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**Myanmar Centre for
Responsible Business**

Challenges of the proposed EU- Myanmar Investment Protection Agreement

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Local workshop on the EU-Myanmar IPA sustainability impact assessment*

Yangon, 17 December 2015

As amended following discussions at the workshop

Impacts of a proposed EU/Myanmar Investment Protection Agreement:

What outcome would MCRB like to see?

1. A transparent consultative process based on full knowledge of the proposals
2. Increase in responsible investment in Myanmar, including from the EU, as this will have a positive impact on jobs, growth and poverty alleviation, and raise standards of responsible business
3. 'Policy space' for the Myanmar government and people i.e. freedom to legislate to raise standards of social, environmental and human rights protection
4. A treaty which does not expose Myanmar to significant and expensive litigation risks and damages (claims by companies in \$\$billions) as a consequence of the current uncertain regulatory climate, thereby reducing public funds available for health, education etc

A transparent consultative
process?

Problems with the current consultation process



- ▶ This meeting and the online consultation www.eu-myanmarsia.com are positive steps, as are the regular briefings for civil society by the EU Delegation. The Myanmar government also needs to ensure its citizens – business and civil society – are consulted
- ▶ However, for the purposes of a Sustainability Impact Assessments (SIA), how can stakeholders meaningfully comment on the impacts of a draft agreement which they have not seen?
 - A leaked version following the 2nd round of negotiations in May 2015 is in circulation, but not readily available or provided as part of the SIA; furthermore, this may not reflect changes following the 3rd round in September
 - In contrast, the EU published a draft text for the investment chapter of TTIP on 18 September 2015
http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

Comparison with EU/Singapore IPA

- ▶ The EU team has previously referred CSOs who have asked to see the draft EU/Myanmar IPA to the Investment chapter of EU/Singapore Free Trade Agreement which it says it resembles
- ▶ However these agreements (IPA vs FTA) serve different purposes.
- ▶ Furthermore, the equivalent EU/Singapore clauses appear to be more narrowly defined than what the EU has proposed to Myanmar side including on **‘national treatment’** and **‘fair and equitable treatment’**
 - (Articles 9.3 and 9.4 EU/SGP vs EU/Myanmar draft IPA (Chapter 2, Articles 2 and 5))



Further Myanmar/Singapore comparison: The 'umbrella clause'



- ▶ The EU has proposed an 'umbrella clause' ('Observance of Written Commitments', Chapter II, Article 10), similar to that proposed for Article 7 of TTIP with the US. The Myanmar side has proposed to delete this.
- ▶ This 'umbrella clause' would allow a company to sue the Myanmar government if any government authority (e.g. Ministry, sub-national government etc) has breached any written commitment, regardless of the reasons
- ▶ The equivalent clause in the EU/Singapore agreement (Article 9.4(5)) is more narrowly defined and requires the government to act 'deliberately' or 'in a way which substantially alters the balance of rights and obligations in the contractual written obligation'

Assessing the impacts of an Investment Protection Agreement (IPA):

1. Impacts of increased investment in Myanmar from the EU which might follow from an IPA
2. Impacts on Myanmar policy space and regulatory freedom
3. Impacts on litigation risk



1. Increased investment from the EU

Will an EU/Myanmar Investment Protection Agreement lead to increased EU Investment?



- ▶ There is no clear evidence whether or how much IPAs affect company decisions to invest
 - See Analytical Framework For Assessing Costs And Benefits Of Investment Protection Treaties, March 2013, LSE
- ▶ European companies have already invested in Myanmar in the absence of an investment treaty
 - e.g. TOTAL, Shell, ENI, BG, Unilever, Carlsberg, Heineken, BAT, De Heus, Lafarge, Ericsson
- ▶ Large companies have negotiated protections in Production Sharing Contracts (oil and gas), Licence Agreements (telecoms) or can access protection by investing via Singapore and benefitting from the ASEAN Comprehensive Investment Agreement
- ▶ Factors other than an IPA are more important for companies considering whether to invest in Myanmar

Q. Have you experienced difficulties when trying to invest in Myanmar?

A. Yes 14/No 6

Source: July 2013 EU Commission Survey on the future investment relationship between the EU and Myanmar, which received 36 responses, of which 25 from companies and trade associations

<http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=DisplayPublishedResults&form=InvestmentMyanmar>



MCRB assumes that (big) if investment from Europe were to increase as a direct result of the IPA, the impacts would generally be positive....

- ▶ EU investment can bring jobs and growth, technology transfer, higher standards of safety, social and environmental protection
- ▶ However, this will only be the case if European companies invest responsibly and in line with international standards such as
 - OECD Guidelines for Multinational Enterprises
 - UN Guiding Principles on Business and Human Rights (UNGPs)
 - IFC Environment, Health and Safety Guidelines and Performance Standards
 - The first two standards are namechecked in Chap 4, Art. 6(3) of the draft EU/M IPA. This (welcome) reference does not create binding requirements on either Party, but a shared ‘commitment to foster adherence
- ▶ Furthermore, it is essential that Myanmar strengthens and enforces its regulation of responsible business conduct in NATIONAL LAW
 - In addition to enhancing social and environmental protection, Myanmar could also require all investors receiving a permit from Myanmar Investment Commission to be transparent and respect human rights – see MCRB proposal in next slide, consistent with the UNGPs



Proposal from MCRB for inclusion in the new Myanmar Investment Law [NB NOT for inclusion in the EU/Myanmar IPA]

- MCRB proposes that Myanmar Investment Commission should introduce a compulsory reporting and grievance mechanism requirement for all companies (not just EU) to improve transparency and accountability.
- Suggested text for Law, Regulations or a Notification

REQUIREMENTS FOR COMPANIES IN RECEIPT OF AN MIC PERMIT

[With effect from x.x.2016] All companies in receipt of an MIC Permit are **required to:**

- a) Publish, within six months of the end of the company's financial year, an annual sustainability report in Myanmar language, (and other languages where appropriate). This report should address how the company has invested responsibly in Myanmar (see above for guidance). It should be published on the company website. The web link for the report should be notified to DICA.**
- b) Establish, within six months of receipt of the MIC Permit, an effective grievance mechanism designed in collaboration with affected stakeholders. This should be notified to DICA, and any relevant line ministry, together with the name and contact details of the responsible officer. This mechanism should be publicised on the company's website as well as being accessible to those who the company may affect. A short report on the implementation of the grievance mechanism should be included in the annual sustainability report.**

Introduce reporting requirements for EU investors in Myanmar?

- ▶ Investment in Myanmar presents a high human rights risk. The EU should consider a requirement for greater transparency by EU investors in Myanmar, as the US have done
- ▶ There are general, non-country specific EU reporting requirements:
 - The 2013 EU Accounting Directive require EU companies with more than 500 employees to report payments to the Myanmar government
 - The EU 2014 Non-Financial Reporting Directive includes additional strategic reporting requirements, such as a mandatory requirement to report on policies, the outcomes of those policies, principle risks, and the due diligence processes that have been implemented to prevent human rights abuses.
- ▶ However there is no requirement on EU investors in Myanmar to report specifically on these issues in Myanmar, only globally.
- ▶ The EU's requirements therefore do not require the same level of disclosure as the USA's Reporting Requirements on Burma.
- ▶ If the reporting proposal for inclusion in the new Myanmar Investment Law [previous slide] is not taken up, MCRB recommends the introduction of specific EU reporting requirements for EU investment in Myanmar

2. Potential impact of an IPA on Myanmar's 'policy space' and regulatory framework

How do investment treaties affect ‘policy space’?

- ▶ Examples of policies challenged under investment agreements:
 - financial regulation (*Ping An v Belgium*);
 - energy sector policy (*Vattenfall v Germany*, *AES, Solar & others v Spain*);
 - environmental regulation (*Chemtura v Canada*; *Methanex v US*); and
 - public health policies (*Philip Morris v Australia*);
 - among others.
- ▶ With a lot of gaps in policy and regulation, Myanmar needs a lot of ‘policy space’.....

A few of the gaps in the Myanmar legal framework relating to social and environment protection.....

- ❑ Rights of Indigenous Peoples and Free Prior and Informed Consent
- ❑ Resettlement
- ❑ many standards for environment e.g. emissions, pollution



New and untested laws related to business

- Protection of People with Disabilities (2015)
- Competition Law (2015)
- Law on Protection of National Races (2015)
- Revision of Foreign Investment Law and Citizens Investment Law to delegate investment decision-making to sub-national governments (2015)
- Revised Mining Law (tbc 2015)
- Cultural Protection (2015)



Some laws related to business pending in Parliament

- ❑ Draft Banks and Financial Institutions Law
- ❑ [Industry Law](#)
- ❑ [Amendment to the Land Acquisition Act](#)
 - ❑ changes rate of compensation from 'market value' to "the market value of the land or three years average value of a similar land which exists surrounding it; whichever is more"
- ❑ [Private Education Law](#)
- ❑ [Pesticides Law](#)
- ❑ [New Plant Varieties Protection Law](#)
- ❑ [Copyright Law](#) (Gazette 11 September), [Patent Law](#), [Trademarks Law](#) and [Industrial Design Law](#)
- ❑ Draft Intellectual Property Law (published in Gazette 4 & 11 Sept, Order 82/2015)
- ❑ [Hand Dug Oil Wells Law](#)



NB draft
EU/M
Investment
Protection
Agreement
mentions
intellectual
property
Chap 1, Art
2(iv)

....and probably there are others....

Some forthcoming draft laws related to business

- Draft EIA Procedures
- Draft Myanmar Investment Law
- Draft revision to Companies Act
- Draft Land Use Policy and associated laws that need to be revised
- Draft revision of Hotels and Tourism Law
- Revised Arbitration Law, reported to be based on the UNCITRAL model law

....and many others....

**Myanmar needs a lot of
'policy space'.....**

A specific 'Policy space' concern: Performance (local content) requirements

- ▶ Developing countries often use local content or employment requirements to encourage FDI to build skills and capacity in the local economy e.g.
 - Myanmar Foreign Investment Law (2012) requires 100% non-skilled employees to be Myanmar; 25% skilled workers to be Myanmar within two years, 30% within 4 years and 75% within six years
- ▶ However Chap 2, Art 12 draft EU/M IPA says that neither Party may – once the IPA is signed – impose local content requirements e.g.
 - a ban in Art12(i) on any requirement 'to hire a given number of percentage of its own nationals'
 - Art12(k) prevents Myanmar from 'restrict[ing] the exportation or sale for export'. What does this mean for policies intended to ensure more of Myanmar's energy resources stay in Myanmar for local consumption?
- ▶ Art 12(4)(a) allows a Party to make an exception for existing 'non-conforming measures' if listed in a Schedule to the Annex.
 - Has the Myanmar government identified the full list of such existing measures?
- ▶ What does Article 12 mean for Myanmar's policy space to adopt a new combined Myanmar Investment Law?

'The right to regulate'

- ▶ Draft EU/M IPA has text in the pre-ambble (as with Canada and Singapore/EU IPAs)
 - *"RECOGNISING the right of the Parties to take non-discriminatory measures to achieve legitimate public policy objectives on the basis of the level of protection that they deem appropriate;"*
- ▶ Article 8(3) (on indirect expropriation) says
 - *"For greater certainty, non-discriminatory measures by a Party that are proportionate in light of the above-mentioned factors and designed and applied to protect legitimate public policy objectives do not constitute indirect expropriation"*
- ▶ The draft EU-M IPA draft also has a 'Place Holder Article'
 - Does the EU plan to propose the same 'right to regulate' Article as in the draft EU/US TTIP (Section 2, Article 2)?



Potential positive impacts on regulation

- ▶ The draft EU/M IPA could support positive developments concerning sustainability and responsible business conduct in Myanmar. For example, the IPA contains a commitment to transparency in law-making (Chapter III, and Chapter IV Article 8)
 - Such an improvement would be highly desirable. However similar requirements in the Myanmar/Japan Investment Agreement (Article 8) have not resulted in more transparency in Myanmar law-making
- ▶ Myanmar commits to ‘endeavour to’ ratify remaining fundamental ILO Conventions (Chapter IV, Article 3)
- ▶ There is support for other cooperation and commitments in the area of environment and sustainability e.g. Article 6(3) includes a welcome reference to EU and Myanmar committing to
 - *“refer and adhere to internationally recognised guidelines and principles on CSR and responsible business conduct, such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, ISO 26000, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy”.*

Corporate Social Responsibility

- ▶ Chapter IV, Article 6 is titled ‘Corporate Social Responsibility’ (CSR)
- ▶ The term ‘CSR’ is not used in the key international standards referenced (e.g. UN Guiding Principles on Business and Human Rights, OECD Guidelines, UN Global Compact), and its use is also increasingly rare amongst companies.
- ▶ The term ‘CSR’ causes confusion as it is understood differently by different stakeholders.
- ▶ Furthermore the reference (Article 6(1) to CSR having a ‘voluntary nature’ is at odds with the 2011 EU definition of CSR as “*the responsibility of enterprises for their impacts on society*”. A responsibility defined in this way is unavoidable. The responsibility *per se* cannot be ‘voluntary’. However how a company assumes this responsibility is difficult to regulate or make compulsory
- ▶ MCRB therefore suggests not using the phrase ‘CSR’ in the IPA Chapter IV Article 6 and instead referring only to ‘Responsible Business Conduct’.

3. Potential impacts of an EU/Myanmar IPA on litigation risk

Litigation risk could arise from

- ▶ Changes to legislation and policy which are not consistent with the IPA (see previous slides)
 - Because Myanmar deliberately chooses to adopt policies and laws which are inconsistent with an IPA
 - Because a branch of Myanmar government (national or subnational) adopts policy or law unaware of IPA treaty obligations
- ▶ Other decisions by government
 - Either intentional or as a result of poor administrative capacity, poor intra-government coordination, or conflicts between laws
 - Intended to provide redress for previous grievances from the military government
 - NB draft EU/M IPA grants protections to *‘investments existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter’*.
- ▶ Changes to laws etc which are done without informing business and others, or giving an opportunity to comment
 - (see Chapter III – Transparency). Opaque regulation is still frequent practice in Myanmar

Other uncertainties in Myanmar

- ▶ Land ownership, registration
- ▶ Consequences of conflict and post-conflict
- ▶ Delegated powers of States, Regions and Self-Administered Zones
- ▶ EIA Process does not yet work to identify local concerns at an early stage
- ▶ Administrative capacity of all levels of government
- ▶ Intra-government coordination and information-sharing



Some scenarios which
might lead to litigation...

Scenario 1: local opposition



- ▶ A Myanmar government agency is considering whether to grant a licence or approval necessary for an investment to operate (e.g. whether to approve an Environment and Social Impact Assessment).
- ▶ The local community oppose the investment.
- ▶ The Myanmar government refuses to issue the licence/approval.
- ▶ The investor threatens to sue.
- ▶ Some claims of this sort have been successful (e.g. *Bilcon v Canada*)

Scenario 2: new regulations



- ▶ The Myanmar government enacts new regulations governing investments in a given sector e.g. revised environmental requirements.
- ▶ A government agency then cancels an investor's licence to operate for failure to comply with the new requirements.
- ▶ The investor threatens to sue.
- ▶ Some claims of this sort have been successful (e.g. *Tecmed v Mexico*)

Scenario 3: changes to tax

- ▶ The Myanmar government tries to change the revenue arrangements governing an investment, for example following decisions on revenue sharing with States and Regions.
- ▶ The investor threatens to sue.
- ▶ Some claims of this sort have been successful (e.g. *Occidental v Ecuador*)



Scenario 4: inconsistency between laws

- ▶ An investor obtains an investment permit from the Myanmar Investment Commission
- ▶ The relevant line Ministry (e.g. Ministry of Mines) or Ministry of Environment refuses to issue approval, or attaches processes/conditions that the investor does not like, or that vary the terms of an MIC permit.
- ▶ The investor sues.
- ▶ Similar fact patterns have been the source of many successful investment treaty claims (e.g. *MTD v Chile*).



Scenario 5: Security and conflict

- ▶ A European investment is based in an area of Myanmar in which conflict re-emerges
- ▶ The government informs the Tatmadaw that Myanmar needs to meet its obligations under the EU/M IPA (draft Article 5) to '*accord full physical protection and security to the investors and their investment*', so as to avoid either paying compensation (Article 6) or the risk of litigation.
- ▶ The Tatmadaw commits human rights abuses against local communities through the provision of 'security' to the investment.



Conclusions/recommendations (1)

- ▶ Myanmar's politics, policy and regulation relating to business are in flux. This is NOT the right time to finalise an EU–Myanmar IPA.
 - To do so could result in costly litigation against Myanmar
 - It is difficult to amend an agreement if problems are later identified
- ▶ Before completing the negotiations, the Myanmar Government should ensure it undertaken a cross–government assessment of the risk of litigation and 'regulatory chill' posed by an EU/Myanmar IPA
 - This should including through examination of the effect on existing laws, contracts and licences, in consultation with existing investors
 - Development partners could be asked to provide legal assistance for this
- ▶ To promote trust and understanding of the purpose of the EU/Myanmar IPA, the EU should:
 - Immediately publish its proposal for the EU/Myanmar IPA as it did for the US/TTIP
 - Undertake genuine capacity–building for civil society (consistent with its commitments under the CSO Roadmap), media and business

Conclusions/recommendations (2)

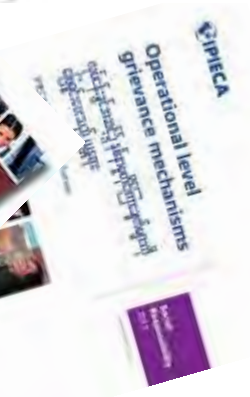
- ▶ To attract EU investment, the Myanmar government should focus in 2016 on
 - Regulatory reform and implementation, particularly labour and land law
 - Better inter-departmental coordination and speeding up processes across government
 - More consistent law and decision-making
 - Improved communication and transparency
- ▶ The EU (and other development partners) should provide (further) assistance for reforms to improve the investment climate
- ▶ Any future EU-Myanmar Investment Protection Agreement should:
 - include provisions on the ‘right to regulate’ which take into account the Myanmar context and the ‘do no harm principle’;
 - Ensure that language for articles on ‘national treatment’, ‘fair and equitable treatment’; and ‘observation of written commitments’ (umbrella clause) reflects the narrower definitions included in the agreement with Singapore, since the current draft appears to expect a higher standard of administrative competence from Myanmar than from Singapore.
- ▶ Pursue ongoing and genuinely transparent consultation by both EU and Myanmar government with business (Myanmar and foreign) and civil society

MCRB publications
and translations

Thank you!



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BRIEFING PAPER
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