

Complaint to the Australian National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises

NCP

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Subject

Alleged non-compliance with the OECD Guidelines for Multinational Enterprises by Myanmar Metals Limited in relation to its divestment from Bawdwin Mine.

Date

14 September 2021

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1 Executive summary

Publish What You Pay Australia (‘the Complainant’), on behalf of 245 Myanmar-based civil society organisations (‘CSOs’), is submitting this complaint against Australian-headquartered Myanmar Metals Limited (‘MYL’) to Australia’s National Contact Point (‘NCP’) in accordance with the OECD Guidelines for Multinational Enterprises (‘OECD Guidelines’). The 245 Myanmar-based CSOs must remain anonymous due to the severe human rights violations being committed by the military junta in Myanmar and the CSOs’ concerns that they will face repercussions if they become known. The complaint relates to MYL’s activities in Myanmar.

In 2017, MYL acquired an option in relation to the Bawdwin mine in northern Shan State, Myanmar, one of the world’s largest deposits of zinc, lead and silver.¹ In 2018, MYL exercised that option to acquire its majority 51% participating interest in a joint venture to develop the mine (‘the Bawdwin Joint Venture’, ‘BJV’) comprised of MYL through its wholly owned Myanmar-based subsidiary, Bright Mountain Resources Myanmar Co., Ltd. (‘BMR’) and two Myanmar-registered companies, Win Myint Mo Industries Co. Ltd (‘WMM’) and EAP Global Co. Ltd (‘EAP’). According to the BJV website, MYL/BMR is the international investor and project manager, WMM is the permit holder and EAP is the local investor.² The BJV holds an 100% participating interest in the Bawdwin Production Sharing Agreement with WMM shareholders and Mining Enterprise No. 1 (‘ME-1’) – a Myanmar state-owned enterprise that sits under the Ministry of Natural Resources and Environmental Conservation, which is now under the control of the military junta.³

The Bawdwin mine presently consists of an open pit, underground workings and associated processing infrastructure, and the mine has not been operated since 2009.⁴ The BJV’s project at the mine involves redevelopment of the mine, removal of some of the existing infrastructure and construction of new infrastructure to support future mining activities.⁵

¹ See MYL, ‘Bawdwin’, <https://myanmarmetals.com.au/operations/> (accessed 18 August 2021); MYL, ‘MYL enters into binding agreements for divestment of Bawdwin interest’, 17 August 2021, https://cdn-api.markitdigital.com/apiman-gateway/ASX/asx-research/1.0/file/2924-02407882-6A1045947?access_token=83ff96335c2d45a094df02a206a39ff4 (accessed 18 August 2021).

² BJV, ‘Development overview’, <https://www.bawdwinjv.com/project/development-overview> (accessed 26 August 2021).

³ MYL, ‘2021 General Meeting – Notice of General Meeting – Explanatory Memorandum’, 25 August 2021, page 7, https://assets.ctfassets.net/hnlfgsjzg6je/S5CA34dRlva6Hy2LLIDRT/9e4c40d4971992f0b796084f4c19091b/210826_NOM.pdf (accessed 26 August 2021). Mining Enterprise No. 1 was designated by the National Unity Government of the Republic of the Union of Myanmar (‘NUG’), a Myanmar government in exile formed by parliamentarians ousted in the 2021 coup d’état, as a ‘Restricted Entity’, meaning “any entity, company, enterprise, department, agency, ministry, or a person under direct or indirect control or ownership of the illegal military council”: NUG, ‘Ministry of Planning, Finance, and Investment: Three-Pillar Framework Guiding Responsible Investment and Continued Operations’, 21 July 2021, page 4, <https://assets-mopfi.nugmyanmar.org/images/2021/07/NUGs-Investment-Guidance.pdf> (accessed 26 August 2021).

⁴ BJV, ‘Scoping report’, April 2020, page 1, https://www.bawdwinjv.com/images/Downloads/BJV_FinalScopingReport.pdf (accessed 26 August 2021).

⁵ BJV, ‘Scoping report’, April 2020, page 1, https://www.bawdwinjv.com/images/Downloads/BJV_FinalScopingReport.pdf (accessed 26 August 2021).

On 17 August 2021, MYL announced the divestment of its entire interest in the BJV to WMM for a total consideration of US\$30 million, conditional on MYL shareholder approval.⁶ MYL shareholders will consider and approve the divestment at MYL's General Meeting on 24 September 2021.⁷ The Complainant understands that MYL's divestment is due to the "extremely problematic and realistically unlikely" procurement of project finance for the development of the Bawdwin mine following the recent military coup in Myanmar and MYL's inability to evidence sources of adequate funding for the project to the Myanmar regime.⁸

The Complainant considers that MYL has reached its decision to disengage from the BJV irresponsibly. In the Complainant's opinion, MYL has failed to act in accordance with the principles and standards in the OECD Guidelines in three key respects. First, MYL has failed to conduct appropriate risk-based human rights due diligence in relation to the divestment and has failed to meaningfully engage with stakeholders. Second, MYL has failed to seek to prevent or mitigate adverse human rights impacts that may arise after the sale of its interest in the BJV. Third, MYL has failed to be transparent in relation to its decision to disengage from the BJV. In short, the Complainant submits that MYL's proposed divestment from the mine does not comply with the OECD Guidelines and, if the divestment occurs, would constitute irresponsible disengagement.

The Complainant respectfully requests that the NCP expedite its initial assessment, given that a binding agreement to dispose of MYL's interest in the BJV has already been entered and MYL's impending General Meeting (at which shareholders will consider and potentially approve the transaction) on 24 September 2021. MYL has projected that, if shareholders approve the transaction, the divestment will be finalised by 26 November 2021.⁹

If the NCP determines that the issues raised merit further examination, the Complainant encourages the NCP to offer good offices as soon as possible, with the aim of resolving the issues raised in the complaint. If the good offices fail to produce a mutually acceptable solution, the Complainant requests that the NCP conduct an examination of the facts and make a public statement that contains a determination as to whether MYL has acted in accordance with the OECD Guidelines and recommendations to MYL aimed at bringing its behaviour into line with the Guidelines.

⁶ See MYL, '2021 General Meeting – Notice of General Meeting – Explanatory Memorandum', 25 August 2021, pages 7-8,

https://assets.ctfassets.net/hnlfgsjzg6je/S5CA34dRlva6Hy2LIIDRT/9e4c40d4971992f0b796084f4c19091b/210826_NOM.pdf (accessed 26 August 2021). MYL stated that, as of 25 August 2021, it was not aware of any other regulatory approvals that will be required for the divestment.

⁷ MYL, '2021 General Meeting', 25 August 2021,

https://assets.ctfassets.net/hnlfgsjzg6je/S5CA34dRlva6Hy2LIIDRT/9e4c40d4971992f0b796084f4c19091b/210826_NOM.pdf (accessed 26 August 2021).

⁸ MYL, '2021 General Meeting – Notice of General Meeting – Explanatory Memorandum', 25 August 2021, page 6, https://assets.ctfassets.net/hnlfgsjzg6je/S5CA34dRlva6Hy2LIIDRT/9e4c40d4971992f0b796084f4c19091b/210826_NOM.pdf (accessed 26 August 2021).

⁹ MYL, '2021 General Meeting – Notice of General Meeting – Explanatory Memorandum', 25 August 2021, page 13, https://assets.ctfassets.net/hnlfgsjzg6je/S5CA34dRlva6Hy2LIIDRT/9e4c40d4971992f0b796084f4c19091b/210826_NOM.pdf (accessed 26 August 2021).

2 Criteria for making an initial assessment

The Complainant respectfully submits that the issues raised in this complaint are bona fide and relevant to the implementation of the OECD Guidelines. The following sections address the criteria that the NCP should consider when making an initial assessment.¹⁰

2.1 The identity of the party concerned and its interest in the matter

2.1.1 The company: Myanmar Metals Limited

MYL is a Perth-headquartered explorer and mine developer listed on the Australian Securities Exchange ('ASX').¹¹ MYL holds a 51% majority interest in the BJV, which is comprised of MYL through its wholly owned Myanmar-based subsidiary, BMR, and two Myanmar-registered companies, WMM and EAP.

2.1.2 The notifier: Publish What You Pay Australia

Publish What You Pay Australia ('PWYP') is a civil society coalition of 30 anti-corruption, human rights, environmental and faith-based organisations advocating for greater transparency and accountability of the mining, gas and oil sectors.¹² PWYP is a member of the global PWYP movement, which consists of over 1000 organisations and 50 national coalitions working to ensure that revenues from oil, gas and mining help improve people's lives.¹³

PWYP is filing this complaint on behalf of 245 Myanmar-based CSOs, which must remain anonymous due to the serious human rights violations being committed by the Myanmar military junta. These include CSOs connected to communities near the Bawdwin Mine, in Namtu Township, Kyaukme District, Myanmar. Upon the NCP's request, the Complainant can confidentially share the names of all the CSOs on whose behalf it files this complaint.

2.2 Whether the issue is material and substantiated

The Complainant alleges that the proposed divestment contravenes MYL's responsibilities under the OECD Guidelines in three key respects.

2.2.1 Inadequate due diligence, including failure to meaningfully engage with stakeholders

According to the OECD Guidelines, the decision to disengage from a business relationship is a decision like any other for which multinational enterprises ('MNEs') should conduct human rights due diligence to identify, prevent and mitigate adverse impacts resulting from the business decision.

Chapter II (General Policies), OECD Guidelines provides that MNEs should:

¹⁰ OECD, 2011, OECD Guidelines for Multinational Enterprises, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, I. Commentary on the Procedural Guidance for NCPs, Initial Assessment, page 82-83, paragraph 25.

¹¹ MYL, 'About Myanmar Metals', <https://myanmarmetals.com.au/company> (accessed 18 August 2021).

¹² See PWYP, 'Who we are', <https://www.pwyp.org.au/who-we-are> (accessed 23 August 2021).

¹³ PWYP, <https://www.pwyp.org/> (accessed 23 August 2021); PWYP, 'Who we are', <https://www.pwyp.org.au/who-we-are> (accessed 23 August 2021).

“10. **Carry out risk-based due diligence**, for example by incorporating it into their enterprise risk management systems, to **identify, prevent and mitigate actual and potential adverse impacts** [...] and **account for how these impacts are addressed**.

...

14. Engage with relevant stakeholders in order to provide **meaningful opportunities** for their **views to be taken into account** in relation to planning and decision making for projects or other activities that may **significantly impact local communities**.¹⁴

The 2018 OECD Due Diligence Guidance for Responsible Business Conduct (‘OECD Due Diligence Guidance’) provides further guidance as to what this due diligence expectation means when it comes to responsible disengagement:

“In these situations enterprises should also **consider and address the potential adverse impacts of a decision to disengage**. If an enterprise determines that disengagement is the most appropriate action, there are a range of actions that it may take to ensure that its process for disengagement is responsible”.¹⁵

Examples of responsible disengagement include that the MNE clearly articulate its escalation measures for disengagement upfront with stakeholders and provide detailed information supporting the decision to disengage to stakeholders.¹⁶

As an MNE with responsibilities under the OECD Guidelines, MYL should conduct comprehensive due diligence on its divestment from the BJV. Such due diligence should identify, prevent and mitigate actual and potential impacts of the sale. This includes identifying and assessing impacts that MYL may cause or contribute to through its activities, and to address those impacts when they occur, and to use leverage to encourage prevention or mitigation of impacts to which it is linked via its business relationships. Note that Section 2.2.2 considers the issue of contribution and prevention and mitigation of impacts.

The Complainant has previously urged MYL to conduct due diligence prior to any divestment from the BJV.¹⁷ However, the Complainant is not aware of any due diligence that MYL has done in relation to the transaction. MYL’s ASX announcement regarding the sale to WMM does not refer to any due diligence that it has conducted. Indeed, the ASX announcement refers to a non-binding, conditional proposal by Yintai Gold Co. Ltd. (‘Yintai’) from June 2021 to acquire all MYL’s shares in the BJV. MYL notes several reasons for not proceeding with Yintai’s proposal:

“Given the number of conditions imposed by Yintai in relation to the provision of an offer – including a **site visit**, the **completion of further legal, technical and financial due diligence** to Yintai’s satisfaction and **final internal investment approvals** – there is no guarantee that a formal offer will be made by Yintai. It should be noted that site based due diligence enquiries

¹⁴ OECD, 2011, OECD Guidelines for Multinational Enterprises, Chapter II General Policies, paragraphs 10 and 14.

¹⁵ OECD, 2011, OECD Due Diligence Guidance for Responsible Business Conduct, page 80.

¹⁶ OECD, 2011, OECD Due Diligence Guidance for Responsible Business Conduct, page 80.

¹⁷ Letter from PWYP to Mr. John Lamb, Executive Chairman and CEO of MYL, ‘Re: Potential future sale to Yintai Gold’, sent 17 August 2021 (**Annexure A**).

may present a logistical challenge at this time due to the political situation in Myanmar and restrictions on travel due to the COVID-19 pandemic.”¹⁸

In the Complainant’s view, this statement and the short period between Yintai’s proposal and its agreement with WMM strongly suggests that MYL has not conducted due diligence on its divestment to WMM. Moreover, MYL’s intention of finalising the divestment by the near date of 26 November 2021 suggests MYL also does not plan to undertake due diligence activities in the future. While the Complainant appreciates the ‘logistical challenges’ associated with doing due diligence on MYL’s divestment from the Bawdwin mine, these challenges do not release MYL from its responsibility to so do, in accordance with the OECD Guidelines.

In any event, if MYL has conducted due diligence on the transaction, MYL should have disclosed the actions it undertook (see further discussion on disclosure in Section 2.2.3 below). Further, in the Complainant’s opinion, such due diligence should have led to the conclusion that the sale could result in severe human rights impacts for local people and communities living near to the Bawdwin mine and risks that under WMM, the mine could be developed and generate revenue for the illegitimate military junta, which is committing ongoing, grave human rights violations (detailed in Section 2.2.2 below). Having identified these risks, MYL should, in accordance with the OECD Guidelines, have taken steps to prevent or mitigate harmful impacts associated with its decision to divest.

The Complaint also notes that MYL has neither consulted nor engaged with any of the 245 Myanmar-based CSOs on whose behalf it has filed this complaint, nor the National Unity Government of the Republic of the Union of Myanmar (‘NUG’), in relation to its planned disengagement. Notably, several of the notifying CSOs that previously communicated with MYL in relation to its Myanmar operations’ human rights responsibilities were not consulted in relation to the sale, while at the same time PWYP has tried and failed to engage with MYL in relation to its divestment.¹⁹ These organisations are ‘relevant stakeholders’ as many engage with communities close to the Bawdwin mine and are concerned with a wide range of human rights issues throughout Myanmar, including financial flows to the “illegal” Myanmar junta.²⁰ Accordingly, MYL has failed to provide meaningful opportunities for stakeholders’ views to be taken into consideration in relation to its disengagement decision.

2.2.2 Failure to prevent or mitigate adverse human rights impacts

Chapter IV (Human Rights), OECD Guidelines relevantly provides that MNEs should:

“1. **Respect human rights**, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

¹⁸ MYL, ‘MYL enters into binding agreements for divestment of Bawdwin interest’, 17 August 2021, page 4, https://cdn-api.markitdigital.com/apiman-gateway/ASX/asx-research/1.0/file/2924-02407882-6A1045947?access_token=83ff96335c2d45a094df02a206a39ff4 (accessed 18 August 2021).

¹⁹ On 17 and 30 August 2021, the National Director of PWYP emailed MYL, offering to engage in discussions with MYL in relation to the sale of its Myanmar operations and to arrange a meeting with the NUG. PWYP has not received a response to either of these emails.

²⁰ Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews, A/HRC/46/56, 4 March 2021, https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session46/Documents/A_HRC_46_56.pdf (accessed 23 August 2021).

2. Within the context of their own activities, **avoid** causing or **contributing** to adverse human rights impacts and **address such impacts** when they occur.

...

4. Have a policy commitment to respect human rights.

5. **Carry out human rights due diligence** as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.”

Section 2.2.1 detailed the Complainant’s contentions in relation to MYL’s failure to conduct human rights due diligence in accordance with the OECD Guidelines. In this section, the Complainant outlines its claims that MYL has failed to prevent or mitigate potential adverse human rights impacts to local people and communities near to Bawdwin mine to which it is contributing through the BJV, and the risk that the mine, if developed under the current regime in Myanmar, could generate revenue for the military junta, thereby contributing to ongoing and severe human rights violations in the country.

According to the OECD Due Diligence Guidance, an MNE is ‘contributing’ to a potential adverse impact if its activities, in combination with the activities of other entities, cause the impact, or if the activities of the MNE cause, facilitate or incentivise another entity to cause an adverse impact.²¹ MNEs that are contributing to a potential adverse impact should identify these impacts and address them, including by exercising leverage to prevent or mitigate the risk of harm occurring.

In the Complainant’s view, MYL is in danger of contributing to the potential negative human rights impacts that may occur following its divestment from the BJV. MYL has admitted that it is having and will continue to have difficulty finding funding to commence development of the mine, given the present political situation in Myanmar. MYL is thus presently a barrier to development of the mine.²² By divesting from the BJV and selling its share to WMM, MYL could clear the way for WMM to secure alternate funding (such as funding from domestic investors) to develop the mine. MYL would thus be in a position of facilitating the ability of WMM and other current or future partners to develop the mine, likely leading to a range of adverse impacts caused by WMM, EAP, or other business partners, or the Myanmar military, ethnic armed groups, or other third parties.

MYL therefore must take action to prevent or mitigate the potential impacts to which its irresponsible divestment would contribute. These potential impacts include an increase in armed conflict in the region surrounding the Bawdwin mine, harms to local people and communities associated with armed conflict, and financing and legitimization of the illegal military junta.

The Complainant notes potential negative impacts of the proposed sale to WMM. WMM does not have a track record of responsible business nor a public human rights policy. It is highly unlikely that WMM would follow the OECD Guidelines. WMM is a company formerly with ties to the illegal drug trade and to the previous military regime in Myanmar. WMM is now majority owned by National Infrastructure Holding Co (‘NIHC’), a leading Myanmar-based infrastructure conglomerate. NIHC was created in 2016

²¹ OECD, 2018, Due Diligence Guidance for Responsible Business Conduct, page 70.

²² MYL, ‘2021 General Meeting – Notice of General Meeting – Explanatory Memorandum’, 25 August 2021, page 6, https://assets.ctfassets.net/hnlfgsjzg6je/S5CA34dRlva6Hy2LlIDRT/9e4c40d4971992f0b796084f4c19091b/210826_NOM.pdf (accessed 26 August 2021).

out of the demerger of Asia World Co., Ltd ('AWC') into two separate entities: NIHC and Asia World Company Limited.²³ AWC was founded by Lo Hsing Han, a businessman with strong links to the illegal heroin trade and a supporter of the previous military junta in Myanmar.²⁴ Lo Hsing Han's son, Steven Law, is the current owner of Asia World Company Limited, who allegedly provided material support to the former junta in exchange for concessions and used AWC to launder profits from illicit drugs.²⁵ In 2008 and 2010, both father and son were placed on the U.S. Treasury's financial sanctions list due to their alleged involvement in illicit activities, namely the heroin trade,²⁶ and their financial support of the then military junta.²⁷ The US Treasury also designated and blocked the property interests of AWC and its subsidiaries.²⁸ Sanctions against AWC were in place when WMM, then owned by AWC, took control of the Bawdwin mine in January 2010.

Two owners from NIHC are both former directors and a co-founder of AWC.²⁹ The Complainant is deeply concerned about the connections between WMM, NIHC, former links to illegal activities (for which perpetrators have not been held accountable), and support of the current, illegal military junta in Myanmar.

²³ National Infrastructure Holdings Company, 'NIHC incorporation', <http://www.nihcmm.com/single-post/2016/01/27/asia-world-company-dermerged-into-two-entities-national-infrastructure-holdings-co-ltd-an> (accessed 19 August 2021).

²⁴ PWYP and Myanmar Alliance for Transparency and Accountability, 'Extracting the truth about the Bawdwin Mine', February 2021, page 8, <https://www.pwyp.org.au/publications/extracting-the-truth-behind-the-bawdwin-mine> (accessed 18 August 2021) (**Annexure B**). An unpublished, extended version of this report dated October 2020 is included in **Annexure C**. This was not published as a result of the changed circumstances in Myanmar following the 1 February 2021 attempted coup, however it is included as an annexure to this complaint for additional background.

²⁵ US Department of the Treasury, 'Steven Law financial network', February 2008, <https://www.treasury.gov/press-center/press-releases/Documents/law%20network%20chart.pdf> (accessed 20 August 2021); Liana Sun Wyler, 'CRS Report for Congress: Burma and Transnational Crime', 21 August 2008, <https://sgp.fas.org/crs/row/RL34225.pdf> (accessed 2 September 2021).

²⁶ Lo Hsing Han (deceased) was labelled the 'Godfather of Heroin' by the US Treasury and was one of the world's key heroin traffickers from the 1970s to his death: US Department of the Treasury, 'Treasury sanctions additional financial operatives of the Burmese regime', 25 February 2010, <https://www.treasury.gov/press-center/press-releases/Pages/hp837.aspx> (accessed 20 August 2021); The Guardian, "Godfather of heroin' dies in Burma", 7 July 2013, <https://www.theguardian.com/world/2013/jul/07/godfather-heroin-dies-burma> (accessed 20 August 2021).

²⁷ PWYP and Myanmar Alliance for Transparency and Accountability, 'Extracting the truth about the Bawdwin Mine', February 2021, page 8, <https://www.pwyp.org.au/publications/extracting-the-truth-behind-the-bawdwin-mine> (accessed 18 August 2021); US Department of the Treasury, 'Burma designations', 25 February 2008, <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20080225> (accessed 20 August 2021); US Department of the Treasury, 'Treasury sanctions additional financial operatives of the Burmese regime', 25 February 2010, <https://www.treasury.gov/press-center/press-releases/Pages/hp837.aspx> (accessed 20 August 2021).

²⁸ US Department of the Treasury, 'Burma designations', 25 February 2008, <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20080225> (accessed 20 August 2021); US Department of the Treasury, 'Treasury sanctions additional financial operatives of the Burmese regime', 25 February 2010, <https://www.treasury.gov/press-center/press-releases/Pages/hp837.aspx> (accessed 20 August 2021).

²⁹ PWYP and Myanmar Alliance for Transparency and Accountability, 'Extracting the truth about the Bawdwin Mine', February 2021, page 8, <https://www.pwyp.org.au/publications/extracting-the-truth-behind-the-bawdwin-mine> (accessed 18 August 2021).

WMM's previous management of the mine, from 2010-2017, also raises doubt that the company would responsibly develop the mine. WMM's former management resulted in job losses with inadequate compensation and increased living costs for local mine communities, whose living conditions subsequently deteriorated. According to a report, a senior WMM source stated that the company had deliberately raised prices to force people to leave to region after they retired.³⁰ Media reports also state that the general manager of the mine had no mining experience and WMM was unable to develop the mine, resulting in the partnership formed with MYL.³¹

The Complainant therefore contends that there are risks of negative impacts from two scenarios resulting in MYL's planned disengagement. Firstly, WMM may manage the project in an irresponsible manner that damages the rights of workers and local residents, as took place under its prior management of the mine. Secondly, WMM takes control of the project in the interim, while transferring management to a third party. Under WMM's control and in the current Myanmar environment, any new project manager/investor cannot be expected to be a responsible business. If the mine is developed by an unscrupulous third party following MYL's disengagement, MYL would no longer have leverage to prevent and mitigate negative human rights impacts. The Complainant's concerns about potential negative human rights impacts arising out of MYL's disengagement and sale to WMM are noted below.

It is unclear how MYL has considered the impacts of its disengagement on the conflict dynamics in the surrounding area. The commencement of operations at the Bawdwin mine was already expected to fuel armed conflict between the Myanmar military and three ethnic armed groups in northern Shan State because of these groups fighting to gain a stronghold over the region.³² This has made local communities highly vulnerable to conflict dynamics surrounding the mine. Currently, armed conflict in Shan State is widespread, and media reports from April, May and August 2021 have described violence between the military and armed groups, including deaths and injuries to local people and the shelling and destruction of villages, causing approximately 1,000 people to flee the fighting and seek refuge elsewhere.³³ Development of the mine under the current circumstances by WMM, a company with direct links to supporters of the previous military junta, would likely involve an increased military presence to secure the area from ethnic armed groups, driving further conflict. Militarisation and conflict will likely

³⁰ Kyaw Lin Htoon, 'Fluctuating fortunes at the Bawdwin mine', *Frontier Myanmar*, 31 January 2018, <https://www.frontiermyanmar.net/en/fluctuating-fortunes-at-the-bawdwin-mine/> (accessed 31 August 2021).

³¹ Kyaw Lin Htoon, 'Fluctuating fortunes at the Bawdwin mine', *Frontier Myanmar*, 31 January 2018, <https://www.frontiermyanmar.net/en/fluctuating-fortunes-at-the-bawdwin-mine/> (accessed 31 August 2021).

³² See PWYP and Myanmar Alliance for Transparency and Accountability, 'Extracting the truth about the Bawdwin Mine', February 2021, page 8, <https://www.pwyp.org.au/publications/extracting-the-truth-behind-the-bawdwin-mine> (accessed 18 August 2021).

³³ [Translation] BNI Multimedia Group, 'Fights between EAOs kill five and wound three in northern Shan State', 10 April 2021, <https://www.bnionline.net/en/news/fights-between-eaos-kill-five-and-wound-three-northern-shan-state> (accessed 23 August 2021); [Translation] VoA News, 'Fighting intensifies between ethnic forces in Namtu Township, northern Shan State', 26 May 2021, <https://burmese.voanews.com/a/rcss-ssa-sspp-ssa-tnla-shan/5904999.html> (accessed 23 August 2021); [Translation] RFA, 'Fighting erupts in Kyaukme', 11 August 2021, <https://www.rfa.org/burmese/news/sspp-tnla-fighting-in-kyaukme-08112021083857.html> (accessed 23 August 2021).

adversely impact the local population, particularly women and girls, who have already experienced rape and sexual violence connected to resource extraction in conflict areas in Shan State.³⁴

The Complainant is also concerned about the forced displacement of local communities if or when planning for the Bawdwin mine proceeds under WMM, particularly given WMM's reported attempts to drive out some community residents by raising living costs.³⁵ MYL has also failed to resolve community concerns regarding resettlement.³⁶ MYL's Scoping Report from April 2020 indicated that MYL was helping develop resettlement planning that would occur from Q1 2020 to Q1 2021, with local communities being resettled from Q1 2021 to Q1 2023.³⁷ The Complainant understands that these plans have been delayed by the military coup and the Covid-19 pandemic. Relocation, however, is resisted by local residents.³⁸ In this regard, MYL appears to be contradicting its own CEO's statement that MYL would "raise the bar for mine development, including... mitigating social impacts".³⁹ Given the political situation in Myanmar and the ongoing armed conflict in and around the Bawdwin mine, there are real concerns that local residents will not have the opportunity to give their consent in relation to resettlement and that communities will be forcibly removed if or when the development of the mine proceeds. The Complainant notes its concern that dialogue between local people and the BJV will cease entirely once the divestment to WMM concludes. The risk that there will no longer be meaningful stakeholder engagement is one of the potential impacts to which MYL's divestment would contribute.

The Complainant is also concerned that if or when the Bawdwin mine becomes operational, either through WMM or more likely a third-party manager, any revenue payments contractually required in relation to the mine under the current circumstances would provide a concerning source of revenue for the junta.⁴⁰ A 2020 study by OpenOil predicted that the Myanmar state would earn US\$112 million annually by 2023 from the Bawdwin mine (if operational).⁴¹ These payments may be used by the junta to fund the Myanmar military, including by purchasing military hardware and weapons, thereby

³⁴ PWYP and Myanmar Alliance for Transparency and Accountability, 'Extracting the truth about the Bawdwin Mine', February 2021, page 8, <https://www.pwyp.org.au/publications/extracting-the-truth-behind-the-bawdwin-mine> (accessed 18 August 2021).

³⁵ Kyaw Lin Htoon, 'Fluctuating fortunes at the Bawdwin mine', *Frontier Myanmar*, 31 January 2018, <https://www.frontiermyanmar.net/en/fluctuating-fortunes-at-the-bawdwin-mine/> (accessed 31 August 2021).

³⁶ Civil society concerns regarding resettlement and the risks of the mine inflaming armed conflict were conveyed in a 2020 meeting with MYL. At that meeting, CSOs urged greater consultation and transparency by MYL. Concerns regarding resettlement were also raised with the BJV and are unresolved in light of MYL's planned disengagement. Due to security concerns of the Complainant, details of these meetings must be kept confidential but may be disclosed to the NCP on request.

³⁷ BJV, 'Scoping report', April 2020, page 66, https://www.bawdwinjv.com/images/Downloads/BJV_FinalScopingReport.pdf (accessed 26 August 2021).

³⁸ Nan Lwin Hnin Pwint, 'Residents refuse to move for Australia-Myanmar joint venture mine', *The Irrawaddy*, 27 January 2021, <https://www.irrawaddy.com/news/burma/residents-refuse-move-australia-myanmar-joint-venture-mine.html> (accessed 23 August 2021).

³⁹ Kyaw Lin Htoon, 'Fluctuating fortunes at the Bawdwin mine', *Frontier Myanmar*, 31 January 2018, <https://www.frontiermyanmar.net/en/fluctuating-fortunes-at-the-bawdwin-mine/> (accessed 31 August 2021).

⁴⁰ PWYP and Myanmar Alliance for Transparency and Accountability, 'Extracting the truth about the Bawdwin Mine', February 2021, page 6, <https://www.pwyp.org.au/publications/extracting-the-truth-behind-the-bawdwin-mine> (accessed 18 August 2021).

⁴¹ Johnny West and Daniela Quiros Lepiz, 'Bawdwin: Myanmar's first foreign mining investment?', January 2020, https://openoil.net/wp/wp-content/uploads/2016/12/oo_my_bawdwin_report_200114_0812_jw.pdf (accessed 2 September 2021). OpenOil's website: <http://openoil.net/about-us/>.

supporting the military to commit further atrocities. The Complainant is concerned that the sale to WMM and the subsequent financial support for the illegal activities of the military would be expedited under management of an unscrupulous project developer and investor.

The Complainant submits that, given MYL's contribution to the potential human rights harms that may occur after its divestment from the BJV, MYL should use its leverage to influence its business partners (WMM and EAP) to address, including to prevent and mitigate, those potential harms. Section 2.6 proposes ways that the Complainant would seek for MYL to exercise this leverage.

2.2.3 Lack of transparency regarding disengagement decision-making

Chapter III (Disclosure), OECD Guidelines relevantly provides:

“1. Enterprises should ensure that **timely and accurate information** is disclosed on **all material matters** regarding their **activities**, structure, **financial situation**, performance, ownership and governance. This information should be disclosed for the **enterprise as a whole**, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.

2. Disclosure policies of enterprises should include, but not be limited to, material information on:

...

f) **foreseeable risk factors**; [...]"

MNEs are encouraged to disclose clear and complete information on their operations to various stakeholders, including local communities and special interest groups, to improve public understanding of MNEs and their interaction with society and the environment.⁴² Neither the Complainant nor any of the 245 Myanmar-based CSOs are aware of any disclosure by MYL to the local communities near to the Bawdwin mine in relation to its planned disengagement. Neither the Complainant nor any of the CSOs – key stakeholders with a special interest in MYL's investment in the mine – have been provided with information beyond the company's ASX announcements about the divestment. Transparency is especially important in view of the potential risk factors associated with MYL's disengagement detailed in Section 2.2.2 above. Accordingly, the Complainant submits that MYL has failed to disclose adequate information about the planned divestment to stakeholders.

MYL should also disclose information about any agreements between WMM and ME-1 in relation to the Bawdwin mine, including the proposed Production Sharing Agreement or any draft terms thereof. These agreements are material matters about the financial situation of the Bawdwin mine, and therefore their disclosure would provide insight into potential financial flows from the mine to the Myanmar junta, if or when the mine becomes operational.

⁴² OECD Guidelines, Chapter III (Disclosure), Commentary on Disclosure, page 23, paragraph 14.

2.3 Whether there seems to be a link between the enterprise’s activities and the issue raised in the specific instance

The Complainant submits that there is a clear link between MYL and the alleged contraventions of the OECD Guidelines (as outlined in Section 2.2).

The Complainant also submits that MYL and WMM are in a ‘business relationship’ and thus MYL has responsibilities under the OECD Guidelines. The Guidelines broadly define ‘business relationship’ to include “relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services.”⁴³ Accordingly, all business relationships are potentially relevant to and thus covered by the OECD Guidelines. There is no requirement for such a relationship to commence, for example, with the execution of a final contract or shareholder approval.

2.4 The relevance of applicable law and procedures, including court rulings

The OECD Guidelines and United Nations Guiding Principles on Business and Human Rights are the most authoritative international standards on responsible business conduct, due diligence and (ir)responsible disengagement. The principles and standards contained in both instruments are applicable.

Myanmar law is not applicable to the complaint. Australia has “grave concerns” about the military coup in Myanmar and has condemned the military’s use of lethal force and violence against civilians exercising their universal human rights.⁴⁴

The Complainant is not aware of any relevant domestic or international court rulings.

2.5 How similar issues have been, or are being, treated in other domestic or international proceedings

The Complainant is aware of two proceedings before the Norwegian NCP that consider issues similar to the present complaint.

On 16 December 2019, the Committee Seeking Justice for Alethankyaw (‘CSJA’) filed a specific instance against Telenor ASA (‘Telenor’) to the Norwegian NCP. CSJA claims, among other things, that Telenor failed to carry out appropriate due diligence in relation to its Myanmar business.⁴⁵ The Norwegian NCP found that the issues raised merited further consideration and decided to proceed with the complaint.⁴⁶ The complaint is currently in progress.

⁴³ OECD Guidelines, Chapter II (General Policies), Commentary on General Policies, page 28, paragraph 28.

⁴⁴ Senator the Hon Marise Payne, Australian Minister for Foreign Affairs, ‘Statement on Myanmar’, 7 March 2021, <https://www.foreignminister.gov.au/minister/marise-payne/media-release/statement-myanmar-0> (accessed 18 August 2021).

⁴⁵ See National Contact Point for Responsible Business Conduct Norway, ‘Committee Seeking Justice for Alethankyaw (CSJA) vs. Telenor’, <https://www.responsiblebusiness.no/committee-seeking-justice-for-alethankyaw-csja-vs-telenor/> (accessed 18 August 2021).

⁴⁶ National Contact Point for Responsible Business Conduct Norway, ‘Initial assessment: Committee Seeking Justice for Alethankyaw (CSJA) vs. Telenor Group’, 28 October 2020,

On 27 July 2021, The Centre for Research on Multinational Corporations ('SOMO'), on behalf of 474 anonymous Myanmar-based CSOs, filed a separate specific instance against Telenor to the Norwegian NCP. The complaint contends that Telenor's sale of its Myanmar business to the Lebanese company M1 Group fails to meet the standards of responsible disengagement set out in the OECD Guidelines in three key respects: (1) Telenor failed to conduct appropriate due diligence and failed to seek to prevent or mitigate adverse human rights impacts potentially arising from the sale of its Myanmar operations; (2) Telenor failed to meaningfully engage with stakeholders in relation to the sale; and (3) Telenor had not been transparent about its decision to disengage from its Myanmar business.⁴⁷ The Norwegian NCP has not yet assessed the complaint.

2.6 Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the OECD Guidelines

Consideration of the complaint by the Australian NCP would greatly contribute to the purposes and effectiveness of the OECD Guidelines. The Complainant previously sought to engage in dialogue with MYL without success, but is hopeful that the NCP's good offices will be accepted by the company on this occasion.⁴⁸ Facilitated dialogue by the NCP between the parties to the complaint, with the aim of ensuring MYL's activities comply with the principles and standards of the Guidelines, would be especially useful for the resolution of the issues raised in this complaint and shed light on the responsibilities of MNEs divesting from countries subject to conflict or instability.

If the NCP decides that the issues raised merit further examination and offers its good offices to the parties, the Complainant will seek the following outcomes.

Human rights due diligence

1. For MYL to conduct comprehensive risk-based human rights due diligence, including to seek to prevent or mitigate adverse human rights impacts to which it may be contributing, prior to any divestment from the BJV. In the alternative, for MYL to provide information on due diligence (if any) that it has conducted prior to any divestment from the BJV.
2. For MYL to meaningfully engage with key stakeholders in relation to the proposed sale, particularly communities close to the Bawdwin mine and Myanmar-based CSOs representing the interest of local people and communities.
3. For MYL to seek advice in relation to the proposed transaction from the NUG, Myanmar's parallel government formed by democratically elected parliamentarians ousted in the 2021 attempted military coup.⁴⁹ In July 2021, the NUG's Ministry of Planning, Finance, and Investment published its 'Three-Pillar Framework Guiding Responsible Investment and Continued Operations', which states, "The Ministry is available to provide further advice and guidance

https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2020/10/CSJA-Telenor_Initial-Assessment_EN.pdf (accessed 18 August 2021).

⁴⁷ See OECD Watch, 'SOMO representing 474 Myanmar CSOs vs. Telenor ASA', <https://www.oecdwatch.org/complaint/somo-representing-474-myanmar-csos-vs-telenor-asa/> (accessed 18 August 2021).

⁴⁸ Letter from nine CSOs to Mr. John Lamb, Executive Chairman and CEO of MYL, 19 March 2021 (**Annexure D**). See also footnote 19.

⁴⁹ NUG, <https://www.nugmyanmar.org/en/> (accessed 23 August 2021).

upon request to those investors wishing to clarify the suitability of their continued operations in Myanmar.”⁵⁰

Exercising leverage to address potential human rights impacts

4. Even if MYL’s shareholders agree to divestment from the Bawdwin mine, MYL should withhold from the sale until it receives written confirmation from WMM and EAP of the plans they will implement to prevent or mitigate the anticipated human rights impacts.

Disclosure

5. For MYL to be more transparent with key stakeholders, particularly CSOs and trade unions representing local people and communities near the Bawdwin mine, in relation to the proposed divestment.
6. For MYL to disclose the proposed Production Sharing Agreement, or any draft terms thereof, between WMM and ME-1 for the Bawdwin mine. The Complainant notes that contract transparency is part of the 2019 Extractive Industries Transparency Initiative (EITI) Standard. Myanmar as an EITI country would have been obliged to disclose contract or licenses entered into after January 2021.⁵¹The agreement between WMM and ME-1 should not be considered commercial in confidence.

Responsible disengagement

7. Generally, for MYL to act in accordance with its obligations under the OECD Guidelines in relation to responsible disengagement. The Complainant does not consider WMM a responsible entity for MYL to disengage to and therefore concludes that MYL should cancel the proposed sale to WMM and only sell to an entity that is assessed as responsible under the OECD Guidelines.
8. Should MYL choose not to disengage, MYL should persuade the BJV parties to delay the commencement of operations and any expansion of the Bawdwin mine until such a time as democracy and peaceful relations are restored to Shan State.

3 Conclusion and recommendations

In conclusion, the Complainant contends that MYL is irresponsibly disengaging from the BJV. This contention has three limbs: (1) inadequate human rights due diligence, including failure to meaningfully consult with stakeholders; (2) MYL’s failure to prevent or mitigate potential human rights impacts arising after the sale of MYL’s interest to WMM and the commencement of mining operations; and (3) failure to be transparent in relation to its proposed divestment from the Bawdwin mine.

MYL, as a partner of the BJV, has committed to applying the principles of Corporate Social Responsibility, to act in an ethical, safe, responsible and transparent manner, and to be attentive to the needs of stakeholders.⁵² MYL has also directly committed to respecting human rights and acting ethically and

⁵⁰ NUG, Ministry of Planning, Finance, and Investment, ‘Three-pillar framework guiding responsible investment and continued operations’, 21 July 2021, page 6, <https://assets-mopfi.nugmyanmar.org/images/2021/07/NUGs-Investment-Guidance.pdf> (accessed 26 August 2021).

⁵¹ EITI, ‘EITI 2019 Standard’, <https://eiti.org/document/eiti-standard-2019#r2-4> (accessed 9 September 2021)

⁵² BJV, ‘BJV partners’, <https://www.bawdwinjv.com/about/bjv-partners> (accessed 20 August 2021).

transparently with stakeholders.⁵³ The Complainant calls on MYL to uphold these commitments and more generally to meet its responsibilities under the OECD Guidelines.

Considering that a binding agreement between MYL and WMM has been reached, dependent only on shareholder approval, the Complainant respectfully requests for the Australian NCP to expedite this complaint and to swiftly conduct its initial assessment. If the NCP determines that the issues raised merit further examination, the NCP is encouraged to promptly offer good offices to the parties with a view to the resolution of the issues raised in the complaint.

If MYL declines the NCP's offer of good offices, or alternatively if good offices between the parties fail to reach a mutually agreeable solution, the Complainant encourages the NCP to conduct its own fact-finding (potentially involving a third-party examination of the issues raised) and/or develop Terms of Reference for a fact-finding report in dialogue with the parties to the complaint. In any case, the Complainant respectfully requests that the NCP issue a public statement, including a determination on MYL's compliance with the OECD Guidelines and recommendations for MYL to ensure that it acts responsibly in the future.

⁵³ MYL, 'Sustainability', <https://myanmarmetals.com.au/sustainability> (accessed 23 August 2021).