

FIDH - International Federation for Human Rights

END-OF-MISSION STATEMENT

Burma/Myanmar not ready for rights-compliant investment

28 February 2013 - The current legal, political, and economic context in Burma/Myanmar does not enable foreign investment that complies with key international norms and standards. This is the finding of an informal visit to Burma/Myanmar carried out by the International Federation for Human Rights (FIDH) along with its member organization Altsean-Burma. In February 2013, the FIDH–Altsean-Burma team met with stakeholders from across the country, including affected communities, human rights defenders, legal practitioners, and labour activists, and conducted a two-day training workshop jointly with Altsean-Burma and Burma Partnership for civil society groups on business and human rights.

Based on its interviews, meetings, and other interactions and considering the current reforms and re-engagement of the international community, FIDH and Altsean-Burma believe that Burma/Myanmar continues to lack the legal and institutional framework necessary in order to allow responsible investment. In the current environment, companies will find it difficult to exercise all of their initial and ongoing due diligence responsibilities according to international standards, including ensuring that they do not contribute directly or indirectly to human rights abuses and that any abuses that are linked to their operations are duly addressed and remedied. Currently, in many instances, the engagement of companies is serving to compound the ongoing human rights abuses in the country.

Foremost, the country remains plagued by widespread corruption and impunity, which prevents the effective implementation of the rights of individuals and communities affected by business operations in Burma/Myanmar. In addition, ongoing human rights abuses related to land, labour, access to justice, and freedom of expression and assembly continue. Such abuses have been recently linked to business activities. While the Government of Myanmar has made some selective legal reforms in these areas, those reforms remain shallow and often fail to comply with international standards. In addition, the implementation of reforms remains limited and inconsistent throughout the country.

For instance, civil society groups throughout Burma/Myanmar continue to report that farmers and entire communities are being **evicted from their land** to make way for infrastructure and commercial projects. In connection to the development of the Dawei Special Economic Zone by the Thai company Italian-Thai Development (ITD), at least 20,000 people are being forcibly displaced¹. Newly-enacted legislation – the Farmland Law and the Vacant, Fallow, and Virgin Land Management Law – legitimizes the government confiscation of land for any project that the government claims to be of “national interest” and permits the government to use all designated “vacant” lands. The application of these laws appears to be in contradiction with international standards relating to the right to adequate housing and forced evictions². Businessmen who have close connections to government authorities are already taking advantage of the current situation by registering land in their own names. Civil society groups have reportedly made numerous

¹ A Framework Agreement was signed on November 2, 2010, between Myanmar and Thailand that grants Italian-Thai Development (ITD) the right to develop and operate over a 75 years’ land lease period the Dawei Project including a deep-sea port, industrial estate, pipeline along the road-link to Thailand, and related infrastructure. The project, which plans to develop land covering 205 square kilometers in Dawei, is supposed to be completed by 2018.

² Myanmar has not ratified the ICESCR, however, both CEDAW and CRC, to which Myanmar is a Party, prohibit forced evictions. The UN Basic Principles on Development-based Evictions and Displacement set out a number of guarantees against forced evictions linked to development projects.

complaints to a parliamentary commission established on 26 July 2012 to investigate land confiscation cases, but the commission has been unable to deal effectively with these cases or move forward on reforms to prevent further occurrence. While foreign investors may, in good faith, lease land for their activities, it will be challenging for them to confirm that such land has not been illegally confiscated from families who have been denied access to legal remedy.

Although the Myanmar authorities signed an agreement with the ILO to eliminate forced labour by 2015, new forced labour cases are still being reported, particularly in ethnic areas. The practice appears to continue to be a tool used by the authorities, including the military, in connection with infrastructure projects. **Poor labour conditions** including excessive working hours, low wages, poor health and safety conditions, child labour, and arbitrary penalties on workers are prevalent in many industries, such as in the garment and electronics sector, as local labour laws are not sufficient and being properly implemented.

In October 2011, the Labour Organisations Law was enacted to permit the formation of trade unions. This is an important step forward. Yet, Burma/Myanmar has not ratified most of the fundamental ILO Conventions. In addition, despite the Labour Organisations Law, labour activists continue to be harassed by the authorities and their freedom of association continues to be restricted. Greater efforts and time are needed to meaningfully organise workers and to enable workers' representation at the factory level. In this context, international companies that conduct social auditing of the supply chain, including Burmese factories, may find it difficult to verify whether workers' rights are respected, unless workers have been able to organise and transparency of supply chains is guaranteed.

In general, **remedies** for those whose rights have been violated are ineffective in Burma/Myanmar. Impunity for human rights violations prevails, with Article 445 of the 2008 Constitution granting military personnel and government officials immunity from prosecution. When civil society representatives have used the media and/or the courts to denounce abuses by local businesses, in some cases, those human rights defenders have been charged for defamation or threatened with violence. Farmers also are being increasingly prosecuted or sued for tending land that was confiscated from them. In this context, access to an effective remedy for business-related human rights abuses, one of the pillars of the UN Guiding Principles on Business and Human Rights (UNGPs), remains a huge challenge.

The Myanmar authorities continue to severely **restrict the right to assemble peacefully**. The Government's intolerance was highlighted internationally in November 2012 at the Letpadaung copper mine in Sagaing Region, when authorities used white phosphorus grenades to crack down on peaceful protesters. As a result, scores of monks and civilians were seriously injured. Article 18 of the Peaceful Gathering and Demonstration Law of December 2011 is frequently used against those peacefully protesting against human rights abuses³. Section 401 of the Criminal Procedure Code threatens recently released political prisoners with re-arrest and being forced to serve the remainder of their original sentence for any violation of existing laws, thereby dissuading them from further protests.

So far, the Government's much-publicized reform process has not translated into significant improvements for the lives of the Burmese people, who remain subjected to arbitrary practices by the authorities. FIDH and Altsean-Burma received testimony that the practice of extortion and illegal taxation of communities by the military continues widespread, particularly in ethnic-majority

³ Recent examples include the 3 January 2013 conviction by a court in Pegu of four workers from the Moehti Moemi gold mine to six months in prison and a 10,000 kyat (US\$11) fine under Section 505(b) of the Criminal Code and the Peaceful Gathering and Demonstration Law for their peaceful protest against the company operating the mine and the 12 January 2013 conviction of four activists to one month's imprisonment for their participation in peaceful protests against the Monywa copper mine. Altsean-Burma, Burma Bulletin, January 2013.

areas and where military presence is high. **Lack of transparency** as well as the absence of consultation with affected communities continues to be the norm for state-sponsored infrastructure projects. In this environment, where populations are encumbered by arbitrary rule and oppression and remain fearful of government, it will prove difficult for foreign investors to conduct meaningful consultation with affected communities, as set forth by the UNGPs.

Last, the economy of Burma/Myanmar is still largely dominated by State-owned enterprises (SOEs) and private companies owned by so-called “cronies”, i.e. individuals closely connected to highly-placed members of the executive. In particular, the state-owned Myanmar Oil and Gas Enterprise (MOGE), the sole operator of oil and gas exploration and production in Burma/Myanmar, and the military-controlled conglomerate Union of Myanmar Economic Holdings (UMEH), have been connected to a wide array of human rights abuses. These SOEs and the “cronies” stand to benefit the most from new investments rather than the Burmese people. FIDH and Altsean-Burma welcome the announcement by the Myanmar authorities of their willingness to join the Extractive Industries Transparency Initiative (EITI), and hopes that the Government of Myanmar will undertake the required reforms to ensure transparency of public revenues, which is a first step toward accountability and redistribution of wealth. Until such reforms are carried out, however, there is no guarantee that revenues derived from trade and investment will benefit the people through effective poverty-reduction policies.

FIDH and Altsean-Burma recall that the European Union (EU)’s Council conclusions on Burma/Myanmar adopted on 23 April 2012, which suspended sanctions against Burma/Myanmar, reiterated the need for European companies to conduct any activities in Burma/Myanmar in accordance with the UNGPs and OECD Guidelines for Multinational Enterprises. In addition, the Reporting Requirements on Responsible Investment in Burma issued by the United States Government on 11 July 2012 requires companies conducting business in Burma/Myanmar to report publicly on their business operations and key policies and procedures, including those related to human rights violations. FIDH and Altsean-Burma also note that many business enterprises have committed to upholding the UNGPs and have formed a local network of the Global Compact in Burma/Myanmar.

FIDH and Altsean-Burma welcome these first steps but consider them insufficient to overcome the structural flaws that are obstacles to businesses’ abilities to respect human rights through their operations in Burma/Myanmar. Without greater change, foreign companies coming into Burma/Myanmar would be stepping into a minefield, with also serious reputational and financial risks. It is in the interest of business enterprises that an adequate legal and institutional framework for the protection and respect of human rights is in place and that effective redress mechanisms are available prior to entering into business relations in Burma/Myanmar. In light of these barriers, FIDH and Altsean-Burma believe that it will be extremely challenging for foreign businesses to respect human rights and carry out human rights due diligence as prescribed by the UNGPs.

Thus, FIDH and Altsean-Burma demand that the international community steps up efforts to ensure that the Government of Myanmar effectively implements reforms, in particular, protection of civilians from human rights violations and access to remedy. The cornerstone of such reforms should be focused on ending and preventing recurrence of impunity, which continues to be the greatest obstacle to respect for human rights by businesses in Burma/Myanmar.

The international community should not relieve its pressure towards the Myanmar authorities and should:

- ☒ Push harder for reform of the legal framework (including of the 2008 Constitution) to make it compliant with international human rights law; encourage the Government of Myanmar to ratify main international human rights treaties, in particular the ICESCR, the ICCPR, and

- ILO Conventions 98, 105, 100, 111, 138 and 182;
- ☒ Ensure that necessary reforms are made to reduce the occurrence of corruption, including measures to protect whistleblowers;
 - ☒ Approve the suspension of economic sanctions for another 12 months before any decision to lift them altogether;
 - ☒ Support renewal of the mandate of the UN Special Rapporteur on the situation of human rights in Myanmar;
 - ☒ Ensure full transparency of foreign business activities in Burma/Myanmar by requiring disclosure of details of investments (including of contracts) and all business relationships, including the list of suppliers of companies sourcing from Burma/Myanmar;
 - ☒ Require investors to carry out initial and ongoing human rights due diligence, including human rights impact assessments of their operations in Burma/Myanmar, and require public reporting by foreign investors in Burma/Myanmar of their human rights policies, environmental and social risks, the impacts of their activities, and measures taken to mitigate negative impacts;
 - ☒ Require disclosure of all payments made by companies to the Myanmar authorities; and
 - ☒ Ensure affected communities have access to effective remedies and, in particular, facilitate access of victims to courts in the home country of companies active in Burma/Myanmar.

FIDH and Altsean-Burma recommend that business enterprises insist to the Myanmar authorities upon the implementation of reforms and the development of frameworks needed to enable them to invest responsibly and to guarantee that they do not cause or benefit from abuses to the Burmese people. In undertaking investments, at a minimum, foreign companies operating in Burma/Myanmar should:

- ☒ Be fully transparent about their investment projects, including disclosure of the names of business partners and suppliers in the country, and undertake efforts to make this information accessible to local stakeholders, including to affected communities;
- ☒ Avoid business relationships with individuals or companies that have been connected to human rights abuses in Burma/Myanmar;
- ☒ Carry out and disclose the process and results of human rights impact assessments of their activities, as well as those of their business partners in Burma/Myanmar, prior to, during, and after their operations;
- ☒ Disclose any measures taken to prevent, mitigate and address adverse impacts; and
- ☒ Collaborate fully with legitimate and effective remedy mechanisms for victims of human rights abuses that may be linked to their operations.