September 5, 2013

The Honorable Mr. Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Re: Burma Responsible Investment Reporting Requirements

Dear President Obama:

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

The Vale Columbia Center on Sustainable International Investment, a joint center of Columbia Law School and the Earth Institute at Columbia University, recognizes that responsible international investment offers important opportunities to accelerate sustainable development in host countries. We thus applaud the U.S. Government's efforts to encourage responsible investment in Burma, and commend the first companies that have submitted reports.

We believe, however, that future reporting must be significantly strengthened if these Reporting Requirements are to serve their intended goals of assisting U.S. businesses to develop robust policies on the impacts of their operations in Burma and empowering civil society to monitor and promote responsible investments. To date, the reports have failed to provide adequate information related to due diligence and human rights. In order to ensure that gaps are closed in future reports, we urge your Administration to clarify the level and type of information that must be provided. We further urge your Administration to clarify that the Reporting Requirements also apply to investments in which the U.S. investor is "passive."

1. **Robust due diligence is essential to ensuring that international investments contribute to sustainable development.**

International investments can be a crucial tool for promoting sustainable development. However, this is not always the case – particularly when investments are not carried out in a transparent and accountable manner. History is replete with examples of international investments causing or exacerbating corruption, social degradation, human rights abuses, and environmental damage. This is especially so in countries with poor human rights records, like Burma, where abusive government practices and malfeasance have created an environment in which communities have no means of redress against harmful corporate conduct. U.S. entities investing either directly or indirectly in Burma must therefore take particular care to not purposely or unwittingly contribute to negative outcomes and to implement policies and practices that promote growth and development.

Emerging international best practices and human rights norms, such as those articulated in the *Guiding Principles on Business and Human Rights*, assert that businesses should undertake due diligence to avoid and address negative human rights impacts. A number of tools and indicators have been developed to help them do so. Due diligence is a core component of the internationally accepted *responsibility* of business to respect human rights.

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Research has also shown that investor due diligence, coupled with meaningful community engagement, minimizes the financial risks related to community-based conflict.[1] Using due diligence and strategic engagement also helps to protect corporate reputations and the future prospects of companies investing abroad. There is thus reason to believe that strong due diligence standards can assist U.S. corporate competitiveness.

2. **The Reporting Requirements should clarify that human rights due diligence includes issues related to land rights.**

Land rights violations are a concern throughout the developing world, and are particularly problematic in Burma, where large-scale developments have displaced individuals from the land on which they depend. The Reporting Requirements seem to acknowledge this concern, by separating out "property acquisition" as a distinct reporting question.

However, the reporting question on property acquisition only asks about property acquired by the U.S. investor or the investor's subsidiaries. This ignores major property acquisitions by other companies with which the U.S. investor has a substantial business relationship,[2] even when such acquisitions could have significant and negative impacts on land rights.[3] The Reporting Requirements should do more to encourage investors to consider and address the effects of property acquisitions undertaken by companies to which they are linked through substantial business relationships. Rather than revising the scope of the property acquisition question, your Administration could encourage greater transparency under the current requirements by requesting more information on an investor's due diligence on land rights.

We urge your Administration to clarify that any U.S. investor submitting a report should, in responding to the reporting question regarding due diligence on human rights, worker rights and the environment, also provide similar information related to due diligence policies and procedures as they relate to land rights.

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[1] For example, a 2011 study of extractive industry companies by Rachel Davis and Daniel Franks found that community conflicts based on host communities' environmental, social and economic concerns cause significant financial losses to the investor. The authors note that strong community relations can make companies more responsive to community concerns. This, in turn, reduces the risk of costly anti-firm actions, and, ultimately, "reduc[es] the costs to the company that such actions can generate." Rachel Davis and Daniel M. Franks, "The costs of conflict with local communities in the extractive industry," *SRMining2011* (2011). See also Steven Herz, Antonida Vina, and Jonathan Sohn, "Development without Conflict: The Business Case for Community Consent," World Resources Institute (May 2007) (articulating the business case for due diligence and engagement); Witold J. Henisz, "Spinning Gold: The Financial Returns to External Stakeholder Engagement," The Wharton School, University of Pennsylvania (2010) (same).

[2] The *Guiding Principles on Business and Human Rights* explain that, for the purpose of the principles, 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." Arguably, companies in which investment funds invest could fall into this category. John Ruggie, Special Representative of the U.N. Sec'y-General, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," Principle 13 (2011)

[3] For example, three of the submitted reports describe investments in the same Singapore-based company, which focuses in large part on real estate and property transactions in Burma. The company notes on its website that it has 70% operating rights to develop 100,000 acres of contiguous agricultural land. See Agriculture, available at http://www.yomastrategic.com/html/bus_culture.php (last visited August 30, 2013). Current interpretations of the Reporting Requirements would result in no transparency on the due diligence procedures and policies that relate to these types of investments, regardless of their potential impact on land rights.

3. The Reporting Requirements should require information on investments in which the U.S. investor is "passive."

International best practices do not provide bright-line rules for when businesses must undertake human rights due diligence, recognizing that business relationships are complex. Yet emerging norms do assert that human rights due diligence should cover the negative impacts directly linked to an entity's operations, products or services by a business relationship.[4] This is squarely aligned with the growing consensus that the corporate responsibility to respect human rights extends to preventing or mitigating negative human rights impacts.

The Reporting Requirements ask U.S. investors to provide information regarding their due diligence policies and procedures "that address operational impacts on human rights, worker rights, and/or the environment in Burma." The requirements clarify that U.S. investors should also explain "[w]hether and the extent to which the policies and procedures … are applied, required of, or otherwise communicated to related entities in Burma, including but not limited to subsidiaries, subcontractors, and other business partners." Transparency on these initiatives would help the U.S. Government and civil society groups understand what steps companies have taken to ensure that their investments are responsible.

Yet in three of the five public reports, which were submitted by related investment funds,[5] the U.S. investors failed to provide any information on their due diligence policies and procedures. Using identical language, each investor declined to give this information on the grounds that it was merely a "passive investor" in a Singapore-based company operating in Burma, and thus did "not have operations or supply chain in Burma." None of the reports elaborated on the "passive" nature of the investments.

This disavowal of responsibility opens an obvious and large loophole in the transparency required of U.S. investors in Burma. The indirect or "passive" nature of an investment should not nullify the due diligence expected or required of a U.S. investor. The Reporting Requirements apply to U.S. investors that exceed over $500,000 of "new investment" in Burma, or who undertake any investment that includes an agreement with Myanma Oil and Gas Enterprise (regardless of value). The requirements do not specify any other threshold delineating when the requested information should be provided. Arguably, any company that thus undertakes reporting under these requirements should provide all the information requested. This would be a reasonable interpretation of the Reporting Requirements,[6] and would also adhere to emerging international human rights norms.

Notably, the Reporting Requirements do not require companies to *conduct* human rights and environmental due diligence for all investment activities that occur in Burma; they simply require a U.S. investor to *explain* which due diligence policies and procedures are in place, and, further, which have been "applied, required of,

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[4] Ruggie, op. cit., Principle 17; OECD, "Guidelines for Multinational Enterprises," Section IV (2011).

[5] Capital Bank and Trust Company submitted two reports, while Capital International, Inc. submitted one report. All three reports provide the same point of contact (individual and email address), and use nearly identical language.

[6] This would also comport with how the Treasury Department treats investments in third-country companies whose main business activity is in Burma, which is allowed so long as "the third-country company's activities in Burma would not be prohibited if that third-country company were a U.S. person." U.S. Department of the Treasury, Sanctions, Frequently Asked Questions and Answers, No. 279, available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#279 (last visited September 2, 2013).

Other institutions have insisted on social and environmental requirements for passive investments. For example, the European Bank for Reconstruction and Development (EBRD) requires investors to ensure that their passive investments accord with the principles outlined in the EBRD's Environmental and Social Policy and comply with regulations in the country in which the investment is situated. Moreover, investors cannot make passive investments in companies carrying out certain activities, and should commit to divest when an investee company fails to address significant environmental and social issues. Procedures – Passive investments, EBRD, available at http://www.ebrd.com/environment/e-manual/p22pass.html (last visited September 2, 2013).

or otherwise communicated" to other entities in Burma with which the U.S. investor has a business relationship. This is not an onerous reporting burden.

We urge your Administration to issue clarifying guidance that any U.S. investor submitting a report should provide thorough information in response to each reporting question, regardless of whether their investments are "passive."

4. Conclusion

While tremendous efforts have been made to encourage responsible investment in Burma, the Reporting Requirements must be further strengthened through more detailed guidance on substance and application. Improved transparency will help ensure that investments flowing from the United States to Burma will act as a force for sustainable development, rather than serve as a source of corruption, social degradation, human rights abuses, and environmental damage. Thank you for your consideration of these comments. Should you have any questions, we would be happy to discuss this further.

Sincerely,

Lisa E. Sachs
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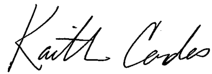
Vale Columbia Center on Sustainable International Investment



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