

Public Consultation on the future investment relationship between the EU and Myanmar

- 1.1: Trade Union
Medium
In one of the 27 EU Member States
Belgium
- 1.2 European Trade Union Confederation and International Trade Union Confederation, filing jointly
- 1.3 Industrial relations and workers' rights
- 2. Section 2 is not relevant, so will just need to check the NO and NOT APPLICABLE options throughout
- 3. I assume we have nothing to say about hypothetical investments from Myanmar.
- 4A Investment Climate
 - 4.1 NO / NO OPINION
 - 4.2 NO OPINION
- 4B Sustainable Development
 - 4.3. Refer to 4.4 [additional points?]
 - 4.4.

In our view, the EU must *require* (or at the very least strongly incentivise) those doing business in Burma, via trade or investment, to uphold human rights standards. Strong accountability and transparency measures for business in Burma should be developed, with civil society, that draw on existing instruments such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Self-regulating company codes of conduct have proven to be ineffective tools and would be dangerously inappropriate in Burma. Given the country's high level of corruption and poor record on human rights, *binding* requirements to assess and remedy any negative human rights impact from investments; regular public reporting on due diligence and business operations and relationships; and the creation of an effective complaint and dispute-settlement mechanism, among others, will be essential to ensure that new trade and investment do not contribute to the country's problems.

At all stages, businesses investing in or operating in Burma must accept the need to work openly and cooperatively with, among others, trade unions. The right to form or join a trade union and to collectively bargain working conditions will be among the most salient human rights at risk in Burma.

We suggest the establishment of a Burma-specific Responsible Investment Commission to which EU corporations would join and that would operate to ensure that multinational enterprises are operating responsibly, contributing both to sustainable development and

the promotion of decent work and employment - especially in a country where human and labour rights violations remain common and the rule of law is extremely weak - and are held accountable for the acts of their operations and their business partners. In the absence of a legal requirement, the EU should take on-going, affirmative measures to encourage EU corporations doing business with Burma to enrol with the Commission. The EU should hold a conference in 2013 convening major EU multinationals and Burmese civil society representatives to discuss UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises and their application, human rights issues that may arise in the course of investment in Burma, recommendations for avoiding or remediating those impacts, and related matters. Further, corporations receiving any subsidies or other benefits from the EU or member states should be required to participate in the Commission.

1. Below are the elements of the proposal:

A. Business must respect human rights, which means avoid infringing on the human rights of others and address adverse human impacts to which it may cause or contribute. Any enterprise doing business in Burma (via trade or investment) would be *required* to meet its responsibilities to respect international standards regarding human rights, including those human rights that have been identified by the ILO as constituting fundamental rights at work, protection of the environment, and corruption. The scope of this requirement should draw on the UN Guiding Principles on Business and Human Rights and the 2011 OECD Guidelines for Multinational Enterprises (as well as OECD guidance related to investments in weak governance zones and conflict-affected and high risk areas, the OECD Convention on Combatting Bribery of Foreign Officials and the UN Convention against Corruption).

Importantly, enterprises also have an additional responsibility to prevent or mitigate adverse human rights impacts that are linked to their operations, products or services by their business relationships. The enterprise need not have contributed to those impacts, but it is expected to use its leverage to seek to change the practices of a business partner. Where such leverage is insufficient then the company should seek to increase its leverage by, for example, engaging other relevant actors.

B. Enterprises would be required to undertake a thorough, credible and ongoing process of human rights due diligence. This involves assessing any actual or potential adverse impacts associated with that trade or investment, including business relationships, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed.¹ An initial Human Rights Due Diligence assessment should be published on a centralised website (maintained by an authoritative expert body) prior to establishing the investment, and then updated on an annual basis. Importantly, the due diligence process should draw upon on both independent experts (such as the ILO) and affected groups, including trade unions.

C. Enterprises would also be required to publicly disclose their business operations and direct or indirect business relationships including their supply chains within Burma.

¹ More detail on the key elements of conducting Human Rights Due Diligence are contained in Guiding Principles 17 to 24 of the UN Guiding Principles on Business and Human Rights.

D. Where actual or potential adverse impacts are identified, an action plan to remediate or to prevent those impacts within a reasonable time must be published with the impact assessment. This action plan should be developed in consultation with affected groups, including trade unions, and be made available to them in the relevant language(s). Further, the enterprise must establish and maintain a process for identifying its human rights and environmental impacts. Enterprises have an on-going due diligence requirement, posting reports on an annual basis. The public must also be given a reasonable opportunity to comment on these reports.

E. Certain economic sectors carry a high risk of adverse human rights and environmental impacts – in particular extractive industries, timber and large infrastructure projects. Any business conducting activities in these sectors, and any other sectors that may be identified as high risk after an initial sector by sector assessment, would require the review and certification of the due diligence reports and action plans by an authoritative expert body prior to the commencement of the business relationship.

F. Enterprises would be required to consent to a process to review alleged breaches of its requirements. This is not a substitute for any legal action which could be taken in any court with jurisdiction. Any third party/affected persons or their representatives could bring a complaint to an independent, authoritative expert body (not an in-house grievance procedure). The complaint would be reviewed together with all evidence and a final report with specific recommendations, if any, would be issued. Efforts would first be made to have the corporation voluntarily prepare and implement a remediation plan consistent with the recommendations. If no plan is prepared or it is not implemented in full, then the enterprise would be required to accept review by ad-hoc arbitration, if requested by the claimant, which would issue a binding award. Claimants could alternatively seek relief in court.

The Commission on Investment should issue an annual report as to the compliance of European corporations with UN Guiding Principles which will be submitted to the Parliament and the Commission. On the basis of this report, there shall be a hearing to discuss its finding and to assess ways to improve compliance in Myanmar (measures both by business and government).

4C Social and Labour

4.5

“While EU investment is likely to create much needed new employment opportunities and potential skills transfers for workers in Myanmar, there is no guarantee that the quality of employment will be positive unless additional measures are taken. The country has a very weak administrative and judicial system and is riddled with corruption. In this atmosphere, we have already seen the violation of fundamental workers’ rights, wage and hour and safety and health laws in a number of industries linked to export. Unfortunately, many of these violations have not been remediated because of the weakness of the institutions established to do so. Much less, there is little preventative capacity, wherein labour inspection can address problems prior to them becoming major problems. 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 unenforceable. The EU must take note of the initiative taken by the US and set forth binding commitments on due diligence. In our view, the EU must go beyond the US approach and require (or strongly incentivise) 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; 2) as due diligence is an on-going process, to publish reports similarly; and 4) to disclose its supply chains in Myanmar.

Further, the very fragile framework of industrial relations in Burma creates a heightened risk of enterprises being directly associated with or contributing to abuses. To strengthen this framework, enterprises should take *proactive* steps to improve the environment for freedom of association, including making commitments with trade unions to adopt and promote an open attitude towards their activities. This would include, among other things, right of access to workers and the workplace, refraining from any acts that would have the effect of discouraging workers in any way from exercising their human rights to form or join trade unions and to bargain collectively, from avoiding any genuine opportunity to bargain collectively and making available facilities for trade union activities.”

4.6

“First, it is the view of the ETUC and ITUC that a bilateral investment agreement with Myanmar is not necessary at this time. While we agree that 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 and aiding with a just transition to a green economy, FDI can also undermine decent work, sustainability, distribution and general well-being especially where host states are unable to enact or enforce appropriate laws and policies. The ETUC and ITUC share concerns regarding the content of current and proposed EU investment agreements. The ETUC Resolution on EU Investment Policy can be found here: <http://www.etuc.org/a/11025>. Should the EU embark on an investment agreement with Myanmar, we strongly urge the EU to address the concerns outlined in that resolution. Section 3 of that resolution deals specifically with the promotion of human rights, labour rights and environmental standards. We also suggest that investors be divested of the opportunity to invoke dispute settlement procedures should they have violated, e.g., fundamental labour rights, a strong incentive for compliance.

In particular as to labour, we would urge that the EU continue to press the government of Myanmar with regard to its labour laws. The Labour Organisations Law, which took effect on March 2012, created a legal framework for the establishment and operation of trade unions - undoubtedly a major step forward from the long-standing situation in which freedom of association was prohibited both in law and practice. A new Settlement of Labour Dispute Law was enacted on March 28, 2012, which now

provides rules for the resolution of disputes through conciliation and arbitration, as well as regulating industrial action. The new laws, while a meaningful improvement, do not fully afford the rights guaranteed under international law; indeed, the laws erect substantial barriers to the free exercise of the right to freedom of association. Of particular concern, the laws provide inadequate protection against anti-union discrimination – which is a serious problem. All too often, workers who exercise their rights under law are dismissed with impunity. Further, agreements reached between employers and workers through the conciliation process are not always respected and are not enforced as binding agreements.

In 1997, the ILO established a Commission of Inquiry on Forced Labour, which in 1998 made three specific recommendations to the Government of Burma: to amend its laws, to eliminate forced labour in practice and to strictly enforce penal sanctions against those responsible. Today, the Villages Act and the Towns Act has been amended, which brings the definition of forced labour into line with ILO Convention 29, though the Constitution remains to be amended. In practice, forced labour is reduced but continues, however, with credible reports of various forms of unpaid forced labour conscripted primarily by the military in 2012-13, including in Arakan, Chin, Kachin, Karen and Shan States. Finally, many of those who have exacted forced labour have received light punishments, if any. Few have actually faced imprisonment for engaging in this serious crime. The EU must press the government to both end the exaction of forced labour by military and civilians as well as end impunity for those who committed this criminal act.”

4D Environment

4.7-4.8: [Any comments welcome]

4E Human Rights

4.9

“Investment has the potential for both positive and negative impacts on human rights. Much depends upon 1) the regulatory environment in the country in which the investment is made and the capacity of the country to enforce those laws and regulations fairly and consistently; 2) the conduct of the investor, particularly whether that investor respects both domestic legislation and international standards and applicable guidelines; and 3) whether the investment is consistent with a long-term plan for the country which is oriented towards democratic and inclusive economic and social development.

With regard to the first point, the UN Guiding Principles on Business and Human Rights 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 is improving in some respects, it is not adequate to require that businesses to respect human rights. Further, again, the rule of law is far from established in Burma, due to weak and/or corrupt public institutions including administrative agencies in charge of enforcement activity and

the judiciary. Indeed, Transparency International designated Burma in 2011 as the second most corrupt country in the world. Thus, neither businesses nor workers and communities can count on the state to fairly apply and enforce laws related to human rights.

The EU has already recognised that EU corporations should uphold the highest standards of corporate responsibility when they trade with or invest in Burma. On June 15, 2012, 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 Resolution now before the European Parliament does signal that businesses operating in Myanmar be bound to high standards, conduct due diligence and disclose supply chains. However, even if passed in its current form, it has only moral rather than legal effect. Of course, even without an obligation it is possible that EU-based corporations would adhere to national laws and international standards, though there is little evidence to suggest that this is typical without constant oversight and public campaigning.

Thus, the prospects for FDI to have a negative impact in this environment are quite high.”

4.10

There are several human rights issues that the EU should focus on in addition to those related to freedom of association and forced labour noted previously.

Human rights organizations and the United Nations have documented widespread and systematic human rights violations, including war crimes and crimes against humanity, throughout Burma in 2011-12. In ethnic territories in particular, these include extrajudicial killings, torture, rape, disappearances, forced relocation, destroying water and food supplies and razing villages. See, for example, the United Nations General Assembly Report of the Special Rapporteur on the situation of human rights in Myanmar, 25 Sept 2012. This has created a massive refugee crisis, with hundreds of thousands of internally displaced persons and a much larger number of refugees in Burma's neighboring and third countries.

Most recently, ethnic violence in Arakan state largely aimed at the Rohingya, a largely Muslim population effectively denied citizenship under a 1982 law, provoked a deep crisis which threatened the democratic reform process in Burma. Indeed, numerous people were killed, villages razed and over 125,000 displaced internally or into neighboring Bangladesh. Anti-Muslim riots erupted in March 2013 in Meikhtila, in central Burma, leaving at least 40 dead. Attacks have subsequently spread to other parts of the country, edging into Yangon. Indeed, the respected NGO Human Rights Watch recently argued, convincingly, that the authorities in Myanmar, as well as

Buddhist monks, have engaged in an organised campaign of ethnic cleansing against the country's Rohingya Muslim population.

Land confiscation also remains a very serious problem, as peasant farmers are ejected from their land to make way for new infrastructure projects meant to attract investment. Indeed, Special Rapporteur Tomas Ojeda recently stated, "Given the expected wave of privatizations and the increase in foreign investment, along with accelerated economic development, there is likely to be an increase in land confiscations, development-induced displacement and other violations of economic, social and cultural rights. Myanmar has an obligation to refrain from and protect against forced evictions from homes and land." Indeed, protests over the expansion of a copper mine, a joint project between the Burmese military and Chinese weapons manufacturer, turned violent last year. Burmese military used white phosphorous to displace the protestors, leaving dozens injured, some with severe burns. The protestors denounced the "unlawful confiscation" of more than 7,800 acres of land and a large number of forced evictions to allow for the mine's expansion.

These issues must be addressed urgently on their own terms, regardless of EU investment. However, there is no question given the current context that business investing or otherwise doing business in Burma face substantial risks of causing or contributing to these human rights violations. This could expose corporations to substantial liability. For their own protection, and of course for the protection of workers and communities, EU corporations are aware of these risks and ensure they do not contribute to become linked to these violations.

This is not an academic concern, as the government of Myanmar already registers several EU corporations already permitted to operate in the country. Issues around land acquisition for investments promise to be particularly sensitive. There have already been conflicts between small-holder farmers and the developers of industrial zones outside of Yangon meant for foreign manufacturers. So far, farmers have been consulted on these projects nor have been offered adequate compensation for their land.

For a list of EU corporations permitted to invest in Myanmar as of April 2013, see <http://www.dica.gov.mm/dicagraph1.htm>

	Permitted Enterprises		
	No.	Approved Amount	%
U.K	58	2994.984	7.08
France	2	469.000	1.11
The Netherlands	7	249.136	0.59
Austria	2	72.500	0.17
Germany	2	17.500	0.04

Denmark	1	13.370	0.03
Switzerland	1	3.382	0.01

5. Other issues

[Any further comments?]

The disappearance of smallholder farms has also placed great pressure on the country's domestic food supply. Compared to other countries, Myanmar should be relatively free from food security issues; however, poor policy decisions limit and regulate the crops farmers can produce. The country also continues to clear forests for agriculture, but the resulting lots have not been put to good use. These actions neither address the country's food security problem, nor provide work for farmers displaced in the process. Instead, Myanmar continues to lose some of its most valuable forests at a high social cost.