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25 January 2016

The Honourable John Kerry
United States Secretary of State
U.S. Department of State 2201 C Street
NW Washington, DC 20520
USA

Re: Burma Responsible Investment Reporting Requirements

Dear Secretary Kerry,

We write in response to the public reports submitted by U.S. companies in compliance with the Burma Responsible Investment Reporting Requirements ("Reporting Requirements") issued by the US Department of State.

Composed of 60 eminent jurists and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. The ICJ appreciates the U.S. government's efforts to promote responsible investment in Myanmar and to ensure that U.S. companies are responsibly managing their business activity in the country. We support your decision to continue to sanction businesses under the National Emergencies Act barring U.S. individuals and companies from investing or doing business with people linked to human rights abuses under the army's military rule.

The ICJ urges caution over the United State's recent decision to allow for an exception to the sanctions regime for people who have already been documented as having links to the military regime and implicated in human rights violations.[1] This caution reflects the ICJ's work with the Directorate of Investment and Company Administration, the Attorney General's Office, and the Union Supreme Court of Myanmar, as well as civil society organizations, to strengthen and support local efforts at ensuring that investment protects and promotes the rule of law, human rights and the environment. In this regard, the ICJ has visited and researched on the human rights and environmental impacts of investments in the 3 Special Economic Zones ("SEZ"), as well as other non-SEZ sites, in the country.

We believe that future reporting must be strengthened to ensure that U.S. companies comply with the Reporting Requirements, conduct due diligence and disclose adequate

[1] US banks call for waiver on Asia World Port, The Myanmar Times, 11 September 2015: http://www.mmtimes.com/index.php/business/16443-us-banks-call-for-waiver-on-asia-world-port.html

information transparently about the impact of their business practices on human rights in Myanmar. This is especially crucial in light of significant reporting gaps in July 2013. Failure to strengthen the requirements will undermine the goal of the Reporting Requirement to be a tool for promoting investment that reinforces those political and economic reforms that are compliant with the rule of law and human rights and help to empower civil society.

1. The need for more robust due diligence standards

International investments can promote the realization of human rights and sustainable development if they are undertaken in a transparent and accountable manner. In Myanmar, where the country's huge development potential has led to expected economic growth by 8.5% last year and at a similar pace in 2016,[2] investment is not always responsible and human rights compliant. On the contrary, businesses have typically failed to adequately consult with affected local communities and have contributed to serious human rights abuses arising from land misappropriations, loss of livelihoods, serious environmental damage, and violent curtailments of freedom of expression and association.[3]

Abusive government practices and malfeasance, along with extremely weak accountability mechanisms, have led to serious human rights violations and abuses in Myanmar.[4] Existing government policies, legislation, administration and enforcement do not effectively regulate business activity. For example, even though the government has the obligation under international law to uphold the rights of its people to informed participation in environmental decision-making, corporate officers and government officials continue to refuse to disclose environmental impact assessment results as they do not believe that working with affected communities is an obligation. Even inadequate existing law, such as the Land Acquisition Act (1894) that guarantees market value for land confiscated by the State, is not adhered to and often unimplemented in practice.

In such a regulatory environment, it is insufficient to rely solely on companies to voluntarily adopt responsible business practices. Against this backdrop of significant human rights risks, it is imperative that U.S. companies investing directly or indirectly in Myanmar undertake stronger due diligence measures to ensure that they do not deliberately or unwittingly contribute to human rights abuses.[5] Without adequate due diligence and meaningful community consultations, businesses will inevitably subject themselves to often justified community opposition resulting in project delays, risk future litigation and financial losses, and suffer reputational damage.

The United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles), unanimously endorsed by the UN Human Rights Council in 2012,

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[2] The International Monetary Fund has reported that Myanmar's economic growth was "fueled by the strong growth momentum and expansionary macroeconomic policies" and that the "projected increase in fiscal deficit is expected to provide an expansionary stimulus and contribute to strong GDP growth" - http://www.imf.org/external/pubs/ft/survey/so/2015/CAR091815A.htm

[3] The ICJ has researched and written about how the lack of transparency around investment projects in Myanmar has led to serious human rights violations: http://www.icj.org/investments-in-myanmar-silence-cannot-be-the-answer/

[4] Ibid.

[5] Vale Columbia Centre on Sustainable International Investment, 5 September 2013: http://ccsi.columbia.edu/files/2013/12/obama.pdf

underscore the duty of business enterprises to respect human rights, to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved. The Guiding Principles set out that the obligation of States to take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, by requiring human rights due diligence.

The ICJ submits that strong due diligence processes can help protect the human rights of people in Myanmar, while ensuring that businesses can help to facilitate, rather than hinder the realization of human rights.

2. The need for human rights due diligence to include land rights and the environment.

The Reporting Requirements currently only require U.S. investors to clarify their due diligence policies and procedures, but this must be amended to include the disclosure of information on due diligence policies and procedures as they relate to land rights.

The Vale Columbia Centre on Sustainable International Investment, in its comments to your Administration in 2013 on the Reporting Requirements, had stated that the current reporting question on property acquisition only asks about property acquired by the U.S. investor or the investor's subsidiaries, and that this "ignores major property acquisitions by other companies with which the U.S. investor has a substantial business relationship even when such acquisitions could have significant and negative impacts on land rights."[6]

The investment rush in Myanmar has intensified land confiscation and related social tensions, and given rise to acts of violence. Land grabbing linked to the development of infrastructure projects, the establishment of SEZs, agriculture concessions and extractive industries has left thousands vulnerable to forced evictions and expropriations without proper compensation.[7] In the Dawei, Thilawa and Kyauk Phyu SEZs, ICJ's research on the ground has revealed tensions between local communities and investors over the lack of meaningful consultations, inadequate compensations, the toll of investment projects on livelihoods, land and the environment, and the lack of judicial accountability.[8]

Even where a U.S. investor may have 'legally' acquired land in Myanmar, its ownership often remains in dispute. Many of these lands were taken from farmers without due process, with little or no compensation and given to associates of the former junta. These properties have also been illegally transferred to private companies during the fifty years of military rule.[9]

The Guiding Principles on Business and Human Rights are applicable in this context, since they define business relationships "to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly

[6] Vale Columbia Centre on Sustainable International Investment, 5 September 2013: http://ccsi.columbia.edu/files/2013/12/obama.pdf

[7] History to repeat itself in Burma's new Special Economic Zone, The Asian Correspondent, 20 April 2015: http://asiancorrespondent.com/2015/04/kyaukphyu-history-to-repeat-itself-in-burmas-newest-special-economic-zone/

[8] Ibid

[9] The Centre for Strategic and Economic Studies: http://csis.org/publication/land-reform-critical-test-myanmars-government

linked to its business operations, products or services."[10]

According to Article 56 of Myanmar's recently passed Environmental Impact Assessment (EIA) Procedure, an EIA investigation shall consider "all biological, physical, social, economic, health, cultural and visual components of the study area, together with all pertinent legal matters relating to the environment, people and communities **(including land use, resources use, and ownership of and rights to land and other resources)** that may be affected by the Project during all Project phases."[11]

There is doubt whether, and how, the EIA Procedures would be implemented in Myanmar, where there is no overarching land or property law to govern ownership, use and transfer of immoveable property. Considering that one-third of Myanmar's 47 million rural residents are landless labourers,[12] further land confiscations due to the sharp increase in foreign investment and development projects are a major cause for concern.

It is therefore vital for companies, especially those involved in the extractives, tourism, agriculture, industrial and manufacturing sectors, to disclose their due diligence policies and procedures relating to land rights as well.[13] Where these policies are shown to be non-existent or deficient, prompt and effective remedial reform will be essential. Companies committed to international standards of responsible business have leverage to help ensure human rights compliant practice on land in Myanmar, where local authorities are less aware of such international standards.[14]

The ICJ believes that the U.S. government should encourage greater transparency under the current requirements on investors' due diligence on human rights, including land rights, the environment with a view to ensuring that effective due diligence procedures are in place.

3. The need for further information on "passive" investors

Companies could avoid disclosing their investments and activities in Myanmar by incorporating in other jurisdictions.[15] Some have raised the question of whether U.S. companies are registering in Singapore to skirt sanctions on Myanmar.[16]

For example, EarthRights International ("ERI") had reported in 2013 that Capital Bank

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[10] The UN Guiding Principles on Business and Human Rights:
http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[11] Environmental Impact Assessment Procedure, The Government of the Republic of the Union of Myanmar, Ministry of Environmental Conservation and Forestry, Notification No. 616 / 2015, Nay Pyi Taw, the 3rd Waning Day of Nadaw, 1377 M.E. (29 December, 2015)

[12] Land reform a critical test for Myanmar's government: http://csis.org/publication/land-reform-critical-test-myanmars-government

[13] Myanmar Centre for Responsible Business, New reports under the State Department's Burma Reporting Requirements underline the importance of thorough due diligence:
http://www.myanmar-responsiblebusiness.org/news/importance-of-thorough-due-diligence.html

[14] Ibid

[15] Investments in Burma: Silence cannot be the answer: http://www.icj.org/investments-in-myanmar-silence-cannot-be-the-answer/

[16] US Companies skirting Myanmar sanctions fuel record investment:
http://www.bloomberg.com/news/articles/2014-11-17/u-s-companies-skirting-myanmar-sanctions-fuel-record-investment

and Trust Company and Capital International Inc. had submitted reports[17] disclosing that they had "undertaken no due diligence whatsoever in their passive investment in Yoma Strategic Holdings Ltd – a Singapore registered company owned by a Myanmar national with significant operations in plantation agriculture and real estate."[18] ERI states that the plantation agriculture sector in which Yoma operates presents high human rights risks: land grabs, labour abuses and environmental destruction have been widely documented.[19]

The ICJ submits that further transparency on these "passive" investments would greatly help the U.S. government and civil society organizations to properly understand the measures companies have taken to ensure their business practices are human rights compliant.

4. Conclusion

Myanmar's historic transition process is significantly influenced by economic development in the country. In order for business activity to help protect and promote human rights for people in Myanmar, it is essential to demand more robust due diligence standards, including human rights and environmental standards, greater clarity on investors' due diligence on land rights, as well as increased transparency on "passive" investments.

The U.S. Treasury Department's list of individuals and businesses banned from having financial or business links to the U.S. must be urgently revised to provide updated and clear information to help potential investors entering Myanmar avoid commercial ventures with those involved in human rights abuses and corruption.

Thank you very much for your consideration of our submission. We hope that the Reporting Requirements will be significantly strengthened with these suggestions in mind. Your continued engagement on such critical issues in Myanmar can help ensure quality reporting from U.S. investors and responsible business practices that promote and protect human rights for the people of Myanmar. Should you have any questions, please do not hesitate to contact us.

Sincerely,

Sam Zarifi

Regional Director, Asia-Pacific Office
International Commission of Jurists
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[17] The Business & Human Rights Resource Centre has stated that these reports fail to meet basic standards for full and accurate disclosure: http://business-humanrights.org/sites/default/files/media/uscb-letter-to-capital-burma-reporting.pdf
[18] EarthRights International, First US companies release reports on investments in Myanmar: http://www.earthrights.org/media/first-us-companies-release-reports-investments-myanmar
[19] Ibid.

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