European Union
24 February 2015

Joint Open Letter: EU-Myanmar Bilateral Investment Treaty

On 12 February 215, the governments of the EU and Myanmar concluded the first round of negotiations for a Bilateral Investment Treaty (BIT). In general, foreign direct investment (FDI) can play a positive role by creating decent jobs, improving productivity, investing in skills and technology transfer, supporting economic diversification and the development of local firms. However, FDI can also undermine decent work, sustainability, distribution and general well-being – especially where host states are unable or unwilling to enact or enforce appropriate laws and policies. Although new EU investment is likely to create needed new employment opportunities for workers in Myanmar, there is no guarantee that the quality of that employment will be positive unless additional measures are taken. The impact of FDI on the environment and on human rights more generally also remains in doubt.

Despite on-going reforms, Myanmar's administrative and judicial systems are weak and riddled with corruption. Already, we have witnessed grave violations of human rights in a number of industries linked to FDI. Given this situation, we seriously question the decision to conclude a BIT with Myanmar at this time. As the European Commission has nevertheless decided to proceed, we insist that at minimum it: 1) include innovative, binding measures on business and human rights which go beyond the standard sustainable development language found in many EU FTAs and 2) substantially modify the investment rules – including on Investor State Dispute Settlement (ISDS).

Business and Human Rights
The UN Guiding Principles on Business and Human Rights, endorsed by the European Union, call on States to enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws (Principle 3) and help ensure that business enterprises operating in conflict-affected areas are not involved in gross human rights abuses by, among other things, ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses (Principle 7). While the legal framework has improved in some respects, it is still not adequate to ensure that businesses respect human rights. Again, the rule of law is far from established in Myanmar. Thus, neither businesses nor workers and communities can count on the state to apply and enforce the laws related to human rights.
The EU has already recognised that EU-based corporations should uphold the highest standards of corporate responsibility when they trade with or invest in Myanmar. On June 15, 2012, then-Commissioners Catherine Ashton and Karel DeGucht, in calling for the reinstatement of GSP, noted that "responsible investment and bilateral trade [are] crucial elements for helping the country recover and flourish." This statement echoes the April 23, 2012 Council

statement that future trade and investment activity by European businesses in Burma/Myanmar should "promot[e] the practice of the highest standards of integrity and corporate social responsibility", referring specifically to the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and the EU's CSR strategy for 2011-2014. To date, however, the EU has yet to give practical effect to these important statements. A 2013 resolution of the European Parliament did signal that businesses operating in Myanmar should be bound to high standards, conduct due diligence and disclose supply chains.

At present, EU corporations are merely subject to voluntary/non-binding initiatives, such as the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and the UN Global Compact. Such initiatives, while important, are insufficient. The EU must take note of the initiative taken by the United States and set forth binding commitments on due diligence. However, the EU must go beyond the US approach and require companies to: 1) have a comprehensive human rights due diligence policy and undertake a thorough and credible due diligence process, assessing any actual or potential adverse impacts associated with that trade or investment, including business relationships, and publish that assessment on a centralized website prior to establishing the investment; 2) where actual or potential adverse impacts are identified, an action plan to remediate or to prevent those impacts within a reasonable time, which must be published with the impact assessment; 3) as due diligence is an on-going process, to publish reports similarly; and 4) to disclose its supply chains in Myanmar. Such processes should involve adequate and meaningful participation of those likely to be affected by the business activities and/or business relationships. Those obligations must accompany any BIT with Myanmar. Those MNEs that do not comply should not be able to make use of the benefits of the BIT. At all stages, MNEs investing in or operating in Myanmar must accept the need to work openly and cooperatively with civil society representatives, including human rights defenders.

Additionally, the EU should take on-going, affirmative measures to encourage EU MNEs doing business with Burma to respect human rights in Myanmar and, whenever possible, to use – individually or collectively – their leverage to promote respect for human rights. The EU should, for example, hold a conference in 2015 convening major EU MNEs and civil society representatives from the EU and Myanmar to discuss effective implementation of the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and in particular human rights issues that may arise in the course of investment in Myanmar, with recommendations for avoiding or remediating those impacts.

Investment Rules

Investor protections under investment treaties have been used in the past to hinder host states' ability to regulate, as recognized in the UN Guiding Principles on Business and Human Rights in its Commentary 9. Further, these

agreements often contain ISDS clauses, a specific type of dispute settlement in investment treaties which allows the investor, i.e. the foreign corporation, to bypass national courts to sue a government in an international arbitral tribunal. Some investors have claimed outrageous sums of money, including not only for alleged actual losses but for loss of anticipated future profits. These tribunals are often populated by the same investment lawyers who also represent clients before these tribunals and thus have an incentive to create a generous legal environment for investors. Arbitrators have also been criticised for their lack of knowledge of applicable international human rights law. The proceedings are not transparent and those defending the public interest, namely civil society organizations, have great difficulty in intervening in these processes. The decisions of these arbitrations are final and binding.
We feel strongly that countries must retain the ability to meet important public policy objectives in line with international human rights obligations, including labour rights, environmental protection, the provision of public goods (health, education and social security) as well as the development of coherent industrial policies. Investment provisions can do just the opposite, allowing foreign investors (or in some cases subsidiaries of domestic firms) to challenge existing or even proposed regulations as a violation of their rights. Moreover, ISDS tribunals tend to completely disregard relevant human rights law in reaching their decisions.

In the absence of strong provisions to address effectively human rights concerns, and in light of the expansive rights granted to investors, such treaties create grave threats. These concerns are elevated in a country like Myanmar where human rights are still routinely violated. Further, we note that the impact assessment for the EU-Myanmar BIT failed to assess the impact of the ISDS on human rights. The assessment clearly lacks any scientific rigour, a fact noted by the Court of Auditors as to previous impact assessments prepared by the European Commission. A proper impact assessment should therefore be undertaken before proceeding any further.

The EU is legally bound to include safeguards to ensure respect for human rights, including respect for these norms in international investment disputes; otherwise, the EU fails to uphold its legal obligations. Finally, pursuant to decisions of the Court of Justice of the European Union, we note that the details of the clauses negotiated in the EU-Myanmar BIT aiming to ensure the respect of Art 21 of the TUE and EU Charter of Fundamental Rights must be provided to civil society in order to comply with its transparency requirements.

Sincerely

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International Federation for Human Rights (FIDH)
Earthrights International
Burma Campaign UK

Trade & Investment Advocacy European Union Myanmar Open Letter
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