) accessibility; 3) predictability; 4) equitability; 5) transparency; 6) rights-compatibility

Submitters can be directed to consult Annex E for further details on the “effectiveness criteria.”

Reporting Question 6. Arrangements with Security Service Providers

Section 6(d) should be expanded to require submitters to disclose their procedures and policies in light of the principles and standards articulated in the Voluntary Principles on Security and Human Rights. We recommend the following questions be included in the reporting requirements along with the checklist of best practices compiled in Annex F from the Voluntary Principles.

Questionnaire:

1. *Risk Assessment Procedures.* Describe the submitter’s policies and procedures for risk assessment of its operating environment.
2. *Interactions Between Company and Public Security.*¹⁶ Describe the submitter’s policies and procedures pertaining to interactions and relationships with public security providers. In particular, be sure to discuss the following:
 - *Security Arrangements.* Specifically describe how the submitter consults with and communicates standards regarding human rights and transparency to the host government.
 - *Deployment and Conduct.* Describe policies and procedures for ensuring conduct and deployment of public security is respectful of individual human rights.
 - *Consultation and Advice.* Describe policies and procedures for consultation with public security. Specifically mention how often the submitter consults with public security, in what setting, and the range of issues that are addressed.
 - *Responses to Human Rights Abuses.* What policies and procedures are in place for recording and reporting credible allegations of human rights abuses by public security,

¹⁶ Given the ongoing restrictions on financial and other transactions with the Burmese military and other elements of the Burmese government, it is expected that any interactions between submitters and the Burmese public security forces will be minimal or, at least, not at the instigation of the investor. However, as it cannot be ruled out that investors will have dealings with public security forces, we include these principles to inform those interactions.

including when such abuses are committed through the use of equipment provided by the submitter?¹⁷

3. *Interaction Between Companies and Private Security.* Describe all policies and procedures regarding interactions and relationships between the submitter and private security. Specifically mention the following:

- *Security Agreements/Contracts.* Is it the submitter's policy and practice to include in contracts with security providers provisions outlining the human rights requirements providers are expected to adhere to? Give details, including penalties for non-compliance.
- *Conduct & Deployment.* Describe the policies and procedures in place for ensuring private security providers observe the submitter's policies of ethical conduct and human rights, the law and professional standards of the host country and any other emerging best practices developed by industry, civil society and governments, including through setting rules of engagement and monitoring and investigation of instances of use of force .
- *Responses to Inappropriate Conduct and Human Rights Abuses.* Describe policies and procedures for recording allegations of human rights abuses, investigating credible allegations, monitoring the status of investigations of allegations forwarded to law enforcement authorities, and enforcing discipline.
- *Employment Policies.* What policies and procedures does the submitter have in place to ensure private security does not employ individuals credibility implicated in human rights abuses to provide security services?
- *Monitoring.* Describe the submitter's policies and procedures for monitoring private security providers to ensure that they fulfill the above obligations.
- *Consultation.* Describe submitter's policies and procedures for consulting with civil society, home country officials, host country officials, and other companies regarding experiences with private security.
- Describe any other measures taken to minimize risk and promote respect for human rights.

Reporting Question 7. Property Acquisition

Currently, the proposed rules contain no reference to internationally recognized human rights standards or best practices relating to property and land acquisition. IFC Performance Standard 5 specifically lays out plans, policies and procedures a submitter should have relating to

¹⁷ Note that the transfer by a U.S. person of anything of value – and particularly military items – to the Burmese public security forces may be a violation of sanctions legislation or Defense Trade Controls that are still in force.

land acquisition, displacement, resettlement, and compensation. The reporting requirements should specifically incorporate these standards and practices. In addition to the questionnaire suggested here, submitters should consult Annex G for a more comprehensive checklist of identified best practices relating to property acquisition derived from the IFC Performance Standard 5 and Guidance Note 5.

Questionnaire:

1. *Project Design & Planning.* In designing projects, how does the submitter ensure it takes into account and balances environmental, social, financial and human rights costs and benefits, and what procedures are in place to ensure engagement with communities that may be displaced?
2. *Grievance Mechanism.* What mechanisms does the submitter have in place for grievances relating to land and property acquisition issues? Describe how it meets the criteria listed in section 5(d).
3. *Compensation.* What is the submitter's compensation policy relating to loss of land and other assets?
4. *Physical Displacement & Resettlement Planning.* What processes and procedures does the submitter have in place to avoid or minimize physical displacement, and for planning for situations where physical displacement will result? Explain how compensation for land and other assets lost is planned for, how negative impacts of displacement are mitigated, how the submitter plans for and identifies the entitlements of those who must be resettled, and how the submitter documents all stages of land transactions and compensation measures.
5. *Economic Displacement & Livelihood Restoration Planning.* What processes and procedures does the submitter have in place to avoid or minimize physical displacement, and for planning for compensation and other assistance in cases where projects involve economic displacement only?
6. *Procedures to Monitor & Evaluate Implementation.* What procedures does the submitter have in place to monitor and evaluate the implementation of its plans related to displacement?
7. *Indigenous Peoples.* What special policies and procedures are in place for situations where indigenous peoples might be adversely impacted?

Reporting Question 8. Transparency.

In order to improve comparability and usefulness of disclosures, information on payments to the Burmese Government should be disaggregated to identify at least the categories required by Section 1504 of the Dodd-Frank Act and the Extractive Industry Transparency Initiative (EITI). Although these initiatives apply only to extractive companies, the categories are

sufficiently general that payment information disaggregated to such an extent will be useful across many, if not all sectors. Payments to each entity of the government should be reported by each payment type, including at least the following:

1. taxes
2. royalties
3. fees
4. production entitlements
5. bonuses
6. dividends; and
7. payments for infrastructure improvements.

The reporting requirements should be clear that they include in-kind payments in addition to monetary payments, as does Section 1504 of the Dodd-Frank Act. We would also urge that an eighth payment type also be included: social payments. Direct payments or projects undertaken by investors for the social welfare of the communities in which they work form part of the revenue stream that countries realize from foreign investment. Although neither Section 1504 of the Dodd-Frank Act nor the EITI currently require companies to disclose their social payments, the EITI does encourage such disclosures and has noted that increasingly EITI programs are including such payments.

Annex A -- Human Rights Policies & Due Diligence

1. *Policy Commitment to Respect Human Rights.* The submitter should have a publicly available statement articulating the submitter's commitment to respect for Human Rights.
 - Is this policy statement approved at the most senior level of the enterprise?
 - Is it informed by relevant internal and or external expertise?
 - Does it stipulate the human rights expectations of personnel, business partners, and other parties directly linked to the submitter's operations, products, or services?
 - Is it publicly available and communicated internally and externally to all personnel, business partners and other relevant parties?
 - Is it reflected in operational policies and procedures necessary to embed it throughout the enterprise?

2. *Company Processes for Identifying & Analyzing Potential and Actual Human Rights Risks & Impacts.* The submitter should have processes in place to conduct human rights due diligence to identify and assess potential and actual human rights risks that may be associated with its activities, operations, and relationships.
 - *Conducting Human Rights Impact Assessments*
 - Do these processes include specific measures to identify potential human rights impacts?
 - Is identification and assessment of human rights impacts undertaken as part of a broader risk assessment/management mechanism, or on its own as a separate process? If the submitter assesses human rights risks as part of a broader risk management system, does it go beyond simply identifying and managing the material risks to the submitter itself and include risks to rights-holders?
 - Does it include explicit references to internationally recognized human rights?
 - Does the process utilize internal and/or independent external human rights expertise?
 - Does the process involve meaningful consultation with potentially affected groups and other relevant stakeholders? How are these stakeholders identified, informed and consulted?
 - *Rights to Be Considered*
 - Does the process incorporate and make reference to the internationally recognized human rights expressed in the International Bill of Human Rights – consisting of the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – and the principles concerning fundamental rights in the 1998 ILO Declaration on Fundamental Principles and Rights at Work?
 - Does the process incorporate and make reference to any other internationally recognized human rights?
 - Does the process take the specific country context into account, including in particular (i) a consideration of recent conflict and the potential for renewed conflict; and (ii) attention to the human rights record of the country as a whole

and specific entities of the state (including public security forces, paramilitaries, and local and national law enforcement)?¹⁸

- How does risk assessment take into account (i) security risks, especially considering political, economic and social factors; (ii) potential for violence; (iii) rule of law, including the local prosecuting authority and judiciary's capacity to hold accountable those responsible for violations of international humanitarian and human rights law; and iv) conflict analysis?
 - *Integration of Findings from Impact Assessments*
 - How does the submitter integrate the findings of its assessments across relevant internal functions and oversight processes?
3. *Policies and Processes for Managing, Preventing, and Remediating Impacts.* The submitter should have processes in place for handling actual and potential impacts on human rights that are identified through human rights due diligence or other means.
- What concrete steps does the submitter take to prevent or mitigate adverse impacts that are directly linked to its business operations, products or services by a business relationship, even if its does not contribute to those impacts?
 - Does the submitter consider feedback from internal and external stakeholders on these processes?
 - What emergency response measures does the submitter have in place in the event of accidents or other emergencies that impact human rights?
4. *Continuous monitoring, review and tracking of response to human rights impacts.* To verify whether adverse human rights impacts are being adequately addressed, the submitter should track and account for the effectiveness of their responses to such impacts.
- What are the submitter's qualitative and/or quantitative indicators and metrics for measuring human rights impact mitigation?
 - How does the submitter communicate externally about its steps to address human rights impacts?
 - How does the submitter respond to concerns about human rights impacts when raised by or on behalf of affected stakeholders.
 - Does the submitter practice human rights due diligence as an ongoing process?
5. *Grievance Mechanisms.* The submitter should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely affected by the submitter's activities. (See Annex E).
6. *Stakeholder Engagement at Each Stage.* Stakeholder engagement is vital, and an engagement plan should be developed at the outset of the project.
- Does the submitter identify stakeholders at the earliest stage and engage with them in the initial analysis and planning of project?

¹⁸ Useful guides on these matters include the Global Compact's Business Guide for Conflict Impact Assessment and Risk Management; the Global Compact's Guidance on Responsible Business in Conflict-Affected and High Risk Areas: A Resource for Companies and Investors; and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones

- Does the submitter have policies and practices for disclosing and disseminating information to stakeholders? Do these disclosures include the following?
 - The purpose, nature, scale of project;
 - The duration of the proposed project or activities;
 - Any risks to and potential impacts on communities;
 - Relevant mitigation measures;
 - The envisioned stakeholder engagement process;
 - Grievance mechanisms
- Does the submitter have grievance mechanisms appropriate to address stakeholder concerns?
- Are communities of indigenous peoples engaged and their free, prior, informed consent obtained when a project could have a potentially adverse impact on them?

Annex B -- Anti-Corruption Policies & Procedures

1. *No Offering, Promising, Giving, Requesting or Accepting of Undue Pecuniary or Other Advantage.* The submitter should not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners, nor should it request or agree to or accept undue pecuniary or other advantage from public officials or employees of business partners.
2. *Company Policy Against Corruption & Demonstrated Commitment.* The submitter should have a clearly articulated and visible corporate policy prohibiting foreign bribery and other forms of corruption.
 - What does senior management do to show strong, explicit, and visible support for anti-corruption policies and internal controls?
3. *Internal Controls, Ethics & Compliance Programs and Measures to Prevent Corruption.* The submitter should develop and adopt adequate internal controls, ethics and compliance programs and measures for preventing and detecting foreign bribery.
 - Do the internal controls and compliance programs reference the OECD's Good Practice Guidance on Internal Controls, Ethics, and Compliance, included as Annex II to the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which highlights good practices for ensuring the effectiveness of internal controls?
 - Do internal controls include a system of financial and accounting procedures designed to ensure the maintenance of fair and accurate books, records and accounts?
 - Does the submitter monitor individual circumstances and bribery risks and re-assess as necessary to ensure that the enterprise's internal controls, ethics and compliance program or measures are adapted and continue to be effective, and to mitigate risk of becoming complicit in any form of corruption?
4. *Enhance Transparency of Activities to Fight Against Corruption.* The submitter should foster openness and dialogue with the public so as to promote awareness of and co-operation with the fight against corruption.
 - Does the submitter make public its commitments against corruption?
 - Does the submitter publicly disclose its management systems and internal controls, ethics and compliance programs, and other measures?
5. *Employee Awareness & Compliance.* The submitter should promote employee awareness of and compliance with its policies, internal controls, and ethics and compliance programs against corruption.
 - Does the submitter have training programs for anti-corruption procedures?
 - Does the submitter have internal disciplinary procedures for violations of the anti-corruption policies and procedures?
6. *Properly Documented Due Diligence Pertaining to Hiring, and Appropriate and Regular Oversight of Agents.* The submitter should ensure that remuneration of agents is appropriate and for legitimate services only.

- Does the submitter maintain and disclose to competent authorities a list of agents engaged in connection with transactions with public bodies and State-owned enterprises?

Annex C -- Stakeholder Engagement

1. *Stakeholder Identification.* How does the submitter identify those stakeholders who are or may be directly or indirectly affected by the planned business activity?
2. *Engagement Planning.* The submitter should develop and implement an engagement plan, scaled to the project risks and impacts and development stage, and tailored to the characteristics and interests of the affected communities.
 - Does the plan (i) identify and prioritize key stakeholder groups, (ii) provide a strategy and timetable for sharing information and consulting with each of the group, (iii) describe resources and responsibilities for implementing stakeholder engagement activities, and (iv) describe how stakeholder engagement activities will be incorporated into the submitter's management systems?
 - Does the submitter articulate specific, differentiated measures to allow for effective participation of those identified as disadvantaged or vulnerable?
 - Where the process depends on community representatives, does the submitter make efforts to verify that such persons do in fact represent the community's views and can be relied upon to faithfully communicate the results of consultations?
3. *Information Disclosure.* The submitter should disclose relevant project information to help affected communities and other stakeholders understand the risks, impacts, and opportunities of the project. Disclosure should begin as early as possible.
 - Does the submitter provide affected communities with access to relevant information on the following?
 - Purpose, nature, and scale of the project;
 - Duration of proposed project and activities
 - Any risks to and potential impacts on communities;
 - Relevant mitigation measures;
 - Envisioned stakeholder engagement process;
 - Grievance mechanisms;
 - Partners, suppliers, contractors, and sub-contractors
 - Is disclosure made in formats that are easily accessible to and understood by affected communities?
4. *Stakeholder Consultation.* A process of consultation should be undertaken that provides affected communities with opportunities to express their views on the risks, impacts and mitigation measures associated with the project and allows for the submitter to consider and respond.
 - Does the submitter provide relevant, transparent, objective, meaningful and easily accessible information *prior* to consulting with stakeholders?
 - Does consultation begin early in the process of identifying environmental, social, and human rights risks and impacts?
 - Does consultation continue on an ongoing basis?
 - Are communities engaged in the following?
 - Identifying potential impacts and risks;
 - Assessing the consequences of those impacts and risks for their lives;

- Providing input into the proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues;
 - Consulting on new impacts and risks that come to light during the planning and assessment process
- How does the submitter ensure that consultation is free of external manipulation, interference, coercion or intimidation?
 - How does the submitter document consultation procedures?
5. *Informed Consultation and Participation.* For projects with a high potential for adverse impacts on affected communities, the submitter should conduct a more in-depth process of consultation, providing for informed consultation and informed participation.
- How are communities' views incorporated into decision-making in cases with potentially adverse impacts?
 - What measures are taken to ensure men and women's views and concerns are equally taken into account?
6. *Free, Prior and Informed Consent (FPIC) from Indigenous Peoples.* See Annex D for additional requirements when projects may impact indigenous peoples.
7. *Grievance Management.* The submitter should have an appropriate grievance mechanism, by which people affected by the submitter's operations can raise concerns with the submitter for consideration and redress.
- Describe who receives grievances, how such grievances are resolved, and how the response will be communicated back to the complainants.
 - How are stakeholders made aware of such mechanisms?¹⁹
8. *Ongoing Reporting to Stakeholders.* Periodic reports should be provided to the affected communities describing progress on issues that involve ongoing risks or impacts to affected communities, or that the consultation process or grievance mechanism have identified as a concern to those communities.
9. *Monitoring & Management Functions.* The submitter should involve stakeholders directly in monitoring the project's impacts, mitigation, and benefits.
- Does the submitter have protocols on when to engage external monitors, for example, where outside monitoring would build credibility and legitimacy with communities by providing an objective and independent source of information?

¹⁹ For more detailed standards on grievance mechanisms, please see Annex E.

Annex D -- Indigenous Peoples & Free, Prior, and Informed Consent (FPIC)

When projects have the potential to adversely impact communities of indigenous peoples, the requirements for engagement are heightened: submitters must obtain the free, prior, informed consent (FPIC) of the affected communities on at least some issues. The latest update to the IFC Performance Standard 7 reflects the evolution of FPIC from a voluntary process to a mandatory prerequisite for a project.

1. *Assessing the Potential for Adverse Impacts.* The submitter should identify through a risks and impacts assessment process: (i) all communities of indigenous peoples within the project area of influence who might be affected by the project; and (ii) the nature and degree of the expected direct and indirect economic, social, cultural and environmental impacts on them.
 - Does the analysis include consideration of indigenous peoples' (i) economic, social and legal status, (ii) institutions, customs, culture, and/or language, (iii) dependence on natural resources; and (iv) past and ongoing relationship to dominant groups and the mainstream economy?
 - Does the submitter conduct a vulnerability analysis conducted by a competent expert that involves the participation of affected peoples?

2. *Circumstances Requiring FPIC.* Does the submitter recognize the requirement of FPIC in the circumstances prescribed by IFC Performance Standard 7? Specifically, does the submitter practice FPIC in the following circumstances?
 - Potentially adverse impacts on lands and natural resources subject to traditional ownership or under customary use;²⁰
 - Relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use;
 - Where a project may significantly impact on critical cultural heritage that is essential to the identity and or cultural, ceremonial or spiritual aspects of indigenous peoples lives;
 - Where the submitter proposes to use an indigenous group's cultural heritage – including knowledge, innovations and or traditional practices – for commercial purposes, does the submitter inform the group of its intentions, the group's rights under domestic and international law, and the potential consequences of the intended use? Does it fairly and equitably share with the group the benefits of such commercialization?

3. *Avoiding Adverse Impacts.* Adverse impacts on affected communities of indigenous peoples should be avoided were possible.
 - Where it is determined that adverse impacts are unavoidable, after the exploration of alternatives, does the submitter minimize, restore, and/or compensate for these impacts in a culturally appropriate manner commensurate with the nature and scale of such impacts and the vulnerability of the affected communities of indigenous peoples?

²⁰ A special case in which FPIC is commonly required is when hazardous substances will be placed or stored on indigenous peoples' territory.

4. *Agreement on the FPIC Process.* The submitter should consult with the affected communities of indigenous peoples to determine the best engagement and negotiation process.
 - Does the submitter conduct informed consultation characterized by participation and good faith negotiation in developing a negotiation process?
 - Does the submitter document the mutually accepted engagement and negotiation process between the submitter and the affected communities of indigenous peoples?
 - Do the agreements reached pursuant to FPIC specifically identify and document the following commitments and differentiated roles and responsibilities?
 - The agreed engagement and consultation process;
 - Environmental, social and cultural impact management (including land and resource management);
 - Agreed mitigation and compensation measures for adverse project impacts
 - Compensation and disbursement framework or arrangements;
 - Employment and contracting opportunities;
 - Governance arrangements;
 - Other commitments such as those pertaining to continued access to lands, contribution to development, etc.;
 - Agreed implementation/delivery mechanisms to meet each party's commitments
 - Any agreements as to the provision of broader development opportunities for indigenous communities;
 - Does the submitter confirm that the agreement is supported by the constituencies identified through the risks and impacts assessment process and with whom the process of engagement and good faith negotiation has occurred?
5. *Documentation of the Outcome.* The FPIC process and the outcome should be well documented and publicly available.
6. *Additional Measures to ensure meaningful engagement.* Does the submitter take targeted steps to address the following issues that may particularly affect indigenous communities' ability to participate in consultation processes?
 - Controls to ensure free and voluntary participation, without manipulation, interference, coercion or intimidation;
 - Evaluation of the capacity of communities to engage in a process of informed consultation;
 - Accommodations to ensure sufficient time is provided for decision-making;
 - Guarantees to ensure that vulnerable groups, particularly women, are included

Annex E -- Grievance Mechanisms

The UN Guiding Principles identify the following “effectiveness criteria” for operation-level grievance mechanisms. Such mechanisms should be:

1. *Legitimate*. How does the mechanism enable trust from the stakeholder groups by whom they are to be used, and what accountability mechanism exists for the fair conduct of grievance processes?
2. *Accessible*. Is the mechanism known to all stakeholder groups for whose use it is provided, and is adequate assistance provided for those who may face particular barriers to access?
3. *Predictable*. Are there clear and known procedures with an indicative timeframe for each stage, clarity on the types of processes and outcomes available, and a means of monitoring implementation?
4. *Equitable*. Do aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in the process on fair, informed, and respectful terms?
5. *Transparent*. Are parties to a particular grievance informed about its progress and provided sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake?
6. *Rights-compatible*. How does the submitter ensure that outcomes and remedies accord with internationally recognized human rights?
7. *A source of continuous learning*. Does the submitter draw on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms?
8. *Based on engagement and dialogue*. Does the submitter consult stakeholder groups on the design and performance of the mechanism, and focus on dialogue as the means to address and resolve grievances?

Annex F -- Arrangements with Security Service Providers

The following checklist of best practices and standards should be consulted when a submitter interacts with security service providers; its contents derive primarily from the Voluntary Principles on Security and Human Rights.

1. *Risk Assessment.* The submitter should engage in effective, accurate assessment of risks in its operating environment. Do risk assessments include consideration of the following factors?
 - *Identification of Security Risks* – potential security risks resulting from economic, civil or social factors should be adequately considered, and measures should be taken to minimize such risk and assess whether the submitter’s activities may heighten risk.
 - *Potential for Violence* – civil society, home and host government representatives, and other sources should be consulted to identify risks of violence.
 - *Human Rights Records* – the record of the public security forces and local and national law enforcement, the existence of paramilitary groups, and the reputation of private security providers should all be examined and taken into account.
 - *Rule of Law* – prosecuting authority and judiciary’s capacity to hold accountable those responsible for human rights abuses should be considered.
 - *Conflict Analysis* – the submitter should identify the root causes and nature of local conflicts and consider the potential for future conflicts in the region.
 - *Equipment Transfers* – when providing equipment to public or private security,²¹ the submitter should consider the risks associated, any relevant export licensing requirements, and the feasibility of measures to mitigate foreseeable negative consequences, including adequate controls to prevent misappropriation or diversion of equipment, which may lead to human rights abuses. Any past incidents should be considered as well.

2. *Interactions Between Company and Public Security.*²² The submitter should have policies and procedures in place for ensuring actions taken by public security providers are consistent with the protection and promotion of human rights.
 - *Security Arrangements.* Does the submitter undertake the following in its dealings with public security providers?
 - Regular consultation with host governments and local communities about the impact of their security arrangements with public security providers on human rights in relevant communities;
 - Regular communication with local police and other state security services operating in the project area;
 - Regular communication of their policies on ethical conduct and human rights to public security providers and insistence that security be conducted consistent with those policies by personnel with adequate and effective training;

²¹ See *supra* note 17.

²² See *supra* note 16.

- Encouragement to host governments to make security arrangements transparent and accessible to the public
- *Deployment & Conduct*
 - How does the submitter ensure that the type and number of public security forces deployed is competent, appropriate and proportional to the threat facing personnel and facilities?
 - If providing equipment to security providers, what measures are taken to comply with applicable law and to prevent any potential negative consequences, including human rights abuses?²³
 - Does the submitter use its influence to promote the following principles with public security: (1) individuals credibly implicated in human right abuses should not provide security services for the submitter; (2) force should be used only when strictly necessary and to an extent proportional to the threat, and (3) the rights of individuals should not be violated while exercising the right to exercise freedom of association and peaceful assembly, the right to engage in collective bargaining, or other related rights of employees as recognized by the UDHR, the ILO Declaration on Fundamental Principles and Rights at Work, ILO Convention 87 as signed and ratified by Myanmar, and domestic legal protections?
 - When physical force is used against employees, local community members, or others in any way connected to the investment, are such incidents reported to the appropriate authorities and to the submitter, and is medical aid provided to injured persons, including alleged offenders?
- *Consultation & Advice.* The submitter should regularly meet with and consult public and private security, other companies in the industry, partners, suppliers, contractors, sub-contractors, host and home governments, and civil society to discuss security, human rights and related issues.
 - What measures does the submitter take to promote observance of applicable international law enforcement principles, particularly those reflected in the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms?
 - Does the submitter support efforts by governments, civil society and multilateral institutions to provide human rights training and education for public security and efforts to strengthen state institutions to ensure accountability and respect for human rights?
- *Monitoring & Responses to Alleged Human Rights Abuses.* The submitter should record and report any credible allegation of human rights abuses by public security in its areas of operation to the appropriate host government authority.
 - Does the submitter actively monitor the status of investigations and press for their proper resolution?

²³ See *supra* note 17.

- Does the submitter monitor the use of equipment provided by the submitter and investigate properly situations in which such equipment is used inappropriately?²⁴
3. *Interaction Between Companies and Private Security.* The submitter should have policies and procedures in place for ensuring that actions taken by public security providers are consistent with the protection and promotion of human rights.
- *Conduct & Deployment.* Private security should observe the policies of the submitter regarding ethical conduct and human rights; the law and professional standards of the country in which they operate; emerging best practices developed by industry, civil society, and governments; and international humanitarian law. How does the submitter should ensure that private security complies with the following expectations?
 - The security provider acts lawfully and consistently with applicable international guidelines regarding local use of force, including the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials, and other emerging best practices developed by companies, civil society and governments;
 - The security provider maintains high levels of technical and professional proficiency;
 - The security provider uses force only when strictly necessary and to an extent proportional to the threat and investigates and reports any incidents of use of force to the submitter, refers the matter to local authorities, and/or takes disciplinary action where appropriate;
 - The security provider has policies regarding the appropriate conduct and local use of force, e.g. rules of engagement. Does the submitter monitor the conduct of security forces or engage independent third parties to conduct monitoring? Does this monitoring encompass detailed investigations into allegations of abusive or unlawful acts, the availability of disciplinary measures sufficient to deter and prevent, and procedures for reporting allegations to relevant local law enforcement authorities when appropriate?
 - The security provider undertakes only preventive and defensive activities and does not engage in activities exclusively the responsibility of state, military or law enforcement authorities.
 - *Responses to Human Rights Abuses.* The submitter should ensure that all allegations of human rights abuses by private security are recorded and all credible allegations properly investigated.
 - Does the company actively monitor the status of investigations that have been forwarded to law enforcement authorities and press for their proper resolution?
 - Does the company have mechanisms to ensure that private security providers are disciplined for improper use of force or other human rights abuses?

²⁴ *Id.*

- *Employment Policies.* The submitter should ensure that private security does not employ individuals credibly implicated in human rights abuses to provide security services and
 - Does the submitter review the background of private security providers, particularly with regard to the use of excessive force?

- *Consultation & Monitoring.* The submitter should consult and monitor private security providers to ensure that they fulfill all the above obligations in providing security.
 - Which stakeholders does the submitter consult with (e.g., civil society, home country officials, host country officials, and other companies) regarding experiences with private security?

- *Contractual Provisions.* The submitter should include the principles outlined above as contractual provisions in agreements with private security providers. In particular:
 - Do contracts require investigation of unlawful or abusive behavior and appropriate disciplinary action?
 - Do contracts permit termination of the relationship by the submitter where there is credible evidence of unlawful or abusive behavior by private security personnel?

Annex G -- Property and Land Acquisition

1. *General Policy & Practice Considerations.*
 - Is it the submitter's policy to avoid, and where avoidance is not possible, minimize displacement by exploring alternative project designs?
 - How does the submitter seek to avoid causing or contributing to forced eviction?
 - How does the submitter anticipate, avoid, and where avoidance is not possible, minimize adverse social and economic impacts from property/land acquisition or land use? What procedures are in place to provide compensation for loss of assets at replacement cost, and ensure that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected?
 - What practices has the submitter adopted to respect existing social and cultural institutions of displaced persons and host communities?
2. *Project Design.* The submitter should consider feasible alternative project designs to avoid or minimize physical and/or economic displacement, while balancing environmental, social, and financial costs and benefits.
 - How does the submitter pay particular attention to impacts on the poor and vulnerable?
3. *Community Engagement.* The submitter should engage with affected communities – including host communities – throughout all phases of the project.
 - Do the submitter's procedures on engagement with affected communities comply with the international standards? (See Annex C)
 - Does engagement related to resettlement and livelihood restoration present options and alternatives to affected persons, where applicable?
 - Does the submitter continue to disclose relevant information and ensure the participation of affected communities and persons during the planning, implementation, monitoring, and evaluation of processes intended to compensate, restore livelihoods, and resettle displaced persons?
 - When activities may result in the displacement of indigenous peoples, does the submitter comply with FPIC standards? (See Annex D).
4. *Grievance Mechanism.* Does the submitter's grievance mechanism address displacement issues effectively? (See effectiveness criteria in Annex E).
 - Does the submitter receive and address specific concerns about compensation and relocation raised by displaced persons or members of host communities in a timely and appropriate fashion?
5. *Compensation.* When displacement cannot be avoided, the submitter should offer displaced communities and persons compensation for loss of assets at full replacement cost and other assistance to help them improve or restore their standards of living or livelihoods.
 - Are compensation standards transparent and applied consistently to all communities and persons affected by the displacement?
 - Where livelihoods of displaced persons are land-based, or where land is collectively owned, does the submitter offer the displaced land-based compensation?

- Does the submitter provide opportunities to displaced communities and persons to derive appropriate development benefits from the project?
 - Does the submitter wait to take possession of acquired land and related assets until after compensation has been made available?
 - Does the submitter (or another relevant stakeholder) provide relocation assistance?
6. *Physical Displacement & Resettlement Planning.* If physical displacement will result, the submitter should conduct resettlement planning that will include, among other things, compensation at full replacement cost for land and other assets lost.
- Do resettlement plans aim to (i) mitigate the negative impacts of displacement; (ii) identify development opportunities; (iii) develop a budget and schedule for resettlement; and (iv) establish the entitlements of all categories of affected persons (including host communities)?
 - Where its activities may result in physical displacement, does the submitter carry out a census to collect appropriate socioeconomic baseline data?
 - How do resettlement plans aim to accomplish the following?
 - Identify all people to be displaced;
 - Demonstrate that displacement is unavoidable;
 - Describe efforts to minimize resettlement;
 - Describe the regulatory framework;
 - Describe the process of informed consultation and participation with affected people regarding acceptable resettlement alternatives, and the level of their participation in the decision-making process;
 - Describe the entitlements for all categories of displaced people and assess risks to vulnerable groups;
 - Enumerate the rates of compensation for lost assets, describe how they were derived, and demonstrate that they are adequate;
 - Provide details on replacement housing;
 - Outline plans for livelihood restoration;
 - Describe relocation assistance to be provided;
 - Outline institutional responsibilities for the implementation of resettlement plans and procedures for grievance and redress;
 - Provide details of the arrangements for monitoring and evaluation and the involvement of affected communities in this phase;
 - Provide a timetable and budget for the implementation of the plan
 - Does the submitter document all transactions to acquire land rights and all compensation measures and relocation activities?
7. *Economic Displacement & Livelihood Restoration Planning.* In cases where projects involve economic displacement only, the submitter should develop a plan to compensate affected persons and/or communities and offer other assistance.
- How does the plan identify the entitlements of affected persons and/or communities and ensure that these are provided in a manner that is consistent, transparent and equitable?
 - Does the submitter compensate economically displaced persons who face loss of assets or access to assets at full replacement cost?

- For economically displaced persons whose livelihoods or income levels are adversely affected, does the submitter provide opportunities to improve, or at least restore their means of income-earning capacity, production levels, and standards of living?
8. *Procedures to Monitor & Evaluate Implementation.* The submitter should have in place, and carry out, procedures to monitor and evaluate the implementation of its resettlement plans and other plans related to displacement.
- Are affected persons consulted during the monitoring process?
 - Are resettlement and restorations plans evaluated to assess whether their provisions have been met? If so, does this review include the following features?
 - Review of the totality of mitigation measures implemented by the submitter;
 - Comparison of outcomes against agreed to objectives;
 - Conclusions as to whether the monitoring process can end;
 - External completion audit of the resettlement plans
9. *Indigenous Peoples.* The submitter should make every effort to explore feasible alternative project designs to avoid any physical relocation of indigenous peoples from their communally held lands or customary lands under use.
- Does the submitter consider all feasible alternatives to relocation and secured the FPIC of the affected communities of indigenous peoples prior to resettling them?