Getting Responsible

Rules of Engagement in the Proxy War For Economic Access

By Brad Brooks-Rubin

When United States (US) Deputy National Security Advisor Daleep Singh landed in Kinshasa recently to engage the Congolese government about access to minerals, his visit could be seen as just another stop for the senior official as he headed next to Germany for a G7 meeting.[1]

But for a country like the Democratic Republic of Congo (DRC), which has experienced decades of horrific conflict linked to the exploitation of its natural resources, the engagement to promote US business interests comes amid a 21st-century version of the colonial-era "Scramble for Africa." The US engagement led by Singh takes place in a competitive context rife with predatory international actors. China, Russia, and others rely on state-owned enterprises (SOEs) or similar proxies in this shadowy and sometimes violent contest, from foreign state proxies like the Kremlin-linked Wagner Group in the Central African Republic (CAR) and Mali to highly connected deal brokers like China's David Du Wei,[2] who was recently profiled in an investigative report by The Sentry for using less-than-legitimate means to advance Chinese infrastructure deals in the DRC.[3]

With the level of senior US government interest focused on the DRC, a country usually perceived as unimportant to global geopolitics, the idea that a proxy war is playing out in the economic competition among the US, China, Russia, and others is not as much of a stretch as it may seem. While the proxy conflict principally centers on access to natural resources, there are also deeper struggles underway for contracts, new markets, and economic partners across the globe.

Increasingly, though, especially in the most challenging cases and environments, companies based in the US and other countries interested in responsible business are not pursuing investments in these contracts, markets, or partnerships. As such, it appears as though many of the tools—from sanctions to economic incentives—that policymakers hoped would pave the way for such investments are falling short in encouraging investment on their own, at least so far. In the case of sanctions, these shortcomings are due in part to the fact that encouraging investment is not their core objective.

Thus, it is time for the US to, among other things, return to an instrument that was used only once but that showed great promise: responsible business reporting requirements. If used properly, this tool could be flexibly applied from Afghanistan to Sudan to the DRC, complementing and enhancing many existing initiatives. It may not be a silver bullet, but it will be a more useful measure than many others the US is trying.

The Last War: Burma Responsible Investment Reporting Requirements

As the Obama administration was easing sanctions on Myanmar in 2013, it created an innovative and unique tool within the framework of a general license issued by the US Department of the Treasury's Office of Foreign Assets Control (OFAC) but announced and administered by the US Department of State.[4, 5] Rather than completely eliminating the prohibition on new investment in the country, the government created an obligation that any US person investing more than $500,000 in Myanmar needed to file a report with the US Embassy in Yangon detailing their business investments and outlining the due diligence measures being taken with respect to specific substantive concerns: dealing with the Myanmar government and military, human rights, corruption, environmental concerns, and more. These were called the Responsible Investment Reporting Requirements ("the 2013 Requirements").[6]

In its 2013 announcement, the State Department crystallized the potential importance of this innovation for all stakeholders:

> The Department of State will use the information collected as a basis to conduct informed consultations with U.S. businesses to encourage and assist them to develop robust policies and procedures to address a range of impacts resulting from their investments and operations in Burma. We also intend the public report to empower civil society to take an active role in monitoring investment in Burma and to work with companies to promote investments that will enhance broad-based development and reinforce political and economic reform.[7]

In other words, the 2013 Requirements would form the basis of an honest conversation the US government hoped to have with both the private sector and nongovernmental organizations about what was happening on the ground and how the evolving business environment in the country could be navigated. Rather than constraining American companies, the 2013 Requirements instead allowed for more constructive and proactive engagement from both the US government and civil society.

Many lauded the 2013 Requirements as a constructive approach for US businesses working in a challenging environment, and large multinational companies actually engaged with them. For example, General Electric elected to file a report because of its "commitment to transparency," even though the company did not think it met the terms of the general license.[8] Similarly, companies like Western Union and Coca-Cola filed extensive reports that provided remarkable insight into the business environment and decisions facing companies.[9] Indeed, Coca-Cola's 2014 report exemplified the "honest conversation" approach, noting that there were "some outstanding issues, particularly those that have required capital investment and ongoing training."[10] The reporting structure of the 2013 Requirements also allowed Coca-Cola to report ongoing challenges in areas such as capacity, hiring, and training, which then opened the door to more constructive review and engagement from outside the company.

However, not every company followed this path of transparency, according to analysis by the Truman Center;[11] some companies filed reports of just a few sentences. The Treasury and State Departments never quite worked out whether such meager submissions actually met the terms of the general license or what enforcement would look like for companies that did not. But from the perspective of civil society and the broader effort to engage in an honest conversation about responsible business, these paltry submissions also served a purpose by shining a light on those companies that likely deserved more scrutiny. And as the State Department predicted, the 2013 Requirements paved the way for Western companies to discuss how they could compete against Chinese and other interests.

The 2013 Requirements were eliminated in 2016 when their underlying legal authority was terminated, and the specific experiment was cut short, although the model has had more recent iterations, including some directly related to Myanmar. At the time, given the optimism about Myanmar, it was hoped that the 2013 Requirements would evolve into a more normal course of responsible and transparent business in the country, which would itself help solidify the democratic transition given the generally close correlation between the climate for doing business and the strength of democratic institutions in a particular country.[12] Whether or not the 2013 Requirements, broader sanctions, or other measures ended prematurely, the course in Myanmar took a tragic backward turn with the coup in 2021, but it could be argued that it was precisely the introduction of a more open and democratic system that prompted the generals to claw power back, showing that the concept was ultimately a positive one.

Clear and Present Danger: Proxy Battles With Uncertain Battlefields

Since the 2013 Requirements were introduced, the Obama, Trump, and Biden administrations have wrestled with an array of complex challenges, both in Myanmar and elsewhere. These issues range from how to impose stricter restrictions and add pressure in countries of concern while averting humanitarian crises (e.g., Afghanistan post-Taliban takeover and post-2021 coup Myanmar), to how to ease restrictions in the wake of positive change (e.g., Sudan post-ousting of Bashir and pre-coup), to how to engage in challenging contexts where global adversaries have economic advantages but the US may have political ones (e.g., the DRC).

In each of these cases and many more like them, the core interest in the 21st century is less about geographic territory through which to expand military presence and more about economic access through which to expand business and partnerships. In some cases, such as the Wagner Group's operations in CAR and Mali,[13] both may be happening at the same time. For the most part, however, especially with respect to China, the main actor is more likely to be an SOE than an actual army.

These foreign SOEs are willing to engage in an array of corrupt and damaging practices as they expand their business footprints into uncertain contexts, according to recent analysis by the Natural Resources Governance Institute.[14] As The Sentry showed in its recent report on the DRC, and as many other investigations in the Congo Hold-up leak revealed,[15, 16] these infractions can involve outright bribery or investment in activities that degrade the environment, human rights, and economic development.

The US government and private sector's responses have been multifaceted but ultimately too complex, inconsistent, and slow moving. They have included a range of both carrots and sticks.

Carrots principally include domestic (e.g., Overseas Private Investment Corporation and Millennium Challenge Corporation) and international (e.g., International Finance Corporation) financial institution funding. Although essential, these processes are generally quite cumbersome and can take years to finalize.

With regard to sticks, sanctions measures that can restrict and ultimately penalize problematic behavior are the most common, and they can be very effective, as they have been in the DRC, especially in impacting the network of sanctioned Israeli mining tycoon Dan Gertler. But continuously updating and calibrating sanctions in a murky and evolving business environment can be challenging. Given its human resources and evidentiary constraints, OFAC can only target so many individuals and companies, particularly when massive SOEs and complicated political and diplomatic scenarios are involved. The Gertler network has been targeted three times, for example, with significant impact from an accountability perspective.[17] For sanctions to be capable of encouraging responsible investment by constraining irresponsible actors, this type of targeting would need to happen far more frequently and with a depth of evidence that can be hard to come by in a context like the DRC. Targeted sanctions are thus necessary but, as always, need to be rooted in the broader policy objective and deployed as one of many tools used to achieve the goal.

Secondary or sectoral sanctions can sometimes be deployed to extend directly to foreign actors' businesses in such economies, but these and other forms of comprehensive sanctions are increasingly rare. De-risking is the most consistent result from these broader forms of sanctions measures, when responsible companies are less likely to be involved due to the fear of getting something wrong and receiving a large fine. Such sanctions measures are especially challenged when the US government has not actually decided its policy approach to a particular conflict, and thus the messaging is unclear at best, as has largely been the case in post-Taliban-takeover Afghanistan.

A combination of carrots and sticks may also be used, such as issue- and sector-specific standards that are designed to improve conduct but that can lead to punishments. Such standards include payment transparency (as issued by the Extractive Industries Transparency Initiative),[18] respect for human rights by security personnel (e.g., the Voluntary Principles),[19] general guidelines for multinationals that can lead to penalties (e.g., the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises and the related "national contact point" system),[20, 21] and myriad other sector-specific approaches (from apparel to jewelry to palm oil).[22, 23, 24] Again, these standards are necessary but generally quite complex and detailed, designed more to bring about change over time than to provide flexible and focused rules. They complement more universal standards, such as the UN Guiding Principles on Business and Human Rights.[25]

All of these measures are essential for progress, especially over the longer term. But the carrots are rarely flexible, and even sanctions can be slow to develop. Without SOEs that can directly tap into government strategy or resources, most companies and banks from the US and other countries focused on responsible business wait on the sidelines, uncertain of whether or how to engage in such challenging environments, understandably afraid of the consequences that can come from a bad decision or an unwitting mistake being discovered by a government agency or civil society organization.

While Singh and other officials look eagerly for ways to ensure access to critical natural resources or markets, they do so with no clear rules of the road.

Battlefield Basics: Responsible Business Reporting Requirements

Many government regulators that have engaged with companies on how to do business in complex environments will know the common executive refrain: "Tell us what to do, and we'll do it." Increasingly, the US government has been doing more telling, from increasing the use of sanctions designations that identify bad actors to issuing recent business advisories related to Myanmar and Cambodia.[26, 27]

But productive engagement and rules for complex environments cannot come from one-way communication because, among other things, it does not allow for meaningful adaptation and adjustment. Even the US Securities and Exchange Commission's expected enhanced Environmental/Social/Governance (ESG) reporting requirements or the new proposed due diligence rules from the European Commission,[28, 29] while positive steps, will not do enough in complicated contexts. These measures are likely too broad and lack the focused coverage necessary to mitigate the specific issues at hand.

These due diligence and global reporting models also do not necessarily encourage honest and self-reflective disclosure, for instance, companies self-reporting shortcomings in specific areas, as Coca-Cola reported under the 2013 Requirements. When a single and fixed set of standards is introduced, the implicit expectation is that companies will seek to report that they are meeting these standards, lest they face legal or reputational repercussions. In many cases, the perception is that government reporting only involves downsides—criticism that companies are painting too rosy a picture or that they have not done enough to address risks. The reporting can potentially open companies up to penalties and contribute to them avoiding, rather than seeking, to do business in a particular place.

This is where the increased use of responsible business reporting requirements ("business requirements") should come in. These complex environments represent significant economic opportunities and interests, as Singh's visit to the DRC shows. As companies consider whether to engage with the complex risks that accompany opportunities or to avoid them altogether, the reporting requirements can provide safe harbor and a level of engagement that other types of reporting have not, as the Coca-Cola report demonstrates.

Taking the model of the 2013 Requirements, the State Department should issue new business requirements for complex environments such as Afghanistan, the DRC, Sudan, Myanmar, Venezuela, and others, and it should mandate that US companies with a certain threshold of business or activity in key sectors of concern file public due diligence reports on specific issues.[30] Such business requirements would most easily be issued by country, but they could also be issued by sector (e.g., investment in certain strategic minerals anywhere worldwide).

These business requirements and the specific issues or criteria they cover should not follow a general template. Instead, they should be focused on the realities of the particular case and context and designed to elicit critical information about doing business in a specific period of time that will benefit all stakeholders, as had been intended by the State Department with the Myanmar model. The key attribute of this model is that the specifics can be adapted to each case and evolve over time.

Of course, there are a number of common concerns in complex environments that would likely be a consistent part of business requirements. For example, given the US Strategy on Countering Corruption released in late 2021 and the June 2021 Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest,[31, 32] reporting on corruption-related due diligence should be a part of each set of business requirements. Other common issues that business requirements would likely include are conflict, human rights, labor, human trafficking, and environmental concerns.

Helpfully, the business requirements model separates risk identification from risk mitigation. This allows companies to use one section of the report to explain the risks present in their operating context and supply chain, as well as the policies in place related to those risks. In a subsequent section, the company can delve into the specifics of addressing these risks, both in terms of progress made and challenges remaining.

The introduction of each set of business requirements would ideally be accompanied by a business advisory similar to those that were issued for Cambodia and Myanmar. The advisory should then be updated periodically thereafter, at least on a yearly basis. Reporting would then be based on—and evaluated against—the details set out in the advisory. Over time, the template for reports in each context should be adjusted to include new concerns and remove those that may have become moot, or at least less urgent.

Importantly, the business requirements can provide more governmental direction on the difficult questions that companies are now forced to answer for themselves. For example, in the DRC, companies considering investment in the natural resources sector are navigating competing priorities and challenges, from extracting minerals necessary for the green economy to countering corruption to respecting human rights. In Afghanistan, companies must navigate the clear direction against doing business with the Taliban and the Haqqani Network with similar positive interests in critical natural resources and opportunities to put money into the hands of non-Taliban actors as a means of averting complete economic and humanitarian collapse.

Conclusion

Doing business in complex environments means facing difficult, if not impossible, dilemmas. If these dilemmas are to be answered at all, it must be accountable political leaders who do so, whether in the administration or in Congress. Otherwise, companies will make poor choices based on narrower economic interests, or, more likely, they will simply walk the other way. But decisions about whether to invest in difficult contexts are best informed through ongoing—and public—conversation and information-sharing, which the business requirements would provide. By framing the approach in this manner—as a conversation that encourages progress over time—the private sector will feel more comfortable taking the risks inherent to these contexts.

So, can another set of reports to the government really assist in dealing with these dilemmas and the related economic contests underway across the globe?

Simply put, yes. The model of reporting described will allow a meaningful and honest conversation among all stakeholders about the costs and benefits of doing business. The reports and the responses they receive can ultimately provide a more constructive and practical answer to the "tell me what to do" request. They can begin to inform a real-time, adaptable set of rules.

The business requirements should not disrupt the longer-term work and change made possible by various issue- and industry-specific standards-setting organizations, nor should they undermine the accountability that can be brought about through sanctions and prosecutions. To the contrary, these approaches should enhance and complement one another.

But the starting point must be one that allows the US government to tell responsible private sector actors: "Here is how you can engage in a responsible manner, how you will be evaluated by us and by external actors in the short term. We encourage you to show up and do this business, and we will continue to engage with and advise you on these efforts over time."

The business requirements model may not guarantee victory for responsible businesses and broader strategic interests, but without an approach of this type in the near future, loss may be inevitable.

Endnotes

1 The White House, "Statement by NSC Spokesperson Emily Horne on Senior Administration Official Travel to the Democratic Republic of the Congo," January 26, 2022, available at: https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/26/statement-by-nsc-spokesperson-emily-horne-on-senior-administration-official-travel-to-the-democratic-republic-of-the-congo/

2 The Sentry, "Investigative Report by CNN With The Sentry: Wagner Group Atrocities," June 15, 2021, available at: https://thesentry.org/reports/cnn-central-african-republic/

3 The Sentry, "The Backchannel: State Capture and Bribery in Congo's Deal of the Century," November 2021, available at: https://thesentry.org/reports/backchannel/

4 US Department of State, "Burma Responsible Investment Reporting Requirements," May 23, 2013, available at: https://2009-2017.state.gov/r/pa/prs/ps/2013/05/209869.htm

5 A general license is a form of permission that is available to everyone without needing to ask OFAC specifically, but OFAC retains authority to pursue enforcement against anyone who fails to follow its terms.

6 Although the official text of the 2013 Requirements has now been removed from US government websites, a law firm's reprint of them is available. See: https://www.millerchevalier.com/sites/default/files/resources/Burma_Responsible_Investment_Regs.pdf

7 See note 4.

8 John Prendergast and Brad Brooks-Rubin, "Modernized Sanctions for Sudan: Unfinished Business for the Obama Administration," Enough Project, April 2016, available at: http://enoughproject.org/files/Modernized_Sanctions_for_Sudan_042016.pdf

9 Ibid.

10 The Coca-Cola Company, "Responsible Investment in Myanmar: Second Report," June 30, 2014, on file with The Sentry.

11 Kendyl Salcito, "The Need for the Burma Responsible Investment Reporting Requirements," Truman Doctrine blog, July 18, 2018, available at: https://medium.com/truman-doctrine-blog/the-need-for-the-burma-responsible-investment-reporting-requirements-9359ec4dfed2

12 Sarah Repucci, "Democracy Is Good for Business," Freedom House, August 3, 2015, available at: https://freedomhouse.org/article/democracy-good-business (last accessed March 28, 2022).

13 Jared Thompson, "The Wagner Group Has Its Eyes on Mali: A New Front in Russia's Irregular Strategy," Modern War Institute, October 14, 2021, available at: https://mwi.usma.edu/the-wagner-group-has-its-eyes-on-mali-a-new-front-in-russias-irregular-strategy/

14 Alexandra Gillies and Tom Shipley, "Anticorruption Guidance for Partners of State-Owned Enterprises," Natural Resources Governance Institute, January 26, 2022, available at: https://resourcegovernance.org/analysis-tools/publications/anticorruption-guidance-partners-state-owned-enterprises

15 See note 3.

16 Platform to Protect Whistleblowers in Africa, Mediapart, and European Investigative Collaborations, "Congo Hold-up," available at: https://congoholdup.com/en/ (last accessed March 13, 2022).

17 See:

US Department of the Treasury, "United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe," Press Release, December 21, 2017, available at: https://home.treasury.gov/news/press-releases/sm0243

US Department of the Treasury, "Treasury Sanctions Fourteen Entities Affiliated With Corrupt Businessman Dan Gertler Under Global Magnitsky," Press Release, June 15, 2018, available at: https://home.treasury.gov/news/press-releases/sm0417

US Department of the Treasury, "Treasury Targets Corruption Linked to Dan Gertler in the Democratic Republic of Congo," Press Release, December 6, 2021, available at: https://home.treasury.gov/news/press-releases/jy0515

18 Extractive Industries Transparency Initiative, "What We Do," available at: https://eiti.org/About (last accessed March 13, 2022).

19 Voluntary Principles on Security and Human Rights, "The Principles," available at: https://www.voluntaryprinciples.org/the-principles/ (last accessed March 13, 2022).

20 Organisation for Economic Co-operation and Development, "Guidelines for Multinational Enterprises," available at: https://www.oecd.org/corporate/mne/ (last accessed March 13, 2022).

21 Organisation for Economic Co-operation and Development, "What Are National Contact Points for RBC?" available at: http://mneguidelines.oecd.org/ncps/ (last accessed March 13, 2022).

22 Fair Labor Association, "Principles of Fair Labor and Responsible Sourcing and Production," available at: https://www.fairlabor.org/our-work/principles (last accessed March 13, 2022).

23 Responsible Jewellery Council, "Code of Practices 2019," available at: https://www.responsiblejewellery.com/standards/code-of-practices-2019/ (last accessed March 13, 2022).

24 Roundtable on Sustainable Palm Oil, "About," available at: https://rspo.org/about (last accessed March 13, 2022).

25 Office of the High Commissioner for Human Rights, "Guiding Principles on Business and Human Rights," 2011, available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (last accessed March 28, 2022).

26 US Department of State, "Risks and Considerations for Businesses and Individuals With Exposure to Entities Responsible for Undermining Democratic Processes, Facilitating Corruption, and Committing Human Rights Abuses in Burma (Myanmar)," January 26, 2022, available at: https://www.state.gov/risks-and-considerations-for-businesses-and-individuals-with-exposure-to-entities-responsible-for-undermining-democratic-processes-facilitating-corruption-and-committing-human-rights-abuses-in-burma/ (last accessed March 13, 2022).

27 US Department of State, "Considerations for U.S. Companies and Organizations That Conduct Business in Cambodia Within Key Sectors or in Partnership With High Risk Entities," November 10, 2021, available at: https://www.state.gov/cambodia-business-advisory-on-high-risk-investments-and-interactions/ (last accessed March 13, 2022).

28 Securities and Exchange Commission, "SEC Response to Climate and ESG Risks and Opportunities," available at: https://www.sec.gov/sec-response-climate-and-esg-risks-and-opportunities

29 White and Case, "European Commission Issues Major Proposal on Due Diligence Obligations to Protect Human Rights and the Environment Across Supply Chains," February 24, 2022, available at: https://www.whitecase.com/publications/alert/european-commission-issues-major-proposal-due-diligence-obligations-protect (last accessed March 13, 2022).

30 In general, the US government can only mandate such filings for US companies. But given the evolution of due diligence requirements in the European Union and other similar forms of business reporting, this could provide an opportunity for the State Department to encourage other jurisdictions to issue analogous requirements or welcome voluntary reporting from foreign companies.

31 The White House, "United States Strategy on Countering Corruption," December 2021, available at: https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf (last accessed March 13, 2022).

32 The White House, "Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest," June 3, 2021, available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/ (last accessed March 13, 2022).