

Complaint under the OECD Guidelines for Multinational Enterprises submitted to the Dutch and United States National Contact Points

Against

S&P DJI Netherlands B.V. and S&P Dow Jones Indices concerning its business relationships with companies linked to the Myanmar military

Submitted by

1. Inclusive Development International
2. Blood Money Campaign Myanmar (BMC)
3. Alternative ASEAN Network on Burma (ALTSEAN-Burma)

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To: **Dutch National Contact Point for the OECD Guidelines**

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I. Introduction

1. This Specific Instance outlines breaches of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) by S&P Dow Jones Indices LLC (S&P DJI), a US-registered and headquartered company, and S&P DJI Netherlands B.V. (S&P DJI Netherlands), a Netherlands-registered and headquartered subsidiary of S&P DJI. It is directed to the Dutch and United States National Contact Points (NCPs). The complainants are Inclusive Development International (IDI), Alternative ASEAN Network on Burma (ALTSEAN-Burma), and Blood Money Campaign Myanmar (BMC).
2. This Specific Instance concerns the failure of S&P DJI to comply with the OECD Guidelines vis-à-vis its business relationships with at least seven companies linked to the Myanmar military, which is responsible for the gravest crimes under international law, including genocide and crimes against humanity.¹
3. On February 1, 2021, Myanmar's military took control of the country in a coup, imprisoning much of the civilian leadership. In response, millions of people took to the streets throughout the country to march in support of democracy, defying threats of a crackdown. While protestors were unified in their opposition to military control, as time wore on, security forces became increasingly violent. As of January 2024, the death toll had surpassed 4,400.² As of November 2023, Myanmar's military and its affiliated groups burned down approximately 77,274 civilian houses.³
4. Years earlier, beginning in 2016, the military launched a campaign of massacres and ethnic cleansing against the Rohingya people in western Myanmar, sparking global headlines.⁴ Officials from the United Nations⁵ and 57 countries⁶ have labelled the military's actions as genocide, with former UN High Commissioner for Human Rights describing the situation as "a textbook example of ethnic cleansing."⁷ In the wake of the genocide, UN officials and civil society have called upon businesses and investors to cut ties with the military.⁸
5. In 2019 the UN Independent International Fact-Finding Mission on Myanmar published an investigation into corporations enabling the Myanmar military,⁹ identifying at least 15 foreign

¹ UN Human Rights Council, Independent International Fact-Finding Mission on Myanmar, The Economic Interests of the Myanmar Military, 5 August 2019. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf

² Assistance Association for Political Prisoners, <https://aappb.org/>

³ Data for Myanmar, <https://www.facebook.com/data4myanmar>

⁴ New York Times, "Rohingya Recount Atrocities: 'They Threw My Baby Into a Fire,'" October 2017.

<https://www.nytimes.com/2017/10/11/world/asia/rohingya-myanmar-atrocities.html>

⁵ UN OHCHR, "Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes," 27 August 2018. <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23475&LangID=E>

⁶ ABC News, "57 countries sue Myanmar over reported genocide of Rohingya in historic lawsuit," November 2019.

<https://abcnews.go.com/Politics/57-countries-sue-myanmar-reported-genocide-rohingya-historic/story?id=66893262>

⁷ UN News, "UN human rights chief points to 'textbook example of ethnic cleansing' in Myanmar," September 2017.

<https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar#:~:text=%E2%80%9CThe%20situation%20seems%20a%20textbook,access%20to%20human%20rights%20investigators>

⁸ UN OHCHR, "UN Fact-Finding Mission on Myanmar exposes military business ties, calls for targeted sanctions and arms embargoes," August 2019. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24868&LangID=E>;

The Washington Post, "The world should hit Myanmar's military where it hurts — in the wallet," August 2019.

<https://www.washingtonpost.com/opinions/2019/08/05/world-should-hit-myanmars-military-where-it-hurts-wallet/>;

Human Rights Watch, "Myanmar: Kirin Should Cut Ties to Military," June 2020 <https://www.hrw.org/news/2020/06/18/myanmar-kirin-should-cut-ties-military>;

Amnesty International, "Myanmar: Leaked documents reveal global business ties to military crimes," September 2020 <https://www.amnesty.org/en/latest/news/2020/09/mehl-military-links-to-global-businesses/>.

⁹ UN Human Rights Council, Independent International Fact-Finding Mission on Myanmar, The Economic Interests of the Myanmar Military, 5 August 2019. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf

firms that have joint ventures with the military and 44 others with commercial ties with military-owned businesses. According to the report, “through such joint venture and commercial relationships, the Mission finds that **any foreign business activity involving the Tatmadaw [...] poses a high risk of contributing to, or being linked to, violations of international human rights law and international humanitarian law. At a minimum, these foreign companies are contributing to supporting the Tatmadaw’s financial capacity** [emphasis added].”¹⁰ In addition, civil society organizations track and publish information on corporations enabling the military.¹¹

6. One year into the military crackdown, in March 2022, Inclusive Development International and ALTSEAN-Burma published an investigation into the military junta’s corporate supporters, as identified in the UN Fact-Finding Report¹² and by reputable civil society organizations,¹³ to identify the companies’ major investors.¹⁴ Our investigation found that a significant financial backer of these corporations is the “ESG” (Environmental, Social and Governance) investing industry.
7. ESG funds are a rapidly growing subset of investing that claims to buy shares in environmentally and socially responsible companies. The \$40 trillion ESG industry promotes itself as a way for everyday investors to align their money with their values. ESG’s rise has been fuelled by a simple promise, repeated by industry executives and marketing materials aimed at the public. As Henry Fernandez, the CEO of S&P’s industry peer MSCI, has publicly claimed, “Our mission [is] to help investors build better portfolios for a better world.”¹⁵
8. Despite these lofty promises, our 2022 report revealed that at least 344 ESG-labelled funds have funnelled at least \$13.4 billion worth of shares into companies arming, funding and legitimizing the Myanmar military. These companies include arms traders, tech firms serving the military-controlled national police force, and others that direct profits to the military, allowing it to surveil and violently crush dissent.
9. As a top provider of ESG ratings and index products, S&P DJI holds immense influence over the direction of ESG-labelled capital. It has played a pivotal role in the decision-making process through which a significant sum of ESG capital has been invested in companies with documented links to the Myanmar military. According to our research,¹⁶ S&P DJI has included on its ESG indexes at least seven companies with ties to the Myanmar military junta. These include:
 - a. PTT Exploration and Production, a petroleum exploration company based in Thailand, which Human Rights Watch reported in May 2021 was partnering with military-linked companies to expand its presence in Myanmar and pays \$500 million per year to junta-controlled enterprises.¹⁷

¹⁰ UN Human Rights Council, “Economic Interests of the Myanmar Military,” September 2019. <https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/economic-interests-myanmar-military>; UN News, “Myanmar companies bankroll ‘brutal operations’ of military, independent UN experts claim in new report,” August 2019. <https://news.un.org/en/story/2019/08/1043701>

¹¹ Burma Campaign, Dirty List <https://burmacampaign.org.uk/take-action/dirty-list/>; Justice for Myanmar <https://www.justiceformyanmar.org/>.

¹² UN Human Rights Council, Independent International Fact-Finding Mission on Myanmar, The Economic Interests of the Myanmar Military, 5 August 2019. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf

¹³ Burma Campaign, Dirty List <https://burmacampaign.org.uk/take-action/dirty-list/>; Justice for Myanmar <https://www.justiceformyanmar.org/>.

¹⁴ Inclusive Development International and ALTSEAN-Burma, “Myanmar ESG Files: How ‘responsible investment’ is enabling a military dictatorship,” March 2022. <https://www.inclusivedevelopment.net/myanmaresgfiles/>

¹⁵ MSCI earnings call for the period ending June 30, 2021. <https://www.fool.com/earnings/call-transcripts/2021/07/28/msci-msci-q2-2021-earnings-call-transcript/>

¹⁶ See Annex 1 and [Annex 2](#). We have narrowed the scope of our research for the purposes of this complaint (in comparison to the 2022 investigation).

¹⁷ Human Rights Watch, Myanmar: Thai State-Owned Company Funds Junta, 25th May 2021 <https://www.hrw.org/news/2021/05/25/myanmar-thai-state-owned-company-funds-junta#>

- b. Siam Cement Group, an industrial conglomerate based in Thailand, whose subsidiary SCG Myanmar Concrete and Aggregate operates in Pyinmabin Industrial Zone, which is owned by Myanmar Economic Holdings Limited, one of the military's principal conglomerates, according to the 2019 UN fact-finding report on the economic interests of the Myanmar military.¹⁸
 - c. The Finnish company Wärtsilä, which Justice for Myanmar reported is involved in a joint venture with an arms dealer, Myanmar Chemical and Machinery, that sells weapons to the Myanmar military. The joint venture reportedly won tenders from the Myanmar military-controlled Electric Power Generation Enterprise for two energy projects in the country.¹⁹
 - d. Alphabet Inc and Apple, two U.S. technology companies whose app stores are used by military-linked companies to promote their products. This includes the mobile service provider Mytel, which is a joint venture of the military-owned Myanmar Economic Corporation, and Myawaddy Bank, a subsidiary of Myanmar Economic Holdings Limited, according to the 2019 U.N. fact-finding report on the economic interests of the Myanmar military;²⁰
 - e. The U.S. social media platform Meta Platforms, Inc. (formerly Facebook), which played a “determining role” in fomenting hate speech that fuelled the Rohingya genocide, according to the head of a UN fact-finding mission.²¹
 - f. The U.S. hospitality company Hilton, which operates a hotel in Arakan State. Reputable civil society organizations allege that the Hilton hotel “directly finances” the Myanmar military and sits on land where the military committed genocide against the Rohingya.²²
10. S&P Dow Jones Indices, including through its Dutch subsidiary, offers two types of products and services, in particular, that link it to these companies and give it an enormous amount of influence over the flow of ESG-labelled capital from investors to companies: 1) S&P DJI creates and maintains **ESG indexes**, which form the basis of many ESG-labelled funds that invest in the companies; and 2) S&P DJI produces **ESG ratings** of these companies, which determine whether a company performs well enough on ESG-related criteria to be included on an ESG index.²³ Due to a high degree of consolidation within the ESG data industry, S&P DJI and a handful of other industry actors offer both of these products and services.
11. S&P DJI, like its industry peers FTSE Russell and MSCI, construct lists—known as indexes—of companies that have rated highly on ESG factors which greenlights them for ESG investment. Investment firms then use these indexes to create ESG funds that buy shares in companies that have been endorsed as “responsible.” These funds, which carry the ESG stamp of approval, are then made available to investors.

¹⁸ UN Human Rights Council, Independent International Fact-Finding Mission on Myanmar, The Economic Interests of the Myanmar Military, 5 August 2019, p. 103. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf

¹⁹ Justice for Myanmar, Wärtsilä Corporation. <https://www.justiceformyanmar.org/press-releases/finlands-wartsila-corporation-seeking-profit-from-military-junta>

²⁰ Burma Campaign UK, Alphabet. <https://burmacampaign.org.uk/take-action/alphabet-google/> ; Burma Campaign UK, Apple. <https://burmacampaign.org.uk/take-action/apple/> ; UN Human Rights Council, Independent International Fact-Finding Mission on Myanmar, The Economic Interests of the Myanmar Military, 5 August 2019. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf

²¹ Reuters, “UN Investigators cite Facebook role in Myanmar crisis,” March 2018. <https://www.reuters.com/article/us-myanmar-rohingya-facebook/u-n-investigators-cite-facebook-role-in-myanmar-crisis-idUSKCN1GO2PN/>

²² Justice for Myanmar, “Hilton Hotels Corp and PTT Oil and Retail (PTTOR) in Business with Myanmar Military Cartel,” March 2021. <https://www.justiceformyanmar.org/press-releases/hilton-hotels-corp-and-ptt-oil-and-retail-pttor-in-business-with-myanmar-military-cartel> ; Burma Campaign UK, Hilton <https://burmacampaign.org.uk/take-action/hilton/>;

²³ See Section IV.C.2 and Annex 2 for further background information on ESG indexes.

12. When members of the public invest in these ESG funds, they are led to believe that they are investing in companies that are environmentally and socially responsible, as the label and marketing suggest.²⁴ However, our research indicates that S&P's ratings and indexes systematically fail to accurately capture and reflect companies' human rights track records.²⁵
13. As explained further in Section IV, S&P DJI has a business relationship with the companies that it rates and includes on indexes, and therefore has due diligence responsibilities, including the responsibility to take action where it identifies that these companies are contributing to adverse human rights impacts. The Complainants assert that S&P DJI has failed to address human rights risks and impacts by not exercising the considerable leverage it holds over these companies.
14. In general, index creators like S&P DJI exercise a significant amount of influence over investment flows—particularly, but not limited to, in the context of passively managed²⁶ investment. As former US Securities and Exchange Commission (SEC) chairman Robert Jackson said: “Fundamentally, millions of American families don’t choose what they invest in, an index provider chooses what they invest in.”²⁷ According to one industry commentator at the media outlet Responsible Investor, index providers are “the de facto gatekeepers of trillions of dollars in global capital.”²⁸ Thus, firms like S&P DJI that are responsible for creating and maintaining investment indexes hold immense leverage over the flow of capital.
15. But S&P DJI holds an exceptional level of leverage over the companies that they rate and include on their ESG indexes, which is far greater than their leverage in a conventional index. Because S&P DJI produces the ESG ratings (and designs the ratings methodology) that underlie the ESG indexes they create, the firm has significant discretion over which firms are included, and therefore significant leverage over the companies that want to be added to or remain on the ESG index. The leverage is derived not only from the ability to facilitate or restrict investment in those companies, but also from the ability to bestow reputational benefit upon the companies that are included in an ESG index.
16. A research paper on this topic, published by ESG index firm FTSE Russell, describes how passive investors can “outsource to index providers the work involved in setting [ESG] standards and ensuring that they are met by investee companies.”²⁹ The paper goes on to say, “by developing indexes with clear and transparent rules on sustainability issues, and engaging broadly with investee companies to ensure compliance, index providers can do much of the heavy lifting of engagement on behalf of passive index investors,” and that index providers can “reward or penalize companies,” by removal from the index or through index over and under-weighting.³⁰ The paper details how the firms responsible for ESG index design and calculation can effectively engage with investee companies and use their leverage to incentivize companies to “achieve real world improvements in corporate sustainability performance.” FTSE cites academic research which found that engagement by an ESG index firm (FTSE) and threat of expulsion from an

²⁴ For example, the Acorns app describes ESG as an opportunity for individuals to “invest for good.” <https://www.acorns.com/esg-investing/>. Vanguard similarly markets its ESG funds as a means for individuals to invest in “funds that reflect what matters most to you,” including based on factors like “ethical business practices” and “local community impact.” Vanguard explicitly conflates the concepts of “socially responsible investing (SRI)” with ESG. <https://investor.vanguard.com/investment-products/esg>

²⁵ IDI Submission to the UN Working Group on Business and Human Rights, October 2023. <https://www.inclusivedevelopment.net/wp-content/uploads/2023/10/IDI-Submission-to-UN-Working-Group-Call-for-Input.pdf>

²⁶ Investopedia, Passive Investing. <https://www.investopedia.com/terms/p/passiveinvesting.asp>

²⁷ MarketWatch, “The SEC’s next regulatory target could be index providers,” January 2022. <https://www.marketwatch.com/story/the-secs-next-regulatory-target-could-be-index-providers-11642177134>

²⁸ Responsible Investor, “New Year Resolutions: Index firms can no longer ignore gross human rights abuses in mainstream indices,” January 2020. <https://www.responsible-investor.com/articles/index-firms-can-no-longer-ignore-gross-human-rights-abuses-in-mainstream-indices>

²⁹ FTSE Russell, “Achieving scale in active ownership and engagement through index investing,” April 2021. https://content.ftserussell.com/sites/default/files/achieving_scale_in_active_ownership_and_engagement_through_index_investing_final.pdf?_ga=2.58682530.948067829.1639060060-781965199.1634204423

³⁰ Ibid., page 7.

ESG index doubled the probability that a firm failing to meet environmental criteria for inclusion on the index would comply within a three-year period.³¹ Another study found that companies adjusted their behaviour in response to ESG index criteria.³² These studies demonstrate the considerable leverage held by ESG index firms, like S&P DJI.

17. Our own research, which forms the basis of this complaint, also reveals the significant influence wielded by the firms that create and maintain indexes. [Annex 2](#) of this complaint presents a comprehensive set of data showing that S&P DJI and its industry peers, FTSE Russell and MSCI, have collectively put 23 military-linked companies on their ESG indexes—thus greenlighting them for inclusion in ESG-labelled funds. In total, ESG indices managed by MSCI, FTSE Russell and S&P Dow Jones Indices have directed \$13.7 billion in equity investments in the 23 companies doing business with the military. These investments come via 136 unique ESG funds managed by top asset managers BlackRock, Deutsche Bank, Northern Trust, State Street and Vanguard. A thorough review of these ESG funds’ factsheets and filings revealed that each fund relied substantially on the index for investment decisions and portfolio construction. Any fund that fell short of that threshold, and had limited reliance on the index, was removed from our data set. Thus, MSCI, FTSE Russell and S&P Dow Jones Indices hold a substantial level of influence over the level of investment flows into these 23 companies.
18. The Complainants have alerted S&P DJI to these issues, including by detailing its exposure to companies implicated in serious human rights abuses in Myanmar, multiple times over the course of three years.³³ In our engagement with S&P DJI, we included the following request: “We would like to learn what steps S&P DJI is taking to fulfil its responsibilities under the UN Guiding Principles and the OECD Guidelines, particularly with respect to companies doing business with the Myanmar military. Specifically, we would like to discuss S&P DJI’s approach to identifying human rights impacts it may be directly linked to through its operations and products and its approach to addressing those impacts. We believe that S&P DJI can use its leverage to help prevent human rights abuses with respect to the companies listed on its indexes that have links to the Myanmar military.” There is no indication that S&P DJI has taken any action to address the issues we raised.
19. Therefore, we have turned to the US and Dutch National Contact Point offices to consider this issue and offer to facilitate a dialogue regarding the human rights responsibilities of the S&P DJI corporate entities named in this complaint under the OECD Guidelines.

II. Identity and Interests of the Complainants

1. Inclusive Development International is a U.S.-based non-profit organization that works to advance social, economic, and environmental justice by supporting communities around the world to defend their land, environment, and human rights in the face of harmful investment projects. Through research, casework, and policy advocacy, we hold corporations, financial institutions, and development agencies accountable to their human rights and environmental responsibilities and work to promote a more just and equitable international economic system. Since 2020, Inclusive Development International has been conducting research into the systemic problems pervading the mainstream ESG investing industry,³⁴ with a focus on the role of ESG ratings firms and index providers.³⁵ We were motivated to conduct this research because in the

³¹ Ibid., page 9.

³² Ibid.

³³ See Annex 4 for the Complainants’ full correspondence with MSCI.

³⁴ Inclusive Development International and ALTSEAN-Burma, “Myanmar ESG Files: How “responsible investment” is enabling a military dictatorship,” <https://www.inclusivedevelopment.net/myanmaresgfiles/>

³⁵ See Inclusive Development International, “Stop ESG Washing: Demanding that responsible investment does what it says,” <https://www.inclusivedevelopment.net/policy-advocacy/stopesgwashing/>. See also, David Pred and Natalie Bugalski, “Why ESG investing is bad for human rights and what we can do about it,” <https://www.business-humanrights.org/es/blog/why-esg-investing-is-bad-for-human-rights-what-we-can-do-about-it>

course of our 200+ investigations of harmful investment projects,³⁶ we regularly find ESG-labelled funds invested in corporations causing and contributing to human rights violations. In March 2022, IDI and ALTSEAN-Burma published an expose documenting the flow of ESG-labelled capital into companies with ties to Myanmar's military.³⁷ In 2023, IDI engaged with the United Nations Working Group on Business and Human Rights regarding this topic.³⁸ IDI has also engaged with the US Securities and Exchange Commission (SEC) on this topic.³⁹

2. The Blood Money Campaign (BMC) is a campaign group composed of the collective effort of individuals from diverse communities, including university students, ethnic communities, persons with disabilities, minority religious groups, social and political activists, student unions and pro-democracy supporters who want to fight against the military junta and its oppressions. The main objective of the group is to disrupt the flow of foreign currency revenue to the military junta in Myanmar via non-violent strategies including extensive campaign, evidence-based research and advocacy to the corporate sectors, international governments together with both local, national and international allies. The key focus revenue source is from the oil and gas sector and targeting to all other logistic flows such as banning jet fuel support which has been killing many innocent lives of the people across the country in Myanmar with a number of air strikes. We believe that cutting off the financial resources for the military junta will sever a key source of its power and prevent crimes against humanity. It is a key step on a path towards democracy in Myanmar.
3. Alternative ASEAN Network on Burma (ALTSEAN-Burma), established in 1996, is a regional organization that works at the intersection of Atrocity Prevention, Business and Human Rights, and Women's Rights and Leadership. It has delivered 122 training workshops to empower grassroots communities to defend their rights through advocacy and grievance mechanisms, utilizing understanding of macro-economics and relevant frameworks such as the UN Guiding Principles on Human Rights, and the OECD Guidelines for Multinational Enterprises. Since the military coup began in Burma/Myanmar on 1 February 2021, ALTSEAN-Burma has published a monthly CoupWatch briefer, which includes coverage of economics and corporate responses. In March 2022, ALTSEAN-Burma co-published a report alongside IDI about the ESG industry's support for companies with ties to Myanmar's military.⁴⁰
4. The Complainants have a specific interest in filing this complaint as organizations that are committed to strengthening the alignment of the ESG industry with the OECD Guidelines and other international human rights standards, and that work to promote the respect and protection of human rights in Myanmar.
5. Please direct all correspondence regarding this complaint to Natalie Bugalski natalie@inclusivedevelopment.net and Coleen Scott coleen@inclusivedevelopment.net at Inclusive Development International; Ye Lin Myint bloodmoneycampaign21@gmail.com at Blood Money Campaign (Myanmar); and Debbie Stothard, debbie@altsean.org, at ALTSEAN-Burma.

III. Identity of the Respondents and Applicability of the OECD Guidelines

³⁶ Inclusive Development International, "Following the Money to Justice," <https://www.inclusivedevelopment.net/following-the-money/>.

³⁷ Inclusive Development International and ALTSEAN-Burma, "Myanmar ESG Files: How "responsible investment" is enabling a military dictatorship," <https://www.inclusivedevelopment.net/myanmaresgfiles/>

³⁸ Inclusive Development International Submission to the UN Working Group on Business and Human Rights, October 2023. <https://www.inclusivedevelopment.net/wp-content/uploads/2023/10/IDI-Submission-to-UN-Working-Group-Call-for-Input.pdf>

³⁹ Inclusive Development International Comment letter to Securities and Exchange Commission, August 2022. <https://www.inclusivedevelopment.net/wp-content/uploads/2022/08/SEC-comment-letter.pdf>

⁴⁰ Inclusive Development International and ALTSEAN-Burma, "Myanmar ESG Files: How "responsible investment" is enabling a military dictatorship," <https://www.inclusivedevelopment.net/myanmaresgfiles/>

1. This Specific Instance is against two affiliated entities, S&P Dow Jones Indices LLC (S&P DJI), a U.S. company that produces, maintains, licenses and markets ESG ratings and stock market indexes; and S&P DJI Netherlands B.V., a Dutch subsidiary of S&P Dow Jones Indices, registered in Amsterdam.⁴¹
2. The Specific Instance occurrence takes place in Myanmar, as this is where S&P DJI's omissions have created both risk and de facto harm. S&P DJI and its affiliates are considered multinational enterprises under the OECD Guidelines because their business is global in nature.⁴²
3. According to S&P DJI, the company is “the world’s leading resource for benchmarks and investible indices,” with S&P DJI indexes underlying more than a quarter of the world’s exchange traded funds (ETFs).⁴³ S&P DJI also describes itself as a “pioneer in environmental, social and governance (ESG) indexing.”⁴⁴ S&P DJI produces ESG ratings that underlie its ESG indexes.⁴⁵
4. This Specific Instance also concerns S&P DJI Netherlands B.V., a fully owned Dutch subsidiary of S&P DJI. By establishing a subsidiary in the Netherlands, S&P DJI is legally able to sell its ESG indexes to investors in the European Union.⁴⁶ S&P DJI Netherlands B.V. does this by endorsing indexes administered by S&P DJI as meeting the EU Benchmark Regulation, thus making them available to asset managers in the EU.⁴⁷ To date, nearly 4,500 S&P Dow Jones Indices administered outside of the EU are registered with the European Securities and Markets Authority for use in the EU.⁴⁸ Six companies doing business with the Myanmar military appear on these ESG indices and are made available to EU fund managers via S&P DJI Netherlands B.V.⁴⁹ S&P DJI Netherlands B.V also directly administers the S&P Europe 350 ESG Index,⁵⁰

⁴¹ S&P Dow Jones Indices, S&P DJI establishes EU Authorised Benchmark Administrator in Amsterdam. <https://press.spglobal.com/2018-12-05-S-P-Dow-Jones-Indices-S-P-DJI-establishes-EU-Authorised-Benchmark-Administrator-in-Amsterdam>; KVK, S&P DJI Netherlands B.V. Company information. <https://www.kvk.nl/orderstraat/product-kiezen/?kvknummer=707054450000>

⁴² Chapter I. Concepts and Principles (4): A precise definition of multinational enterprises is not required for the purposes of the Guidelines. The Guidelines allow for a broad approach to identifying multinational enterprises in this context. Main factors include the international nature of an enterprise’s structure or activities and its commercial form, purpose, or activities. They usually comprise of entities established in various countries.

⁴³ S&P DJI, About us. <https://www.spglobal.com/spdji/en/about-us/>

⁴⁴ S&P DJI ESG Scores, Frequently Asked Questions. <https://www.spglobal.com/spdji/en/documents/additional-material/faq-spdji-esg-scores.pdf>

⁴⁵ S&P DJI, S&P DJI ESG Score Methodology. <https://www.spglobal.com/spdji/en/documents/methodologies/methodology-sp-dji-esg-score.pdf> ; S&P ESG+ Indices, Methodology. <https://www.spglobal.com/spdji/en/documents/methodologies/methodology-sp-esg+-indices.pdf>

⁴⁶ Two European regulatory bodies have authorized S&P DJI Netherlands B.V. to administer and endorse indexes as meeting the requirements of the EU’s Benchmark Regulation. A national body, the Dutch Authority for Financial Markets, has authorized the company as a regulated Dutch benchmark administrator. In addition, the European Securities and Markets Authority has authorized S&P DJI Netherlands B.V. as a benchmark administrator under the EU’s Benchmark Regulation. These authorizations permit S&P Dow Jones Indices to market thousands of its indices to customers in the EU. See: AFM Market Watch, Benchmarks, September 2022.

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKFwj274fu68GDAXWEaDABHSEqDsYQFnoECBAQAQ&url=https%3A%2F%2Fwww.afm.nl%2F~%2Fprofmedia%2Ffiles%2Fonderwerpen%2Fafm-market-watch%2Fafm-market-watch-7-benchmarks.pdf&usq=AOvVaw31-4uzktPlgNcA2R9gFhVb&copi=89978449> and European Securities and Markets Authority (ESMA), Benchmarks administrators. https://registers.esma.europa.eu/publication/details?core=esma_registers_bench_entities&docId=189685d6-c42d-4b10-b794-42caf85cc8fa.

⁴⁷ S&P Dow Jones Indices, Frequently Asked Questions, European Union Benchmark Regulation.

<https://www.spglobal.com/spdji/en/documents/additional-material/faq-european-union-benchmark-regulation.pdf>

⁴⁸ European Securities and Markets Authority (ESMA), Benchmarks administrators.

https://registers.esma.europa.eu/publication/details?core=esma_registers_bench_entities&docId=189685d6-c42d-4b10-b794-42caf85cc8fa.

⁴⁹ S&P Dow Jones Indices, Dow Jones Sustainability World Index

https://portal.s1.spglobal.com/survey/documents/DJISComponentsWorld_2023.pdf

⁵⁰ S&P Dow Jones Indices, Equity Indices Benchmark Statement. <https://www.spglobal.com/spdji/en/documents/additional-material/spdji-equity-indices-benchmark-statement.pdf>

which contains the Finnish company Wärtsilä, which is reportedly involved in weapons sales to the Myanmar military.⁵¹

5. Given the global nature of its operations, we therefore submit that the OECD Guidelines are applicable to each of the Respondent S&P entities, and that both the US and Dutch NCPs have a role to play in facilitating dialogue with these entities regarding their responsibilities under the OECD Guidelines.

IV. S&P DJI's Breaches of Human Rights Responsibilities under the OECD Guidelines

This section sets out the factual allegations underlying our complaint, while also offering an analysis of the application of the OECD Guidelines to S&P DJI. The analysis under this section assesses the failure of S&P DJI to abide by its responsibilities under the OECD Guidelines to address human rights impacts that are directly linked to its products and services through its business relationship with seven companies, listed in Annexes 1 and 2 of this complaint. These companies are enabling the Myanmar military to commit serious human rights abuses, including genocide, war crimes and crimes against humanity.⁵²

A) Myanmar military has committed egregious human rights violations

1. Beginning in 2016, the Myanmar military launched a campaign of massacres and ethnic cleansing against the Rohingya people in western Myanmar. A United Nations fact-finding mission concluded that the 2017 crackdown orchestrated by the military had included “genocidal acts.”⁵³ According to the former UN High Commissioner for Human Rights, the situation was “a textbook example of ethnic cleansing.”⁵⁴
2. In 2019, The Gambia filed a case at the International Court of Justice (ICJ) accusing Myanmar of committing genocide against the Rohingya population.⁵⁵ The case was filed on behalf of 57 country members of the Organisation of Islamic Cooperation.⁵⁶ In November 2023, Denmark, France, Germany, the Netherlands, Britain and Maldives filed a joint declaration of intervention in support of the case.⁵⁷
3. In March 2023, United States Secretary of State Anthony Blinken announced that a “rigorous factual and legal analysis,” conducted by the State Department determined that “members of

⁵¹ Wärtsilä, “Wartsila Is Again Included in the Dow Jones Sustainability Index,” December 2023.

<https://www.wartsila.com/media/news/11-12-2023-wartsila-is-again-included-in-the-dow-jones-sustainability-index-3372131>

⁵² In August 2023, the United Nation’s Independent Investigative Mechanism for Myanmar stated that the Myanmar military and its affiliate militias are committing increasingly frequent and brazen war crimes against civilians. See, UN Independent Investigative Mechanism for Myanmar, “War crimes by Myanmar military are more frequent and brazen,” August 2023.

<https://iimm.un.org/press-release-war-crimes-by-myanmar-military-are-more-frequent-and-brazen-myanmar-mechanism-annual-report/#:~:text=These%20war%20crimes%20include%20indiscriminate,killed%20more%20than%20155%20people.>

⁵³ UN OHCHR, “Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes,” August 2018. <https://www.ohchr.org/en/press-releases/2018/08/myanmar-tatmadaw-leaders-must-be-investigated-genocide-crimes-against?LangID=E&NewsID=23475>; UN OHCHR, “UN Fact-Finding Mission on Myanmar exposes military business ties, calls for targeted sanctions and arms embargoes,” August 2019. <https://www.ohchr.org/en/press-releases/2019/08/un-fact-finding-mission-myanmar-exposes-military-business-ties-calls?LangID=E&NewsID=24868>

⁵⁴ UN News, “UN human rights chief points to ‘textbook example of ethnic cleansing’ in Myanmar, September 2017.

<https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar#:~:text=%E2%80%9CThe%20situation%20seems%20a%20textbook,access%20to%20human%20rights%20investigators.>

⁵⁵ International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar). <https://www.icj-cij.org/case/178>

⁵⁶ UN Independent Investigative Mechanism for Myanmar, ICJ – The Gambia v. Myanmar. <https://iimm.un.org/icj-the-gambia-v-myanmar/>

⁵⁷ Al Jazeera, “European nations join Myanmar genocide case,” November 2023.

<https://www.aljazeera.com/news/2023/11/17/five-european-nations-join-myanmar-genocide-case>

the Burmese military committed genocide and crimes against humanity against Rohingya.” This is the eighth instance of genocide ever formally acknowledged by the United States.⁵⁸

4. Today, roughly one million Rohingya are living in overcrowded and under-resourced refugee camps in Bangladesh, many of whom fled Myanmar in 2017 to escape the military’s crimes against humanity and genocide. The estimated 600,000 Rohingya remaining in Rakhine State are subject to persecution and violence, confined to camps and villages without freedom of movement, and cut off from access to adequate food, health care, education, and livelihoods.⁵⁹
5. Years following the genocide, on February 1, 2021, the Myanmar military launched a coup against the civilian government, declaring the results of the November 2020 general election invalid and instating a state of emergency. Senior officials from the governing National League for Democracy (NLD) party were arrested, and mass communications were cut.⁶⁰
6. The military takeover sparked nationwide protests, with millions of people taking to the streets to march in support of democracy, defying threats of a crackdown. Peaceful demonstrations over the first weeks quickly evolved into lethal clashes as the military began a brutal crackdown, arresting elected leaders, civilian officials, protest leaders and journalists, and firing live ammunition at unarmed protesters. As of 16 January 2024, the death toll had surpassed an estimated 4,372.⁶¹
7. The United Nations Security Council has adopted several statements condemning the use of violence against peaceful protestors and calling on the military to restore the democratic transition.⁶² The General Assembly passed a resolution condemning the military takeover and excessive and lethal violence against protestors, and calling for an arms embargo and the release of arbitrarily detained officials and politicians.⁶³ The resolution received 119 votes in favor and 36 abstentions, reflecting broad international consensus against the coup.⁶⁴ Meanwhile, many jurisdictions including the US, UK, Canada and Australia and EU have imposed new sanctions on military officials.⁶⁵
8. The conflict continues today, with an escalated offensive launched by an alliance of ethnic armed groups as recently as October 2023.⁶⁶ As of November 2023, an estimated 1.9 million

⁵⁸ US Department of State, “Genocide, Crimes against Humanity and Ethnic Cleansing of Rohingya in Burma.” <https://www.state.gov/burma-genocide/>

⁵⁹ Human Rights Watch, Rohingya. <https://www.hrw.org/tag/rohingya>

⁶⁰ Parliament of Australia, The Myanmar Coup: A Quick Guide, July 2021.

https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/8042297/upload_binary/8042297.pdf

⁶¹ Assistance Association for Political Prisoners (Burma), <https://aappb.org>

⁶² UN Security Council, Myanmar. <https://www.securitycouncilreport.org/un-documents/myanmar/>

⁶³ UN News, “Myanmar: Timely support and action by Security Council ‘really paramount’, says UN Special Envoy,” June 2021.

<https://news.un.org/en/story/2021/06/1094322>

⁶⁴ Parliament of Australia, The Myanmar Coup: A Quick Guide, July 2021.

https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/8042297/upload_binary/8042297.pdf

⁶⁵ ABC News, “US announces new sanctions targeting Myanmar’s military generals as protests against coup continue,” February 2021. <https://www.abc.net.au/news/2021-02-11/biden-announces-new-sanctions-against-myanmar-generals/13143132>;

Politico, “UK unveils aid ban and fresh sanctions over Myanmar coup,” February 2021 <https://www.politico.eu/article/uk-unveils-aid-ban-fresh-sanctions-myanmar-coup/>;

Politico, “EU extends Myanmar sanctions over military coup,” April 2021.

<https://www.politico.eu/article/eu-myanmar-sanctions-military-coup/>

⁶⁶ The Guardian, “Myanmar junta facing biggest challenge yet after new offensive by armed groups, analysts say,” November 2023. <https://www.theguardian.com/world/2023/nov/07/myanmar-junta-facing-biggest-challenge-yet-after-new-offensive-by-armed-groups-analysts-say>

have been internally displaced.⁶⁷ The conflict and related transport and communications disruptions are significantly hindering humanitarian response to displaced people.⁶⁸

B). Companies doing business with the Myanmar military are enabling and facilitating violations

1. In the wake of the genocide, United Nations experts have called on businesses and investors to cut ties with the Myanmar military.⁶⁹ Human rights campaigners have echoed those calls.⁷⁰
2. The military has been described as a state within a state⁷¹ operating with its own parallel economy.⁷² It relies heavily on business relationships with multinational corporations for arms, equipment, and funding—and to legitimize its brutal behavior to the international community.
3. In August 2019, the UN Independent International Fact-Finding Mission on Myanmar produced a report naming companies with problematic ties to the Myanmar military. In the Fact-Finding Report, the authors urged the international community to “sever ties with Myanmar’s military and the vast web of companies it controls and relies on,” clarifying that the revenue earned by the military through domestic and foreign business dealings “substantially enhances its ability to carry out gross violations of human rights with impunity.”⁷³ The Fact-Finding Report established clearly that the military used its own businesses, local “crony companies,” as well as dealings with foreign companies, to support “brutal operations” against ethnic groups that constitute “serious crimes under international law,” bypassing civilian oversight and evading accountability.⁷⁴
4. The UN Fact-Finding Report details that at least 15 foreign firms have joint ventures with the military, while 44 others have some form of commercial ties with military-owned businesses. According to the report, “through such joint venture and commercial relationships, the Mission finds that **any foreign business activity involving the Tatmadaw and its conglomerates MEHL and MEC poses a high risk of contributing to, or being linked to, violations of international human rights law and international humanitarian law. At a minimum, these foreign companies are contributing to**

⁶⁷ ReliefWeb, Myanmar Emergency Update as of October 2023. <https://reliefweb.int/report/myanmar/myanmar-emergency-update-2-october-2023#:~:text=In%20Myanmar%2C%20increased%20armed%20conflict,East%20still%20under%20martial%20law.>

⁶⁸ Al Jazeera, “About 90,000 people displaced by Myanmar conflict: UN,” November 2023.

<https://www.aljazeera.com/news/2023/11/10/almost-50000-people-displaced-in-northern-myanmar-un-says>

⁶⁹ UN OHCHR, “UN Fact-Finding Mission on Myanmar exposes military business ties, calls for targeted sanctions and arms embargoes,” August 2019. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24868&LangID=E>

⁷⁰ The Washington Post, “The world should hit Myanmar’s military where it hurts — in the wallet,” August 2019.

<https://www.washingtonpost.com/opinions/2019/08/05/world-should-hit-myanmars-military-where-it-hurts-wallet/>; Human Rights Watch, “Myanmar: Kirin Should Cut Ties to Military,” June 2020 <https://www.hrw.org/news/2020/06/18/myanmar-kirin-should-cut-ties-military>;

Amnesty International, “Myanmar: Leaked documents reveal global business ties to military crimes,” September 2020 <https://www.amnesty.org/en/latest/news/2020/09/mehl-military-links-to-global-businesses/>

⁷¹ New York Times, “Inside Myanmar’s Army: They See Protestors as Criminals,” March 2021.

<https://www.nytimes.com/2021/03/28/world/asia/myanmar-army-protests.html>

⁷² Bloomberg, “Myanmar’s Generals Run a Nearly Sanction-Proof Business Empire,” May 2021.

<https://www.bloomberg.com/graphics/2021-myanmar-military-business/>

⁷³ UN Human Rights Council, Economic interests of the Myanmar military, September 2019. <https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/economic-interests-myanmar-military>; UN Human rights Council, “UN Fact-Finding Mission on Myanmar exposes military business ties, calls for targeted sanctions and arms embargoes,” August 2019.

<https://www.ohchr.org/en/press-releases/2019/08/un-fact-finding-mission-myanmar-exposes-military-business-ties-calls?LangID=E&NewsID=24868>

⁷⁴ UN Human Rights Council, Economic interests of the Myanmar military, September 2019. <https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/economic-interests-myanmar-military>; UN News, “Myanmar companies bankroll ‘brutal operations’ of military, independent UN experts claim in new report,” August 2019. <https://news.un.org/en/story/2019/08/1043701>

supporting the Tatmadaw’s financial capacity [emphasis added].⁷⁵ The report identifies at least 14 foreign companies that provided arms and related equipment to the military since 2016, despite the fact that the “Tatmadaw’s dismal human rights record was widely and publicly known,” and that the “public record made it clear that the **Tatmadaw used many of the types of arms and related equipment that these entities were providing to commit gross violations of human rights and serious violations of international humanitarian law.**” The report concludes that, among the arms dealers identified in the report, “**many of these companies and States therefore knew, or ought to have known, that their arms transfers could have a direct and reasonable foreseeable impact on the human rights situation in Myanmar.**”⁷⁶ The report also covers several foreign companies that provided technology including telecommunication services, tracking and precision systems, and internet and data transmission technology.⁷⁷

5. The report recommends that, “No business enterprise active in Myanmar or trading with or investing in businesses in Myanmar should enter into a business relationship of any kind with the security forces of Myanmar, in particular the Tatmadaw, or any enterprise owned or controlled by them, including subsidiaries, or their individual members.” It specifically encourages investors to engage only with businesses that are not affiliated with the military, stating, “We have to promote economic ties with non-Tatmadaw companies and businesses in Myanmar. This will foster the continued liberalization and growth of Myanmar’s economy, including its natural resource sector, but in a manner that contributes to accountability, equity and transparency for its population.”⁷⁸
6. In addition, several reputable Myanmar and international human rights organizations are dedicated to tracking and publicizing information about corporations whose operations contribute to the activities of the Myanmar military.⁷⁹ The complainants have relied upon the UN Fact-Finding report, as well as these reputable civil society reports, to compile the list of companies doing business with the Myanmar military.⁸⁰

C). S&P DJI bestows ESG benefits upon companies implicated in human rights abuse in Myanmar

1. S&P DJI is linked to at least seven of the companies identified by civil society and/or the UN Fact-Finding Mission on Myanmar as contributing to the “brutal operations” of the military junta. Each of these companies is listed on S&P-administered ESG indexes, which are underpinned by S&P DJI’s own ESG ratings and index creation methodology. As one of the industry’s most prominent ESG ratings and ESG index providers, S&P DJI plays a key role in directing ESG investors to invest in these companies.

1. How ESG investing works: the role of indexes and ratings firms

⁷⁵ UN Human Rights Council, Economic interests of the Myanmar military, September 2019. <https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/economic-interests-myanmar-military>; UN News, “Myanmar companies bankroll ‘brutal operations’ of military, independent UN experts claim in new report,” August 2019. <https://news.un.org/en/story/2019/08/1043701>

⁷⁶ UN Human Rights Council, Independent International Fact-Finding Mission on Myanmar, The Economic Interests of the Myanmar Military, 5 August 2019. See Page 5.

https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf

⁷⁷ UN Human Rights Council, Independent International Fact-Finding Mission on Myanmar, The Economic Interests of the Myanmar Military, 5 August 2019. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf

⁷⁸ UN Human Rights Council, Independent International Fact-Finding Mission on Myanmar, The Economic Interests of the Myanmar Military, 5 August 2019. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf

⁷⁹ See e.g. Burma Campaign UK The Dirty List <https://burmacampaign.org.uk/take-action/dirty-list/> and Justice for Myanmar, <https://www.justiceformyanmar.org/>

⁸⁰ Please see Annex 1 for sources for each company.

- a. Please refer to **Annex 3** of the complaint for graphics of the “ESG Ecosystem,” and detailed descriptions of the role of investment indexes, and more specifically of ESG indexes, as well as the role of ESG ratings firms. This section summarizes the relationship between S&P DJI and companies implicated in human rights abuses.
- b. An investment index is a list of securities, typically stocks or bonds, intended to replicate a certain portion of the market.⁸¹ Historically, asset managers bought index data to benchmark (or compare) their actively managed funds against an index that represented “the market” (such as the S&P 500, the industry standard benchmark index).⁸² Due to the rise of passive investing, index providers have gained even greater importance and today these actors significantly influence the decision-making of asset managers and the holdings of their funds. In the context of a passive fund or Exchange Traded Fund (ETF), the asset manager purchases the index holdings data from the index provider, so that the asset manager can mimic the index exactly, or with very little deviation.⁸³
- c. Today, more than half of all US domestic equity funds are passively managed—this has effectively shifted the point of decision-making, and the power that flows from it, to the firms that create and maintain indexes. As former SEC chairman Robert Jackson said: “Fundamentally, millions of American families don’t choose what they invest in, an index provider chooses what they invest in.”⁸⁴ Similarly, in 2019 the Wall Street Journal dubbed index providers “the new kings of Wall Street,” calling them “the biggest power brokers in the industry.”⁸⁵ According to Responsible Investor, index providers are “the de facto gatekeepers of trillions of dollars in global capital.”⁸⁶ Thus, firms like S&P DJI that are responsible for creating and maintaining investment indexes hold immense leverage over the flow of capital in passive investing.
- d. Just like conventional investment indexes, ESG indexes play a vital role in directing the flow of ESG-labelled capital. ESG index providers, like S&P DJI, determine which companies appear on ESG indexes based upon the companies’ financial performance and ESG ratings.
- e. As a vertically integrated company, S&P DJI offers not only ESG indexes, but also the ESG ratings that underly them. It is important to note that these ESG ratings score companies on how environmental, social and governance issues affect a company’s financial materiality, rather than how a company’s conduct affects people, society and the environment.⁸⁷

⁸¹ Investopedia, “What is an index? Examples, How it’s Used, and How to Invest,” June 2023.

<https://www.investopedia.com/terms/i/index.asp>

⁸² Investopedia, “What does it mean when people say they ‘beat the market?’” January 2021.

<https://www.investopedia.com/ask/answers/03/100903.asp>

⁸³ MSCI, US SEC Form 10-k, December 2019.

https://www.sec.gov/ix?doc=/Archives/edgar/data/1408198/000156459020004992/msci-10k_20191231.htm

⁸⁴ Marketwatch, “The SEC’s next regulatory target could be index providers,” January 2022.

<https://www.marketwatch.com/story/the-secs-next-regulatory-target-could-be-index-providers-11642177134>

⁸⁵ Wall Street Journal, “Index Funds are the new kings of wall street,” September 2019. <https://www.wsj.com/articles/index-funds-are-the-new-kings-of-wall-street-11568799004>

⁸⁶ Responsible Investor, “New Years Resolutions: index firms can no longer ignore gross human rights abuses in mainstream indices,” January 2020. <https://www.responsible-investor.com/articles/index-firms-can-no-longer-ignore-gross-human-rights-abuses-in-mainstream-indices>

⁸⁷ For more explanation, see: Bloomberg, “The ESG Mirage,” December 2021. <https://www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line/>

- f. To construct an ESG index, companies on the conventional index that fall below a certain ESG ratings threshold are removed from consideration. The remaining companies with high enough scores are placed on the ESG index. The index provider, like S&P DJI, then “weights” each company—meaning that it allocates each one a certain percentage of the ESG index’s total investment value. This weighting system tells the fund managers how much money to invest in each company. For S&P DJI, weighting is based on the companies’ market capitalization.
 - g. The index providers then sell the indexes to asset managers, who use them to construct funds that carry the “ESG” or “sustainable” label. For ESG funds that are passively managed, the fund manager will typically follow the index exactly, with little to no deviation. Active fund managers, who have wide discretion to pick stocks, may deviate, but the index is nonetheless the starting point—it establishes the ‘investible universe.’ Although the majority of assets under management in ESG funds are still actively managed, the rate of growth for passively managed funds is rapid. In 2020, 75% of total net investment flows into ESG funds were into passively managed ESG funds.
 - h. Thus, ESG investment indexes play an enormous role in influencing which companies receive ESG investments. By giving companies high ESG scores and including them on ESG indexes, S&P DJI is not only conferring reputational benefits to those companies, but it is also bestowing significant material financial benefits. This power to bestow or withhold significant material benefit to companies gives S&P DJI considerable leverage over their ESG and human rights conduct.
2. S&P DJI has included on its ESG indexes at least seven of the companies identified by civil society and/or UN experts as firms with ties to the Myanmar military junta (See Annex 1). These include the following companies that we found in ESG funds benchmarked to S&P Dow Jones administered indexes:⁸⁸
 - a. Alphabet Inc and Apple, two U.S. technology companies whose app stores are used by military-linked companies to promote their products. This includes the mobile service provider Mytel, which is a joint venture of the military-owned Myanmar Economic Corporation, and Myawaddy Bank, a subsidiary of Myanmar Economic Holdings Limited, according to the 2019 U.N. fact-finding report on the economic interests of the Myanmar military;⁸⁹
 - b. The U.S. social media platform Meta Platforms, Inc. (formerly Facebook), which played a “determining role” in fomenting hate speech that fuelled the Rohingya genocide, according to the head of a UN fact-finding mission.⁹⁰

⁸⁸ It should be noted that our research was limited to funds that include the term “ESG” in its name and only funds that are disclosed on the Refinitiv financial database, which only captures a slice of global capital markets.

⁸⁹ Burma Campaign UK, Alphabet. <https://burmacampaign.org.uk/take-action/alphabet-google/> ; Burma Campaign UK, Apple. <https://burmacampaign.org.uk/take-action/apple/> ; UN Human Rights Council, Independent International Fact-Finding Mission on Myanmar, The Economic Interests of the Myanmar Military, 5 August 2019.

https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf

⁹⁰ Reuters, “UN Investigators cite Facebook role in Myanmar crisis,” March 2018. <https://www.reuters.com/article/us-myanmar-rohingya-facebook/u-n-investigators-cite-facebook-role-in-myanmar-crisis-idUSKCN1GO2PN/>

- c. The U.S. hospitality company Hilton, which operates a hotel in Arakan State. Reputable civil society organizations allege that the Hilton hotel “directly finances” the Myanmar military and sits on land where the military committed genocide against the Rohingya.⁹¹
3. A full list of the companies identified in ESG funds benchmarked to S&P DJI ESG indexes [Annex 2](#).
4. Additionally, the following companies with ties to the Myanmar military are included in the constituent lists of the prominent Dow Jones Sustainability Indices (which we do not have fund data for):
 - a. PTT Exploration and Production, a petroleum exploration company based in Thailand, which Human Rights Watch reported in May 2021 was partnering with military-linked companies to expand its presence in Myanmar and pays \$500 million per year to junta-controlled enterprises.⁹²
 - b. Siam Cement Group, an industrial conglomerate based in Thailand, whose subsidiary SCG Myanmar Concrete and Aggregate operates in Pyinmabin Industrial Zone, which is owned by Myanmar Economic Holdings Limited, one of the military’s principal conglomerates, according to the 2019 UN fact-finding report on the economic interests of the Myanmar military.⁹³
5. An ESG index that is directly administered by S&P DJI Netherlands B.V, the S&P Europe 350 ESG Index,⁹⁴ contains the Finnish company Wärtsilä,⁹⁵ which Justice for Myanmar has reported is involved in a joint venture with an arms dealer, Myanmar Chemical and Machinery, that sells weapons to the Myanmar military. The joint venture won tenders from the Myanmar military-controlled Electric Power Generation Enterprise for two energy projects in the country.⁹⁶
6. When formulating ESG ratings for these companies, and deciding whether to include them on ESG indexes, S&P DJI has failed to account for these companies’ violation of international human rights standards, including the companies’ failure to respond adequately to the recommendations in the UN Fact-Finding Report by severing their ties to the Myanmar military. Despite being alerted to this issue multiple times by the Complainants, there is no indication that S&P DJI has lowered the ESG scores of these companies accordingly or removed them from ESG indexes. There is also no indication that S&P DJI has exercised leverage over these companies by, for example, engaging them in a dialogue over the issues raised and making clear its expectation that the companies do not enable or

⁹¹ Justice for Myanmar, “Hilton Hotels Corp and PTT Oil and Retail (PTTOR) in Business with Myanmar Military Cartel,” March 2021. <https://www.justiceformyanmar.org/press-releases/hilton-hotels-corp-and-ptt-oil-and-retail-pttor-in-business-with-myanmar-military-cartel> ; Burma Campaign UK, Hilton <https://burmacampaign.org.uk/take-action/hilton/>;

⁹² Human Rights Watch, Myanmar: Thai State-Owned Company Funds Junta, 25th May 2021 <https://www.hrw.org/news/2021/05/25/myanmar-thai-state-owned-company-funds-junta#> ; S&P Dow Jones Indices, [Dow Jones Sustainability World Index https://portal.s1.spglobal.com/survey/documents/DJSIComponentsWorld_2023.pdf](https://portal.s1.spglobal.com/survey/documents/DJSIComponentsWorld_2023.pdf)

⁹³ UN Human Rights Council, Independent International Fact-Finding Mission on Myanmar, The Economic Interests of the Myanmar Military, 5 August 2019, p. 103. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf ; S&P Dow Jones Indices, [Dow Jones Sustainability World Index https://portal.s1.spglobal.com/survey/documents/DJSIComponentsWorld_2023.pdf](https://portal.s1.spglobal.com/survey/documents/DJSIComponentsWorld_2023.pdf) ; S&P Dow Jones Indices, [Dow Jones Sustainability Emerging Markets Index https://portal.s1.spglobal.com/survey/documents/DJSIComponentsEmergingMarkets_2023.pdf](https://portal.s1.spglobal.com/survey/documents/DJSIComponentsEmergingMarkets_2023.pdf)

⁹⁴ S&P Global, S&P Europe 350 ESG Index. <https://www.spglobal.com/spdji/en/documents/additional-material/brochure-spg-europe-350-esg-index.pdf>

⁹⁵ Wärtsilä, Wärtsilä is again included in the Dow Jones Sustainability Index. <https://www.wartsila.com/media/news/11-12-2023-wartsila-is-again-included-in-the-dow-jones-sustainability-index-3372131>

⁹⁶ Justice for Myanmar, Wärtsilä. <https://www.justiceformyanmar.org/press-releases/finlands-wartsila-corporation-seeking-profit-from-military-junta>

facilitate human rights abuses in Myanmar in order for them to maintain their ESG ratings and remain in their ESG indexes.

D). S&P DJI is directly linked to adverse impacts in Myanmar through its business relationships with companies complicit in human rights abuses

1. As discussed above, the ESG scores given by S&P DJI to the companies named in this complaint have failed to adequately capture and reflect the adverse human rights impacts associated with those companies' activities and business relationships. These flawed ESG ratings have then been used to determine the companies' inclusion on ESG indexes, which are relied upon by investors and asset managers to build funds deceptively marketed as "sustainable" or "responsible."
2. Below we set out an analysis of S&P DJI's human rights responsibilities under the OECD Guidelines vis-à-vis the companies that it rates and includes on ESG indexes. Our conclusion is that S&P DJI has a business relationship with the companies it rates and includes on indexes, and that S&P DJI therefore has a responsibility to conduct adequate due diligence and a responsibility to exercise leverage over companies that are causing or contributing to adverse human rights impacts.
3. S&P DJI has a "business relationship" with the seven companies
 - a. According to the OECD Guidelines: "Enterprises should seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products, or services by a business relationship."⁹⁷ The Commentary on Chapter II defines "business relationship" as including relationships with business partners, entities in the supply chain which supply products or services that contribute to the enterprise's own products or services that are directly linked to its business products, or services.⁹⁸ This definition accounts for a broad spectrum of relationships that could include both traditional commercial relationships and those of financial services providers.
 - b. Similarly, under the United Nations Guiding Principles on Business and Human Rights (UNGPs), companies have a responsibility to "prevent or mitigate adverse impacts that are directly linked to their operations, products or services by their business relationships."⁹⁹ Under the UNGPs, "business relationships" are not limited to a company's direct contractual relationships with business partners, but also include relationships with entities throughout its value chain.¹⁰⁰ According to past OHCHR advice, "the commentary to Guiding Principle 13 suggests an expansive interpretation of the scope of companies and business relationships covered."¹⁰¹ It is widely recognized in supply chain contexts, for instance, that business relationships extend throughout a

⁹⁷ OECD Guidelines, Chapter II General Policies (A)(13).

⁹⁸ OECD Guidelines, Commentary to Chapter II General Policies (17).

⁹⁹ UNGP 13(b).

¹⁰⁰ Official commentary to UNGP13(b) states, "For the purpose of these Guiding Principles a business enterprise's [...] 'business relationships' are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services." According to the OECD, "'Linkage' is defined by the relationship between the adverse impact and the enterprise's products, services or operations through another entity (i.e. business relationship). 'Directly linked' is not defined by direct contractual relationships, for example 'direct sourcing.'" See OECD Due Diligence Guidance for Responsible Business Conduct (2018), Annex, Question 29.

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

¹⁰¹ OHCHR response to request for advice regarding the application of the UN Guiding Principles on Business and Human rights where private sector banks act as nominee shareholders,

<https://www.ohchr.org/Documents/Issues/Business/finance-2021-response-nominee-shareholders.pdf>

company's supply chain, even where the relationship exists through multiple intermediary entities.¹⁰² In the financial sector, it has also been established that under both the OECD Guidelines and UNGPs, a business relationship may exist between a financial institution and an investee company, including through “multiple tiers of business relationships.”¹⁰³

- c. While S&P DJI may not enter into a direct contractual relationship with the companies that appear on its indexes, S&P DJI maintains a business relationship with the companies. The companies constitute an essential component of the products and services sold by S&P DJI and are therefore an integral part of S&P DJI's value chain. S&P DJI, as a ratings firm, solicits information from the companies it scores, and those companies provide vital information (in the form of surveys, self-assessments, and other ESG reporting formats) to S&P DJI's ratings division which allows it to score companies and produce ESG indexes. Furthermore, the relationship between ESG firms and investee companies is mutually beneficial, generating value for both parties. When S&P DJI assigns a high enough rating to include a company on its ESG index, it imbues reputational benefits and facilitates access to significant capital for that company,¹⁰⁴ while simultaneously earning profits itself by providing the rating and index maintenance service to investors.
4. The ESG firms that score companies and include them on their ESG-labelled indexes have a business relationship with those companies, which constitute an integral part of their value chain, and would therefore be directly linked to the human rights abuses to which those companies may have caused or contributed. The Complainants submit that S&P DJI is directly linked to the human rights abuses associated with the operations of the seven companies named by civil society and/or in the UN Fact-Finding Report on Myanmar, as outlined in **Annex 1** of this complaint.

E). S&P DJI has a responsibility to conduct due diligence and to exercise leverage to prevent and mitigate adverse impacts

1. According to the OECD Guidelines, enterprises should carry out risk-based due diligence to identify, prevent and mitigate actual and potential adverse impacts associated with their operations.¹⁰⁵ Due diligence should not only cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, but it should also cover impacts which may be directly linked to the business enterprise's operations, products, or services by its business relationships. Where an enterprise identifies a human rights risk or

¹⁰² OECD provides the following example of a directly linked relationship: “, if an enterprise sources cobalt mined using child labour which is then used in its products the enterprise can be directly linked to the adverse impact (i.e. child labour). In this case, the enterprise did not cause or contribute to the adverse impact itself, but nevertheless there still can be a direct link between the enterprise's products and the adverse impact through its business relationships with the entities involved in its sourcing of the cobalt (i.e. with the smelter, minerals trader, and mining enterprise using child labour).” In this example, the end user's directly linkage to the impact extends through multiple intermediary relationships. See OECD Due Diligence Guidance for Responsible Business Conduct (2018), Annex, Question 29. <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

¹⁰³ OHCHR response to request for advice regarding the application of the UN Guiding Principles on Business and Human rights where private sector banks act as nominee shareholders, <https://www.ohchr.org/Documents/Issues/Business/finance-2021-response-nominee-shareholders.pdf>. See also OHCHR response regarding the issue of the applicability of the Guiding Principles on Business and Human rights to minority shareholdings, <https://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf> and OECD Guidance on Responsible Business Conduct in the Financial Sector, <https://mneguidelines.oecd.org/rbc-financial-sector.htm>

¹⁰⁴ In most cases, a company does not receive equity capital when it is included on an ESG index, because the money changes hands on the secondary market (unless the company is undertaking an equity issue). However, a company does benefit materially when its ESG rating increases or it is included on an ESG index. Such potential benefits include an increase in share price or an improved credit rating, according to multiple quantitative studies.

¹⁰⁵ Chapter II General Policy, (A)(11); Chapter IV Human Rights (5).

impact to which it is directly linked, it should seek to prevent or mitigate that impact through the exercise of leverage.¹⁰⁶ Commentary to Chapter II of the OECD Guidelines states that where an enterprise identifies risk, it should use leverage to mitigate any remaining impacts to the greatest extent possible. It notes that leverage is considered to exist where the enterprise can effect change in the wrongful practices of the entity that causes the harm. Leverage can be used alone or in cooperation with other entities.¹⁰⁷ The Commentary on Chapter IV clarifies that among factors that will enter into the determination of the appropriate action (to seek ways to prevent or mitigate adverse human rights impacts directly linked through a business relationship) are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, and the severity of the impact.¹⁰⁸ As has been outlined in the UN Guiding Principles and the OECD Guidelines, when investing – directly or indirectly through other companies – in conflict affected areas, enhanced due diligence is expected as risks of harms are heightened.

2. The existence of a business relationship entails a responsibility for ratings firms and index providers, including S&P DJI, to conduct human rights due diligence to identify human rights risks and impacts to which they may be directly linked. Where risks or impacts are identified, S&P DJI has a responsibility to exercise the considerable leverage it holds over companies that appear on its indexes, with an aim to prevent or mitigate those impacts. The exercise of leverage may include dialogue with the companies and, as necessary, downgrading the implicated companies' ratings and excluding them from ESG indexes if the companies fail to act to address human rights risks or impacts.
3. All index providers (including those that construct conventional, non-ESG indexes) maintain business relationships with the companies that appear on their indexes, by nature of their value chain and services, which entails directing investments towards those companies—and as a result, conventional index providers also have a responsibility to address risks and impacts to which they are linked. However, the roles and responsibilities of ESG and non-ESG index providers to address human rights risks and impacts to which they are linked through those business relationships diverge in important ways: 1) because ESG ratings and index providers market themselves as an environmental and social due diligence tool for other investors; and 2) because ESG firms hold considerable leverage over companies that conventional indexes do not.
 - a. First, ESG ratings and index firms, including S&P DJI, actively market their products and services to investors as important tools that investors can rely upon when conducting their own human rights due diligence. The Complainants have extensive experience engaging with investors exposed to significant human rights impacts in their portfolios, many of which have informed us that they rely—in part or in whole—upon the ESG ratings of companies (often provided by S&P DJI) to conduct human rights due diligence. A high score on ESG performance and inclusion in an ESG index creates the public perception of a “stamp of approval” with respect to social and environmental issues. This approval is used by companies to advance their business and attract investment; and is relied upon by investors seeking to fulfil their own human rights responsibilities under the Guiding Principles and OECD Guidelines. By actively representing themselves in this way, ESG firms have created a public expectation and arguably a duty of care to meet minimum standards of reliability and effectiveness.

¹⁰⁶ Chapter II General Policy (A)(13) and Chapter IV Human Rights (3).

¹⁰⁷ Guidelines, Commentary on Chapter II: General Policies, paras. 22-24.

¹⁰⁸ Guidelines, Commentary on Chapter IV: Human Rights, para. 48.

- b. Second, ESG firms, including S&P DJI, hold heightened leverage over the companies that they rate and include on their ESG indexes — even greater leverage than providers of conventional indexes hold, which is already substantial. The ESG index creation methodology enables the index creator to include or exclude certain companies from the ESG index based upon the companies’ ESG and human rights performance. In the case of S&P DJI, which produces the ESG ratings that underlie the ESG indexes they create, the firm has significant discretion over which firms are included, and therefore significant leverage over the companies that want to be added to or remain on the ESG index. The leverage is derived not only from the ability to facilitate or restrict investment in those companies, but also from the ability to bestow reputational benefit upon the companies that are included in an ESG index.
4. The index provider FTSE Russell—an industry peer of S&P DJI—published a research paper on the topic of leverage and the role of index firms in influencing company behavior in instances of passive investing.¹⁰⁹ A key finding of the paper is that passive investors can “outsource to index providers the work involved in setting [ESG] standards and ensuring that they are met by investee companies.” The paper goes on to say, “by developing indexes with clear and transparent rules on sustainability issues, and engaging broadly with investee companies to ensure compliance, index providers can do much of the heavy lifting of engagement on behalf of passive index investors,” and that index providers can “reward or penalize companies,” by removal from the index or through index over and under-weighting.¹¹⁰ The paper details how the firms responsible for ESG index design and calculation can effectively engage with investee companies and use their leverage to incentivize companies to “achieve real world improvements in corporate sustainability performance.” These incentives, according to FTSE, can include both reputational benefits, if there is visibility in index selection, as well as through greater investment flows.¹¹¹
 5. FTSE cites academic research into this area, which found that engagement by an ESG index firm (FTSE) and threat of expulsion from an ESG index doubled the probability that a firm failing to meet environmental criteria for inclusion on the index would comply within a three-year period.¹¹² Another study found that companies adjusted their behavior in response to ESG index criteria.¹¹³ These studies demonstrate the considerable leverage held by ESG index firms, like S&P DJI.
 6. S&P DJI has, in at least one past instance, successfully used its leverage to address human rights risks and impacts. This occurred in 2021, when S&P DJI removed Adani Ports, India’s largest port operator, from its Dow Jones Sustainability Indices. The decision was triggered by “heightened risks to the company regarding their commercial relationship with Myanmar’s military, who are alleged to have committed serious human rights abuses under international law,” the index provider said in a statement.¹¹⁴ Following the lowering of its ESG score and public removal from S&P’s ESG index, Adani Ports publicly announced that it would cancel its proposed project with the military and end its involvement in Myanmar.¹¹⁵ This incident

¹⁰⁹ FTSE Russell, “Achieving scale in active ownership and engagement through index investing,” https://content.ftserussell.com/sites/default/files/achieving_scale_in_active_ownership_and_engagement_through_index_investing_final.pdf?_ga=2.58682530.948067829.1639060060-781965199.1634204423

¹¹⁰ *Ibid.*, page 7.

¹¹¹ *Ibid.*, page 3.

¹¹² *Ibid.*, page 9.

¹¹³ *Ibid.*

¹¹⁴ S&P Dow Jones Indices, “Removal of Adani Ports and Special Economic Zone from the Dow Jones Sustainability Indices,” https://www.spglobal.com/spdji/en/documents/indexnews/announcements/20210412-1355163/1355163_djisi-adani-20210412.pdf

¹¹⁵ Reuters, “India’s Adani Ports scraps Myanmar container terminal plans,” <https://www.reuters.com/world/india/indias-adani-ports-says-it-will-exit-myanmar-investment-2021-10-27/>

illustrates how S&P DJI can meet its human rights responsibilities by exercising its considerable leverage to address human rights concerns.

F). S&P DJI has failed to conduct effective due diligence and exercise leverage in accordance with the OECD Guidelines

1. We contend that S&P DJI has failed to exercise effective human rights due diligence vis-à-vis the companies that it rates and includes on ESG indexes. This is evidenced by the companies with ties to the Myanmar military that S&P DJI continues to include on its ESG indexes, despite widely publicized and credible reports from human rights experts (including the UN Independent Fact-Finding Mission and reputable civil society organizations) implicating these companies in serious human rights abuses. Effective human rights due diligence would have identified these risks and impacts, providing S&P DJI the opportunity to prevent being directly linked in the first place (by downgrading the companies' ESG scores accordingly, and removing them from ESG indexes). This evidently did not occur.
2. Furthermore, when alerted by the Complainants to the existence of these companies on its ESG indexes, and requested to act in accordance with the OECD Guidelines, S&P DJI demonstrated an unwillingness to acknowledge and fulfil its responsibilities. There is no indication that S&P DJI has exercised leverage to prevent or mitigate the impacts to which it is linked. For full copies of the complainants' correspondence with S&P, see **Annex 4**.

V. Conclusion and Request for US and Dutch NCP Assistance

1. The Complainants request that the US and Dutch NCPs offer their good offices to resolve this dispute with the Respondents consequent to their failure to comply with OECD Guidelines.
2. The Complainants request that S&P DJI fulfil its obligations under the OECD Guidelines by:
 - a. Conducting robust due diligence in relation to the companies it rates and includes on ESG indexes, in particular where those companies are doing business in conflict-affected areas.
 - b. Exercising leverage with the seven companies enabling human rights abuses in Myanmar, to urge the companies to sever their links to the Myanmar military.¹¹⁶
 - c. If the companies fail to act, S&P DJI should lower their ESG ratings and remove them from the ESG indexes that they are currently listed on.
 - d. S&P DJI should bring its ESG products and operations into accordance with the OECD Guidelines, including by aligning ESG standards with human rights standards (including the OECD Guidelines). IDI has proposed a number of reforms to do so.¹¹⁷
 - e. S&P DJI should establish an accessible and effective grievance mechanism to enable external stakeholders, including communities adversely impacted by corporate activities, to raise concerns directly with S&P DJI about companies they rate and list on their ESG indexes.
3. We would welcome the opportunity for a facilitated dialogue with S&P DJI through the NCPs' good offices to discuss and reach a resolution on how S&P DJI can ensure its conformance with the OECD Guidelines, including specifically in relation to the seven companies mentioned.
4. If the Respondents decline our offer of dispute resolution, or a resolution cannot be reached, we request that the US and Dutch NCPs examine this complaint and make specific recommendations to bring S&P DJI into conformance with the OECD Guidelines with respect

¹¹⁶ The Complainants can provide specific demands for each of the companies.

¹¹⁷ See IDI, Stop ESGwashing, <https://www.inclusivedevelopment.net/policy-advocacy/stopesgwashing/> and IDI Submission to the UN Working Group on Business and Human Rights, <https://www.inclusivedevelopment.net/wp-content/uploads/2023/10/IDI-Submission-to-UN-Working-Group-Call-for-Input.pdf>

to their failure to prevent and mitigate adverse human rights impacts that are directly linked to their products and services.