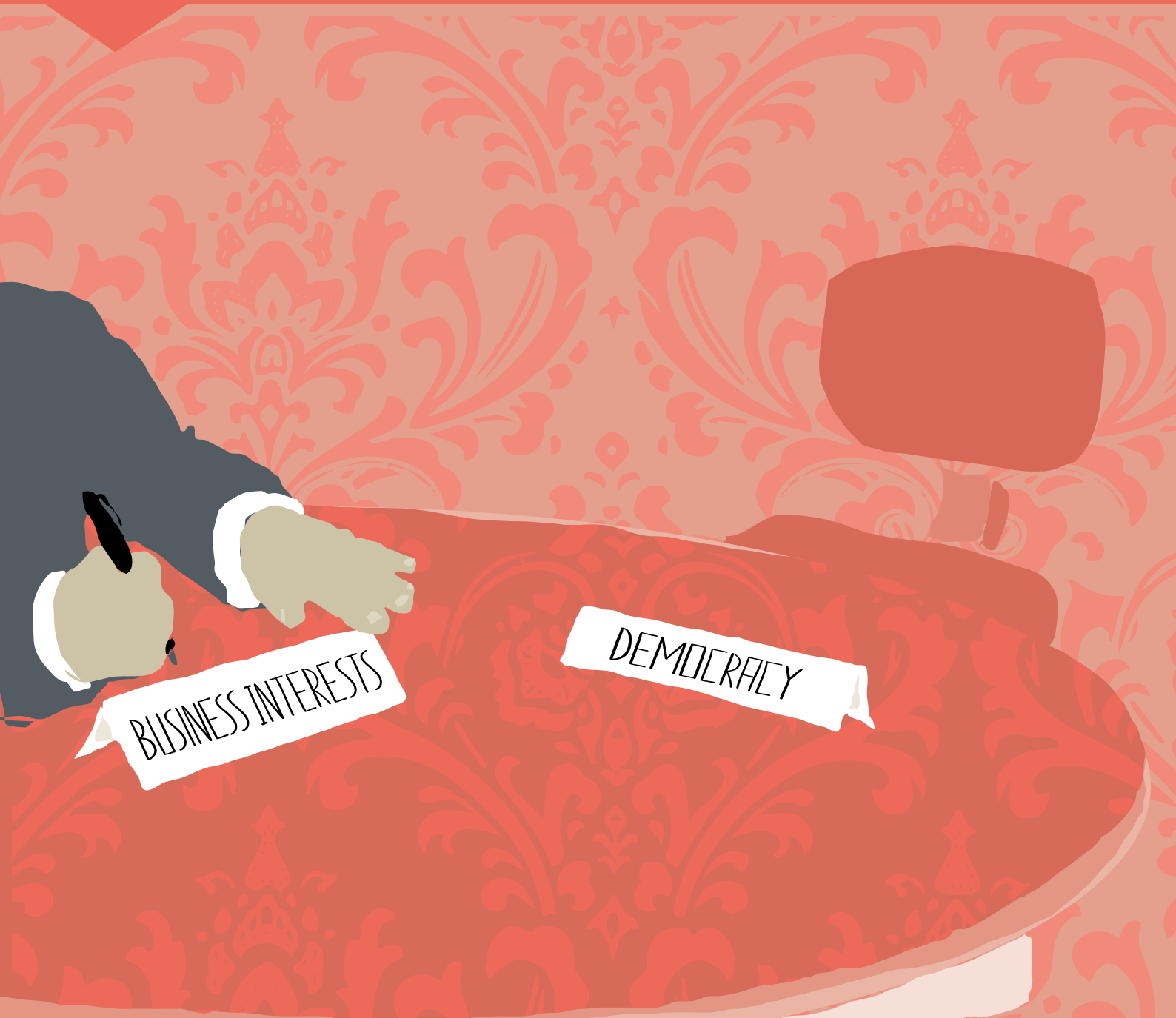




Myths and risks of the EU-Myanmar Investment Protection Agreement



Executive Summary

As the signing of the EU-Myanmar Investment Protection Agreement (IPA) draws near, concerns over the secrecy surrounding the agreement's negotiations and the risks it poses abound, alongside many myths about its potential benefits.

Myanmar is in the early days of democratization, with many laws and policies from the country's military era in need of reform. Myanmar faces formidable challenges to build regulatory frameworks – not least in relation to the ownership and revenue sharing of natural resources in various ethnic areas, to the protection of human and labour rights and the environment.

The peace process to end the 68-year old civil war is slow, with military offensives by the national army against ethnic armed groups ongoing in Kachin and Shan States, resulting in abuses against civilians and massive displacement. Achieving a lasting peace will involve moving towards a more federal system for which many new policies and laws will have to be introduced.

This paper argues that the benefits of the IPA are highly overstated, and the risks seriously underestimated:

Myths

- 1: It will bring high levels of European investment and help the country develop
- 2: It will protect workers' rights and the environment
- 3: EU investors will help improve Myanmar's human rights situation
- 4: EU-Myanmar IPA negotiations are far more transparent than other treaties negotiated by Myanmar
- 5: EU-Myanmar IPA will be just one of many treaties signed by Myanmar

Risks

- 1: It will prevent democratic regulatory reform
- 2: It will impact on a scarce public budget
- 3: It will block the peace process
- 4: It takes away the incentive to strengthen the national judicial system
- 5: It could be approved without any public scrutiny

The IPA could have major negative impacts on democratic development, human rights and sustainable peace in Myanmar, depriving it of the necessary policy space to harness investment to serve sustainable development and peace. It also has the potential to bankrupt the country through potential lawsuits filed by foreign companies unwilling to see stronger regulations that may impact their profits.

Furthermore, there are serious human rights violations against Muslim communities in Rakhine State as well as peoples in other parts of the country.¹ The EU has made the upholding of human rights an integral part of its external trade relations – so if negotiations continue with Myanmar under the current circumstances, this commitment is in question.

The IPA negotiations may be drawing to a close, but there is still time for a much-needed, wide-ranging public debate among parliamentarians and civil society to close the democratic gap opened up by the IPA negotiations. Parliamentarians in Europe and Myanmar have a key role to play in this debate. This briefing includes a series of recommendations that aim to strengthen the Parliamentarians' role.

Introduction

The European Commission (EC) has announced that the signing of the investment protection agreement (IPA) between the European Union (EU) and Myanmar is imminent. Currently there is no bilateral investment treaty between any EU Member State and Myanmar – a fledgling democracy in which the national armed forces still play a significant role in politics; democratic reform and the peace process are both young; and which has many outdated laws and policies in need of reform.

If signed and ratified, the EU-Myanmar IPA would be a significant expansion of the investment protection system. In the words of the EC, “the agreement would actually be a real ‘game changer’ for EU investors”.²

But after three years and five rounds of negotiations, citizens and members of parliament in Myanmar and Europe know nothing of what is in the text of the agreement, as all negotiations have been secret. And despite declarations on the part of the EU and Myanmar³ about the importance of transparency in the negotiations, advance warning of the dates or locations of negotiations never been given, and drafts of the treaty have never been shared. The only attempts at transparency have been briefings for civil society organisations (CSOs) on the outcomes of the negotiation rounds after they have happened – announced with only a few days’ notice and only alerting CSOs in Yangon.

The EU is rushing Myanmar into an investment treaty under the same logic of the outdated investment protection model that attracted international criticism from governments in Asia, Latin America and Africa, and international organisations such as the UN Conference on Trade and Development (UNCTAD).

And in its rush the EU is showing double standards. While it has postponed free trade agreement talks with the Philippines because of killings in the country’s so-called war on drugs, it has declined to suspend negotiations with Myanmar in a context of the ongoing military offensives in the Kachin and northern Shan States and the severe repression of Muslim communities in the Rakhine State causing large-scale displacement in these regions. This runs counter to the EU’s commitment to uphold human rights as an integral part of its external trade relations.

The secrecy and fast pace of the negotiations are partly responsible for much misinformation and speculation, fuelling myths about the treaty’s potential benefits amid a complete lack of discussion on its risks. But as the signing of the treaty draws near there is still time for a much-needed and wide-ranging public debate among parliamentarians and civil society to close the democratic gap created by this process.

Myanmar should not feel pressured to prematurely accept an IPA with far-reaching substantive investor protections and an investor-state dispute settlement. There is no compelling reason for Myanmar to sign an investment treaty such as the one proposed by the EU that will only serve to limit future policy space in Myanmar – space that is much needed to make Myanmar’s transition towards a more democratic, equitable and sustainable development a success.

SECTION 1

Myths surrounding the EU-Myanmar IPA

Myth 1: It will bring high levels of European investment and help the country develop

The EC has argued that signing an investment treaty with the EU will bring much-needed European foreign direct investment (FDI) to Myanmar. But this assumption is largely unsubstantiated.

There is no evidence that investment protection agreements attract more investments. Research worldwide has shown that the rule of law and a strong legal framework are much more important incentives to attract foreign investments than any investment agreement.⁴ The experience of several countries⁵ has also shown that foreign investment mainly comes from countries with which they have no investment protection treaty.

“We do not receive significant inflows of FDI from many partners with whom we have BITs [bilateral investment treaties], and at the same time, we continue to receive investment from jurisdictions with which we have no BITs. In short, BITs are not decisive in attracting investment.” South African government official

Even European Trade Commissioner Cecilia Malmström recently admitted that most studies showed no “direct and exclusive causal relationship” between international investment agreements and FDI⁶.

Since 2013, Myanmar’s FDI has steadily grown.⁷ This trend is also true for EU investment flows.⁸ Most likely, foreign investment will continue flowing into Myanmar regardless of whether the IPA is signed.

In addition to the fact that signing the IPA is no assurance that FDI will increase, foreign investment can only be harnessed to contribute to social development and environmental protection if the right regulatory framework is in place.

Not all investment works towards the goal of sustainable development. Trade policy makers tend to measure success based on the volume of investment, but increasingly, evidence shows that the quality of investment matters more than the quantity. For foreign investment to contribute to development, it needs to be targeted and regulated.⁹ UNCTAD has warned that regulation of foreign investment in general is crucial for restricting its negative social and environmental impacts and to guarantee some positive contribution to economic development.¹⁰ It also notes, “more and more governments are moving away from the hands-off approach to economic growth and development that prevailed previously”.¹¹

This is particularly true in countries dependent on natural resource exploitation – greater government influence in the extractive industries is the current trend among resource-rich countries.

Investment treaties of the kind the EU is promoting will in fact put a heavy price tag on the regulatory powers of governments that try to ensure FDI achieves poverty eradication, technology transfer, respect for human rights and environmental protection.

Myth 2: It will protect workers’ rights and the environment

The EC argues that the IPA chapter on sustainable development will help protect labour rights and the environment. While the secrecy surrounding the negotiations means we have been unable to see the text of this chapter, the EC has indicated that it will include “similar provisions [to those] in the EU-Canada Comprehensive Economic and Trade Agreement (CETA)”.¹²

The CETA sustainable development chapter includes aspirational commitments by the Member States to respect ILO standards and conventions, and key multilateral environmental agreements. There is no mention of commitments by investors and there are no binding obligations for States. The chapter is worded to indicate that governments will “encourage” and “promote” good practices but does not include any clear targets and has explicitly excluded the option of an enforcement mechanism. The commitments are purely voluntary.¹³ For this reason, the relevance of the chapter has been questioned.¹⁴ Without binding and enforceable labour and environmental provisions for States and investors, it is highly unlikely we will see any positive improvement in the labour or environmental situation in Myanmar as a result of its IPA with the EU.

Furthermore, the Sustainability Impact Assessment commissioned by the EU concluded that when it comes to the environment, “reliable estimation of potential impacts was not feasible, as increased EU investment could be positive or negative for the environment of Myanmar depending upon how it is directed”.¹⁵

While the positive contributions of the EU-Myanmar IPA to workers’ rights and the environment are highly questionable, the risks are tangible.

The EU-Myanmar IPA grants EU investors the right to sue the Myanmar government if it decides to improve domestic labour standards or implement measures to protect the environment. There are several examples of cases where European investors have used investor-state provisions to challenge governments’ regulation on these two fronts.

Lawsuits by European investors related to labour rights and environmental protection

Labour rights

EU investors have sued governments for increasing the minimum wage:

- French multinational Veolia took the Egyptian government to the International Center for the Settlement of Investment Disputes (ICSID) in 2012 over, among other things, increases in the minimum wage.
- Italian construction company Astaldi brought an ICSID claim against Honduras for altering the technical specifications in a road repair project. One of the claims by the company was the increase in the country’s national minimum wage.

Environmental protection

EU investors have sued governments for taking measures to address climate change and/or preserve the environment. Some examples include:

- In 2009, Spanish energy multinational Abengoa sued the Mexican government for its decision to block the operation of a toxic waste disposal facility. The facility would have been installed only two kilometres away from a natural reserve and less than 500 metres from the *hñáñu* indigenous community, putting at risk their fragile ecosystem, including spilling arsenic into the water table. The arbitrators in the case ordered the Mexican government to pay the company \$45 million USD in compensation for measures intended to protect the environment and local communities.¹⁶
- Gabriel Resources, a Canadian mining company is suing Romania for \$4.4 billion USD. The government denied the environmental permit to establish the mine because the gold mining project would destroy the ancient site of Roşia Montană (today a UNESCO World Heritage candidate) and cause severe environmental damage.

Countries such as Myanmar, which will be among the most affected by climate change, should have the right to impose environmental policies without the fear of being sued at international investment tribunals.¹⁷

Myth 3: EU investors will help improve Myanmar's human rights situation

The EC claims the IPA will improve human rights because “EU investors would be expected to value and protect human rights, especially as they often include corporate social responsibility (CSR) in their business operations. By increasing the share of EU investment, the IPA would therefore benefit the overall human rights situation in Myanmar”.¹⁸ However, ‘voluntary’ codes such as CSR approaches have repeatedly failed to tackle corporations’ human rights abuses and environmental crimes.¹⁹ The EU and the legislations of EU member States do not oblige companies to respect human rights in their operations and business relationships abroad. For victims, it is almost impossible to access European courts even in cases, where misbehaviour by European companies is evident²⁰.

The EC and the EU's Sustainability Impact Assessment rely on European businesses – under their own steam – to respect human rights, pay decent wages and protect the environment. However, European companies have a track record of human rights and environmental violations in Latin America²¹ and in other regions.²² This is the main reason why 20 countries supported the creation of a process in 2014 towards a UN treaty that would require binding obligations for transnational corporations²³, with momentum continuing to grow. The assumption that European businesses will suddenly start behaving differently in Myanmar is nothing more than wishful thinking.

The environment of conflict, lack of appropriate legal framework and poor access to judicial remedy in Myanmar make it even more likely that European companies will increasingly become complicit in human rights abuses. Currently, most foreign direct investments (FDI) target conflict areas, especially the States of Kachin, Shan, Kayin and Rakhine and sectors with high records of human rights violations, such as energy, mining, garment, and telecommunications. Even the Sustainable Impact Assessment (SIA) has recognized serious human and labour rights issues precisely in these sectors.

If the EU and its member States want to ensure that European businesses do not violate human and environmental rights, they should oblige their companies by law to respect human rights abroad. At least the EU could include a specific set of binding obligations for investors. Furthermore, these obligations should allow affected communities to sue corporations that violate them. But this is not the case – the EU-Myanmar IPA will not include obligations for investors, and only foreign investors can bring claims against States at arbitration tribunals.

The EC also claims that the IPA will not undermine human rights because the treaty “fully preserves Myanmar’s right to [...] protect the economic, social and cultural rights of its people”.²⁴ The EC also argues that the treaty will not prevent Myanmar from regulating in the public interest.

These statements are highly misleading. While it is true that the government of Myanmar can regulate and alter its laws in any way it wants, nothing in the treaty prevents investors from launching multi-million dollar lawsuits as a result of these changes in laws and regulations²⁵. Furthermore, nothing in the treaty would block arbitrators from awarding millions in compensation to investors, even when the demands relate to public interest measures.²⁶ In practice, this means that exercising the right to regulate can cost the government and the people of Myanmar an enormous amount of money from the scarce public budget. The costs are high enough to make the government think twice about advancing regulation. The risk of what is usually called *regulatory chill* has been long proven.²⁷

“...investor protections have expanded with little regard to States’ duties to protect [human rights], skewing the balance between the two. Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration” UN Special Representative on Business and Human Rights, John Ruggie²⁸

The EU-Myanmar IPA leaves the door wide open for investors to sue governments for measures that aim to favour people or the environment, such as land reforms; collection of taxes; domestic fiscal policy; bans on harmful chemicals; bans on mining; environmental restrictions, requirements for environmental impact assessments; regulations regarding transport and disposal of hazardous waste; regulations governing health matters; measures affecting the price and delivery of water; regulations to improve the economic situation of minority populations; and measures to increase revenues gained from production and export of natural resources.

All countries that have signed investment treaties are exposed to possible lawsuits when they propose new regulations that affect in any way the profits of investors (current or future ones). But Myanmar will be particularly exposed to lawsuits, since it is still in the process of building its regulatory framework.

The EU-Myanmar IPA will not only fail to contribute to improve human rights, in fact it may help to penalize the government for ensuring people's human rights to health, access to water or electricity, as well as the right to a healthy environment.

Myth 4: EU-Myanmar IPA negotiations are far more transparent than other treaties negotiated by Myanmar

The EC has attempted to justify the lack of transparency during EU-Myanmar IPA negotiations claiming that Myanmar has negotiated other treaties in an even less transparent manner. The EU is always talking about raising standards, so it is sad that in this case it has chosen not to follow its own advice and instead is lowering them.

In the case of Myanmar, the EC has not followed the basic steps towards transparency they took in other negotiations such as the Transatlantic Trade and Investment Partnership (TTIP), CETA, and the EU-Philippines, EU-Indonesia and EU-Mexico negotiations.

For the agreements related to TTIP, CETA, and the Philippines²⁹, Indonesia³⁰ and Mexico³¹ negotiations, for example, the EC published in advance the dates of rounds of negotiations, and also texts with EU's position on key issues. On the contrary, for Myanmar, all rounds happened in secret, without public announcements. The EC has not published any text. They have only published short reports of the last two rounds of negotiations³² after repeated complaints by civil society³³.

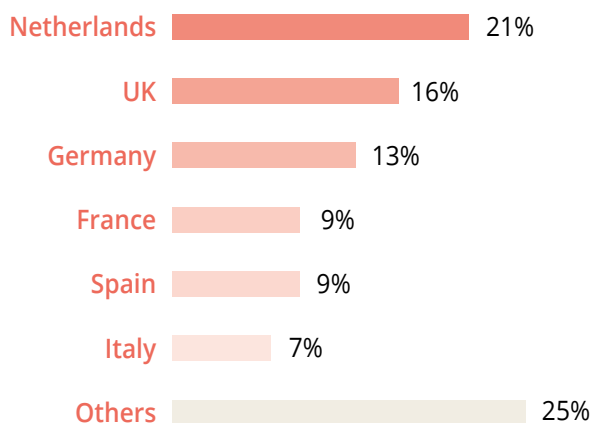
Maybe the most striking – and inexplicable – step taken by the EC is to have limited the access to the texts for Members of the European Parliament (MEPs). Almost all members of the European Parliament's Committee on International Trade (INTA) have been denied access to EU-Myanmar IPA negotiating texts. However, they have access to the texts of all other ongoing negotiations with ASEAN countries.

Myth 5: EU-Myanmar IPA will be just one of many treaties signed by Myanmar

The EC has dismissed civil society concerns about EU-Myanmar IPA with the argument that Myanmar already has other bilateral investment treaties (BITs) with China, Japan and Thailand, for example.

However, the BITs between Myanmar and these countries are not comparable in terms of risk. First of all, a treaty with the EU would represent a massive expansion of the investment arbitration system. Currently, no EU Member State has any BIT signed with Myanmar. So, the IPA with the EU has the effect of extending coverage to 28 countries with just one treaty.

Investor State Dispute Settlements: most frequent EU claimants



Furthermore, Chinese, Japanese and Thai investors have hardly used the ISDS system.³⁴ By contrast, EU investors are the most frequent users of the ISDS system worldwide. According to UNCTAD, investors from EU Member States have launched 431 cases, which represent 56% of the total known investment disputes worldwide. In particular, investors based in the Netherlands, UK and Germany have used the system the most.

Most investments to Myanmar, so far, come from the UK, Netherlands and France.³⁵ There are signs³⁶ that German investors will also increase investment in Myanmar. This indicates that the risk of being sued by investors from these countries is extremely high. Finally, terminating a treaty with 28 EU Member States will be politically very difficult.

SECTION 2

Risks of signing the EU–Myanmar IPA

While the benefits of signing an EU-Myanmar investment protection agreement have been highly overstated, the risks are seriously underestimated. This treaty could have major negative impacts on democratic development, human rights and sustainable peace in Myanmar.

The incentives offered to foreign investors come at a too high a price, depriving Myanmar of the necessary policy space to harness investment to serve sustainable development and peace. It also has the potential to bankrupt the country. Under the provisions of the investment protection agreements, foreign investors can sue the government for millions of dollars if they consider the measures will affect current or future profits.

Risk 1: It will prevent democratic regulatory reform

Myanmar is only in the early stages of democratisation and peace building. Many laws and policies that stem from the military era still need to be revised, and the peace process is slow. Myanmar is a state in transition and faces formidable challenges to build regulatory frameworks, including protecting the economic, social and cultural rights of its people as well as its natural resources. In particular, the years to come will involve negotiations over ownership and revenue-sharing of natural resources in the different ethnic areas.

Signing an investment treaty like EU-Myanmar IPA will severely endanger the prospects for democratic regulatory reform. If it enters into force, Myanmar's government will be wide open to multimillion dollar lawsuits by European investors should the government introduce new and tighter regulation to, for example, protect public health, access to water or to public services; or to limit environmental degradation or support a sustainable peace in Myanmar.

In particular, Myanmar's government will be vulnerable to lawsuits related to the extractive sector. Mining and extraction of oil and gas account for 29% of all business related human rights complaints registered internationally between 2005 and 2014.³⁷ At the same time, these sectors account for 17% of all investment disputes worldwide.³⁸

The cost of these lawsuits (see below) is, in many cases, enough of a deterrent to make governments reluctant to implement social or environmental protection measures that could affect the interests of foreign investors. Postponing or abandoning public-interest legislation for fear of a multimillion dollar international arbitration lawsuit has happened in Canada,³⁹ Indonesia,⁴⁰ Germany⁴¹ and New Zealand⁴² – all countries with a higher national budget than Myanmar. Everything indicates that the enormous financial pressure could lead to Myanmar's government abandoning policies that it would like to promote in the public interest, or watering down those that already exist.

Risk 2: It will impact on a scarce public budget

The financial cost of investment disputes is rising. This applies to the demands that investors make for loss of current or future profits, the financial compensation to investors that arbitration tribunals have decided during recent years, and the legal costs of the cases. The legal costs for the State include payment of defence lawyers (often international law firms) and arbitrators' fees and costs. These have to be paid by the State regardless of the outcome of the case.

In terms of the demands by investors, between 2013 and 2014 there were 59 treaty disputes active where the investor was suing for at least \$1 billion USD—including 10 with stakes of at least \$15 billion USD.⁴³

In 2012, an investment tribunal issued the highest award in history against a government when it ordered Ecuador to pay \$2.3 billion USD to oil company Occidental.⁴⁴ In 2014, a tribunal ordered Russia to compensate the former majority owners of oil and gas company Yukos with \$50 billion USD.

As for legal costs, on average each side will pay \$4.5 million USD per case, but the cost can be much higher.⁴⁵ In 2011, the Philippine government disclosed that it had spent \$58 million USD in costs related to the lawsuits by the German company Fraport.⁴⁶ In the Yukos case, the Russian government paid its defence lawyers \$74 million USD.⁴⁷

These are financial costs that Myanmar cannot afford – it already faces a current deficit in the public budget of 4.52 percent of GDP.⁴⁸ Having to pay for its legal defence in a case of this nature, let alone the award itself, could lead to diverting a significant part of the public budget away from needs such as public services, education and health.

The fact that Myanmar has only been sued once (in 2000)⁴⁹ for a small amount and the tribunal ruled in favour of the State is no consolation. Many countries have experienced that soon after signing investment agreements with the US or European countries, they started to get sued.⁵⁰

Risk 3: It will block the peace process

Myanmar has experienced one of the world's longest-running internal conflicts. A peace process has started to finally seek a solution at the negotiating table to solve ethnic conflict in the country and end the 68-year old civil war but a resolution is still far away. Fighting between Myanmar's armed forces and ethnic armed groups continues in the Kachin and northern Shan States, resulting in abuses against civilians and massive displacement. There is also new conflict and a major humanitarian emergency underway in the Rakhine State. Achieving a lasting peace will involve moving towards a more federal system for which many new policies and laws will have to be introduced.

In particular, as part of the ongoing peace agreement, decisions will have to be taken around natural resource management and sharing – or better regulations to make natural resource extraction more sustainable.

Currently, no proper regulatory or institutional reforms have been made to meaningfully address widespread and systematic land grabbing issues across the country, let alone the more complex land problems in ethnic areas where there are mixed and overlapping administrations and large numbers of internally displaced people in situations of grave food and land insecurity due to both new and old conflict. The EU-Myanmar IPA has the potential to spark new conflict, displacement and human rights violation.

In such a volatile and fragile landscape, it is essential that Myanmar maintains full policy space to harness foreign investment for its own development objectives. An investment protection treaty with the EU has the potential to lock-in current policies because it will be very costly for the government to change them in the future.

Risk 4: It takes away the incentive to strengthen the national judicial system

Like any nascent democracy, Myanmar's judicial system needs strengthening.

The EU had the opportunity to support the development of an independent national judiciary. For example, including an option in the EU-Myanmar IPA requiring that investors exhaust local remedies before going to international arbitration would have encouraged Myanmar's government to improve its national judicial system. Instead, the EU opted for a system that puts European investors in a privileged position by allowing them to bypass the national sphere.

Academics studying this aspect have argued that providing an external source of dispute resolution for foreign investors, “host governments will be less motivated to improve their domestic legal systems, and other aspects of the rule of law that would benefit domestic stakeholders as well”.⁵¹ Further academic research on this issue supports this statement: “Under some circumstances, BITs may lead to lower institutional quality in subsequent years.”⁵²

Risk 5: It could be approved without any public scrutiny

Unlike the practice in the International Trade Committee in the European Parliament, there is a risk that Myanmar’s government will ratify the EU-Myanmar IPA without parliament even discussing it.

Given the potential impact of the IPA on the public budget, it is crucial that Myanmar’s parliament, as guardians of the public interests, discuss the IPA in a meaningful way. But this needs time.

If the EU pushes for a fast conclusion of this investment agreement, the likely scenario is that a treaty with such huge implications could be approved without any public scrutiny. If the EU is interested in promoting the rule of law and democracy in Myanmar it needs to allow time for Myanmar’s Members of Parliament, CSOs and media to familiarize themselves with the possible impacts and consequences of signing investment protection treaties, and have substantive debates before making a commitment.

It is important to remember that the EU-Myanmar IPA, like all other investment treaties, will be hard to roll back. First of all, after it is ratified, it is likely the treaty cannot be terminated for at least 10 years. And, even after that initial period, if the Myanmar government wishes to terminate the treaty it will likely face what is called a survival clause. As a result of this clause, investors will continue enjoying the same level of protection after the treaty is terminated for an average period of 10 to 15 years. So, any decisions taken today to ratify the EU-Myanmar IPA will likely lock in the rights granted to investors for a minimum period of 20 years.

SECTION 3 Recommendations

Recommendations for Members of the European Parliament (MEPs)

1. MEPs should hold a wide debate on EU–Myanmar IPA

MEPs will be asked by the EC to ratify this treaty once it is signed. Yet MEPs have not had the chance to look at the text of this treaty or hold substantive debates about its consequences. MEPs should insist to get access to all relevant documents and initiate a debate based on proper analysis.

2. MEPs should visit Myanmar to assess the human rights situation

The worsening human rights situation for the Muslim communities in Rakhine State, has been denounced by the UN,⁵³ Human Rights Watch⁵⁴ and Amnesty International⁵⁵ among others. The European Parliament itself has approved several resolutions acknowledging the deteriorating situation.⁵⁶ Human rights violations are also taking place in the Kachin and northern Shan States, which have been documented by Amnesty International⁵⁷ and Human Rights Watch⁵⁸.

We recommend that a broad delegation of MEPs visits Myanmar to assess if the EU should be negotiating this treaty with Myanmar's government in the context of significant human rights violations. Furthermore, MEPs could assess if the investment treaty has the potential to hinder the ongoing peace process.

3. MEPs should demand a moratorium on further negotiation of EU–Myanmar IPA until the human rights situation has been resolved and peace reached.

MEPs have the power to put a brake on a process that has been steam-rolled by the EC, disregarding the highly volatile situation in Myanmar.

Recommendations for Myanmar Members of Parliament (MPs)

1. MPs should hold a wide debate in Parliament

Members of Parliament in Myanmar could insist on sufficient time to acquaint themselves with the possible impacts and wider implications of the proposed investment protection treaty at this pivotal point in their country's history.

2. MPs should commission a cost–benefit analysis and a human rights impact assessment of the treaty

Myanmar should take advantage of the fact that it is entering the global economy and global investment frameworks at a time when it can learn from the experiences of other countries with BITs, and make a well-considered decision.

There is a need for Myanmar's government, Members of Parliament, ethnic stakeholders, civil society and the business sector to do a cost-benefit analysis as well as human rights impact assessment of the imminent EU-Myanmar IPA, as a basis for a necessary public debate. The cost-benefit analysis could follow the experience of countries such as the UK,⁵⁹ and in line with other countries that carried out a review process, such as Ecuador, South Africa, India and Indonesia. The human rights impact assessment could follow the framework developed by the former UN Special Rapporteur on the right to adequate food, Olivier de Schutter.⁶⁰

Furthermore, MPs in Myanmar could seek an exchange with MPs from countries such as India or Indonesia to learn about the experience these countries had with BITs.

3. MPs should demand to have the final say in the ratification of this treaty

Even if the treaty is signed in the immediate future, all EU Member States need to ratify the treaty. This can be a lengthy process. Myanmar can use this time to not rush the ratification of the agreement but stick to proper democratic decision-making processes.

Due to the potential impact this investment protection agreement should have on Myanmar's public budget, Myanmar's MPs should demand having the final say on its ratification. Currently, they could propose that the government supports efforts towards a Binding UN Treaty on Transnational Corporations and other business enterprises with respect to human rights currently being negotiated.

Endnotes

- 1 Many of them self-identify as 'Rohingya'.
- 2 Minutes of Trade Policy Committee in the European Council (28 April 2017). Seen by the authors.
- 3 European Commission (2016) Report of the fourth round of negotiations for the EU-Myanmar Investment Protection Agreement, Yangon – 13 to 16 December, http://trade.ec.europa.eu/doclib/docs/2016/december/tradoc_155197.pdf
- 4 Skovgaard Poulsen, Lauge N. (2010) "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence", http://works.bepress.com/lauge_poulsen/4/
- 5 Many countries have found that the promise of increased FDI after signing investment protection agreements failed to materialize. This has been the experience of South Africa, Ecuador, Hungary and Brazil.
- 6 Sam Morgan (2015) Positive effects of TTIP tribunals for investment unclear, Euractiv, 16 September, <http://www.euractiv.com/section/trade-society/news/positive-effects-of-ttip-tribunals-for-investment-unclear/>
- 7 UNCTAD (2017) World Investment Report 2017, Country fact sheet Myanmar, http://unctad.org/sections/dite_dir/docs/wir2017/wir17_fs_mm_en.pdf and World Bank (2017) Myanmar: Foreign direct investment, net inflows (% of GDP) <http://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?end=2015&locations=MM&start=2000&view=chart>
- 8 Eurostat (2017) EU direct investment positions, flows and income, breakdown by partner countries (BPM6), <http://bit.ly/2gBjols>
- 9 S.L. Reiter and H. Kevin Steensma (2010) Human Development and Foreign Direct Investment in Developing Countries: The Influence of FDI Policy and Corruption, World Development Vol. 38, No. 12, pp. 1678–1691
- 10 UNCTAD (2010) World Investment Report: Investing in a Low-Carbon Economy, http://unctad.org/en/Docs/wir2010_en.pdf; UNCTAD (2012) World Investment Report: Towards a New Generation of Investment Policies, http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf; UNCTAD (2014) World Investment Report: Investing in the SDGs: an action plan", http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf
- 11 UNCTAD (2012) World Investment Report: Towards a New Generation of Investment Policies, page 100, http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf
- 12 European Commission (2017) European Commission services' position paper on the Sustainability Impact Assessment in support of the negotiations on an Investment Protection Agreement between the European Union and the Republic of the Union of Myanmar, April, p6, http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155500.doc.pdf
- 13 Laura Puccio and Krisztina Binder (2017) Trade and sustainable development chapters in CETA, European Parliamentary Research Service, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595894/EPRS_BRI\(2017\)595894_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595894/EPRS_BRI(2017)595894_EN.pdf)
- 14 PowerShift, CCPA et al. (2016) Making sense of CETA (2nd Edition), <https://www.tni.org/en/publication/making-sense-of-ceta-2nd-edition> and Transport & Environment and ClientEarth (2016) Comprehensive Economic and Trade Agreement (CETA) and the environment, November, https://www.transportenvironment.org/sites/te/files/publications/2016_11_CETA_Gold_Standard_FINAL.pdf
- 15 European Commission (2016) Sustainability Impact Assessment (SIA) in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, Final Report, http://trade.ec.europa.eu/doclib/docs/2016/december/tradoc_155121.pdf
- 16 Abengoa y Co des vs. Mexico (2013) Award, ICSID case No. ARB(AF)/09/2, 18 April, <https://www.italaw.com/sites/default/files/case-documents/italaw3187.pdf>
- 17 Corporate Europe Observatory et. al (2017) Gold-digging with investor-state lawsuits, https://corporateeurope.org/sites/default/files/attachments/gold_digging_with_investor_state_lawsuits.pdf
- 18 European Commission (2017), p5, see endnote 12.
- 19 Juan Hernández Zubizarreta and Pedro Ramiro (2016) Against the "lex mercatoria". Proposals and alternatives for controlling transnational corporations, OMAL and Paz con Dignidad, http://omal.info/IMG/pdf/against_lex_mercatoria.pdf
- 20 Daniel Blackburn (2017) Removing Barriers to Justice, SOMO <http://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/removing-barriers-to-justice.html>
- 21 In 2006, 2008, 2010 dozens of European transnational corporations operating in Latin America were accused of different violations of human and environmental rights <http://www.enlazandoalternativas.org/IMG/pdf/TPP-verdict.pdf>. For a summary of the violations see <https://www.tni.org/en/article/violations-peoples-rights-european-tncs> In 2014, 80 transnational corporations (many European) were accused of violating human rights and causing environmental devastation in Mexico (section 8.2), <http://permanentpeopletribunal.org/wp-content/uploads/2012/07/TPP-Ciudad-Juarez-definitivo-1.pdf>
- 22 Brid Brennan (2016) Historic Permanent Peoples Tribunal (PPT) Hearing on TNCs in Southern Africa, Transnational Institute, <https://www.tni.org/en/article/historic-permanent-peoples-tribunal-ppt-hearing-on-tncs-in-southern-africa> and Permanent People's Tribunal (2016) Jurors' Report first Southern Africa Permanent Peoples' Tribunal on Transnational Corporations, https://www.tni.org/files/article-downloads/ppt_tnc_swaziland_.pdf
- 23 United Nations Human Rights Council (2017) Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>
- 24 Cecilia Malmstrom (2016) Letter on EU-Myanmar IPA, Ref. Ares(2016)7064977 - 20/12/2016, http://ec.europa.eu/carol/?fuseaction=download&documentId=090166e5af0c5198&title=CM_signed%20-%20reply%20to%20open%20letter%20-%20Myanmar.pdf
- 25 Markus Krajewski (2017) Ensuring the Primacy of Human Rights in Trade and Investment Policies, CIDSE, p.20, <http://www.cidse.org/newsroom/cidse-launches-new-study-on-trade-investment-and-the-un-treaty-on-businesses-human-rights-with-panel-debate-at-eu-parliament.html>
- 26 Natacha Cingotti et. al. (2017) Investment Court System put to the test, Transnational Institute et.al, <https://www.tni.org/en/publication/investment-court-system-put-to-the-test>
- 27 Kyla Tienhaara (2011) Regulatory Chill and the Threat of Arbitration: A View from Political Science, in Evolution in Investment Treaty Law and Arbitration, Chester Brown, Kate Miles, eds., Cambridge University Press, 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065706
- 28 John Ruggie (2008) Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5, Human Rights Council, <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>
- 29 European Commission (2017) EU-Philippines trade negotiations, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1637>
- 30 European Commission (2017) Documents related to EU-Indonesia FTA negotiations, http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=739
- 31 European Commission (2017) Documents related to EU-Mexico FTA negotiations, http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=132

- 32 European Commission (2017) Documents related to EU-Myanmar IPA negotiations, http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=761
- 33 Land In Our Hands et. al (2017) Letter "Myanmar CSOs decline invitation by European Commission", 28 April, <https://www.facebook.com/PKForumMyanmar/posts/1475284949209539:0>
- 34 Chinese investors have initiated four known investment disputes worldwide, Japanese investors have initiated two known investment disputes and there is no data that Thai investors have ever initiated an investment dispute. <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>
- 35 Myanmar government (2017) FOREIGN INVESTMENT OF PERMITTED ENTERPRISES AS OF (31/7/2017), http://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/fdi_by_country_0.pdf
- 36 The German Myanmar Business Chamber was established in 2015 to promote German investment in Myanmar <https://www.gm-bc.com/about-us>
- 37 Kamminga M. 2014: Company Responses to Human Rights Reports. An Empirical Analysis, S. 6. <https://business-humanrights.org/en/company-responses-to-human-rights-reports-an-empirical-analysis>
- 38 UNCTAD (2017) Investment Dispute Settlement Navigator, filter by Economic Sector, <http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector>
- 39 Canada reversed a ban on toxic chemical MMT and agreed on a \$13 million USD payment as a result of an ISDS claim by Ethyl http://www.citizen.org/trade/article_redirect.cfm?ID=6221
- 40 A former Newcrest Mining executive accepted he had threatened to use investor-state dispute settlement (ISDS) to sue Indonesia over a 1999 environmental law banning open-pit mining in protected forests. Soetisna Prawira, the mining ministry's chief lawyer at the time, declared that the threat of "arbitration is the only reason" the government caved in to the companies' demands. https://www.buzzfeed.com/chrisshamby/the-billion-dollar-ultimatum?utm_term=.tcpRPkxva#.fqWkoO4qb
- 41 The City of Hamburg agreeing to lower environmental requirements as a result of a claim by energy giant Vattenfall <https://www.tni.org/en/briefing/nuclear-phase-out-put-test>
- 42 After the lawsuits of tobacco giant Philip Morris against Uruguay and Australia, the government of New Zealand decided to postpone their plans to introduce stricter rules on cigarette packaging. See Tariana Turia (2013) Government moves forward with plain packaging of tobacco products, 19 February, <http://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products>
- 43 Goldhaber, Michael D. (2015) Deciding the world's biggest disputes, 2015 Arbitration Scorecard, American Lawyer, Focus Europe, July
- 44 Cheng, Tai-Heng (2012) ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v the Republic of Ecuador, Kluwer Arbitration Blog, 19 December <http://kluwerarbitrationblog.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/>
- 45 Gaukrodger, David, and Kathryn Gordon (2012) *Investor-state Dispute Settlement: A Scoping Paper for the Investment Policy Community*. OECD Working Papers on International Investment, December, http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf.
- 46 House of Representatives Philippines (2011) Minutes from the Committee on Transportation, [http://www.congress.gov.ph/legisdocs/cdb/CDB%20Vol%201%20No.%2089%20\(03.15.11\).pdf](http://www.congress.gov.ph/legisdocs/cdb/CDB%20Vol%201%20No.%2089%20(03.15.11).pdf)
- 47 Perry, Sebastian (2014) The cost of Yukos, Global Arbitration Review, 29 July, <http://globalarbitrationreview.com/news/article/32852/the-cost-yukos/>
- 48 Nyan Hlaing Lynn (2017) Deficit rises, social spending deferred in 2017-18 budget proposal, Frontier, 1 February, <http://frontiermyanmar.net/en/deficit-rises-social-spending-deferred-in-2017-18-budget-proposal>
- 49 UNCTAD (2017) Yaung Chi v. Myanmar, case details, <http://investmentpolicyhub.unctad.org/ISDS/Details/44>
- 50 In the case of Uruguay, not long after ratifying the US-Uruguay BIT, Uruguay got sued <http://investmentpolicyhub.unctad.org/ISDS/Details/708>. Similar experience had Colombia after ratifying the treaties with US <http://investmentpolicyhub.unctad.org/ISDS/Details/726> and Canada <http://investmentpolicyhub.unctad.org/ISDS/Details/756>
- 51 Lise Johnson and Lisa Sachs (2016) "The outsized costs of ISDS", published in Academy of International Business – Insights, Volume 16, issue 1, February, p2, <http://ccsi.columbia.edu/files/2016/02/AIB-Insights-Vol.-16-Issue-1-The-outsized-costs-of-ISDS-Johnson-Sachs-Feb-2016.pdf>
- 52 Tom Ginsburg (2005) International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance, International Review of Law and Economics, Vol. 25; U Illinois Law & Economics Research Paper No. LE06-027, <http://ssrn.com/abstract=916351>
- 53 United Nations Human Rights (2017) Reports by Special Rapporteur on the situation of human rights in Myanmar, <http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/MM/Pages/SRMyanmar.aspx>
- 54 Human Rights Watch (2016) Burma: events 2016, <https://www.hrw.org/world-report/2017/country-chapters/burma>
- 55 Amnesty International (2017) Myanmar 2016/2017, <https://www.amnesty.org/en/countries/asia-and-the-pacific/myanmar/report-myanmar/>
- 56 European Parliament (2016) The situation of the Rohingya minority in Myanmar, resolution of 15 December, P8_TA(2016)0506, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0506+0+DOC+XML+V0//EN> and European Parliament (2017) EU priorities for the UN Human Rights Council sessions in 2017, P8_TA(2017)0089, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0089+0+DOC+PDF+V0//EN>
- 57 Amnesty International, "Myanmar Borderlands on Fire", <https://www.amnesty.org/en/latest/news/2017/06/myanmars-borderlands-on-fire/>, and: "All Civilians Suffer", Conflict Displacement and Abuse in Northern Myanmar, ASA 16/6429/2017, London 2017. <https://www.amnesty.org/en/documents/asa16/6429/2017/en/>
- 58 Human Rights Watch, Burma: Halt Indiscriminate Attacks in Kachin State, Allow Humanitarian Aid to Reach Population at Risk, 17 January 2013, <https://www.hrw.org/news/2013/01/17/burma-halt-indiscriminate-attacks-kachin-state>, and: "Untold Miseries", Wartime Abuses and Forced Displacement in Burma's Kachin State, 20 March 2012, <https://www.hrw.org/report/2012/03/20/untold-miseries/wartime-abuses-and-forced-displacement-burmas-kachin-state>.
- 59 Poulsen, Lauge N., Jonathan Bonnitcha, and Jason Webb Yackee (2013) Costs and Benefits of an EU-USA Investment Protection Treaty, April, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf
- Poulsen, Lauge N., Jonathan Bonnitcha, and Jason Webb Yackee (2013) Costs and Benefits of an EU-China Investment Protection Treaty, April, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260370/bis-13-1283-costs-and-benefits-of-an-eu-china-investment-protection-treaty.pdf
- Poulsen, Lauge N., Jonathan Bonnitcha, and Jason Webb Yackee (2013) Analytical Framework for Assessing Costs and Benefits of Investment Protection Treaties, April, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260503/bis-13-1285-analytical-framework-for-assessment-costs-and-benefits-of-investment-protection.pdf
- 60 Olivier De Schutter (2011) Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report presented at the 19th Session of the United Nations Human Rights Council, A/HRC/19/59/Add.5, <http://www.srfood.org/en/guiding-principles-on-human-rights-impact-assessments-of-trade-and-investment-agreements>

CONTRIBUTORS

AUTHORS: Cecilia Olivet and Pietje Vervest

EDITOR: Angela Burton

DESIGN: Ricardo Santos

Published by Transnational Institute, Paung Ku, KESAN, Myanmar Alliance for Transparency and Accountability (MATA), Land in Our Hands (LIOH) network, The EU-ASEAN FTA campaign network, CIDSE, MISEREOR, Info Birmanie, Secours Catholique – Caritas France, CCFD-Terre Solidaire, Seattle to Brussels Network, Association Internationale de Techniciens, Experts et Chercheurs (AITEC), 11.11.11

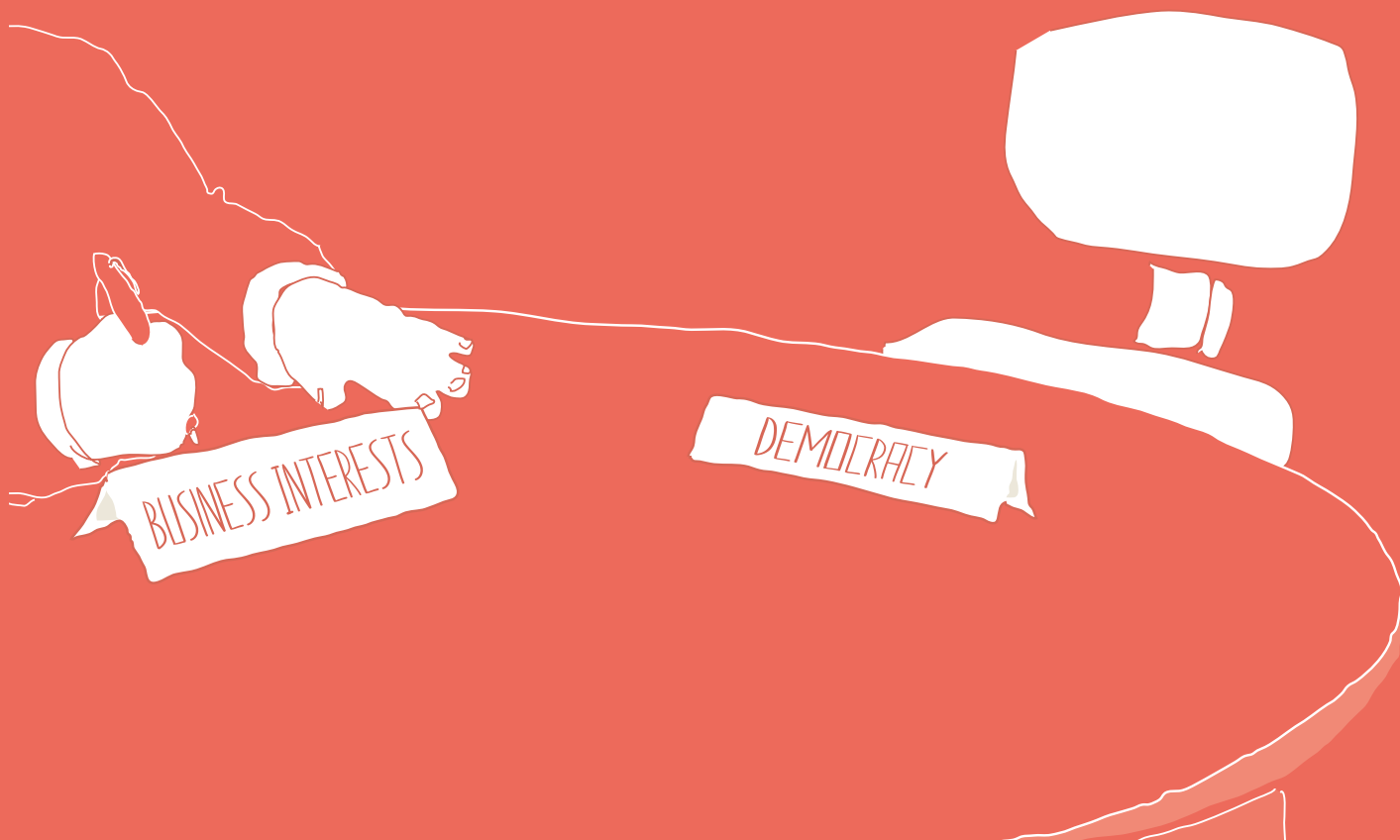
Amsterdam/Brussels/Yangon, September 2017

ACKNOWLEDGEMENTS

We would like to thank Saw Alex, Doi Ra, Armin Paasch and Denise Auclair for insightful comments to the draft of the texts.

PUBLICATION DETAILS

Contents of the report may be quoted or reproduced for non-commercial purposes, provided that the source of information is properly cited.





The Transnational Institute (TNI) is an international research and advocacy institute committed to building a just, democratic and sustainable planet.

For more than 40 years, TNI has served as a unique nexus between social movements, engaged scholars and policy makers.

www.TNI.org



Paung Ku is a civil society strengthening initiative established in 2007. In Myanmar language, 'paung ku' means 'bridging' or 'connecting,' and this best state's Paung Ku's role: acting as bridge and connector, linking civil society actors in Myanmar

with each other, and with allies in the Myanmar government, ASEAN region and on the global stage.



Karen Environmental and Social Action Network (KESAN) is a non-profit organization working alongside local communities in Karen State to ensure sustainable livelihoods by preserving

indigenous knowledge, building capacity and promoting practice and policy change.

www.KESAN.asia



Myanmar Alliance for Transparency and Accountability (MATA) is a national network comprised of over 450 civil society actors

and individuals from all of Myanmar's 14 states and regions. MATA supports members to collaboratively examine economic, political and social reform issues and to advocate for transparency and accountability of governance in Myanmar – with a focus on extractive industries.

www.MATA-nrg.org

Land In Our Hands (LIOH) is network of local farmers' and farmworkers' and allied local civil society organizations from all States and Regions in Myanmar. LIOH advocates for a land use policy in a federal system that is suitable and appropriate for the diverse traditional practices of ethnic people and other customary communities in the context of democratic principles and social justice for all.



The EU-ASEAN FTA campaign network was formed in 2007 to spearhead a regional campaign on the EU-ASEAN Free Trade Agreement. The network

supports national level campaigns in Malaysia, Thailand, Indonesia, and the Philippines as well as regional level engagements through various platforms.



Info Birmanie is a nonprofit association in France founded in 1996. It works for the promotion of human rights, democracy and peace in Burma.

www.INFO-BIRMANIE.org



CIDSE is an international family of Catholic social justice organisations, working together to

promote justice, harness the power of global solidarity and create transformational change to end poverty and inequalities. We promote people's solutions and alternatives that are just and environmentally sustainable, contribute to global movements and advocate at the international level.

www.CIDSE.org



MISEREOR is the international development agency of the Catholic Church in Germany.

Its mission is to fight hunger, disease, poverty, and other forms of human suffering in Asia, Africa, and Latin America by strengthening self-initiative. Issues important to Misereor include small-scale agriculture, land access, water, energy, and other basic needs in impoverished communities.

www.MISEREOR.org



Secours Catholique – Caritas France is an agency of the Catholic Church, a member of the Caritas Internationalis confederation and an association which is officially recognised as being for public benefit. The association fights against the

causes of poverty, inequality and exclusion, and proposes alternatives for the common good.

www.secours-catholique.org



The CCFD-Terre Solidaire, Catholic Committee against Hunger and for Development, is a French NGO founded in 1961, that supports organisations in the

South and the East to fight the structural causes of hunger and poverty and promote sustainable inclusive alternatives.

www.CCFD-terresolidaire.org



Seattle to Brussels Network is a pan-european network formed in 1999 committed to contribute to a democratically accountable trading

system that advances economic justice, social well-being, gender equity and ecological sustainability.

www.S2Bnetwork.org



Association Internationale de Techniciens, Experts et Chercheurs (AITEC) is a French research and campaign group which fights for economic, social and environmental justice.

<http://AITEC.reseau-ipam.org>



11.11.11 is a coalition of 70 NGOs, unions, movements and various solidarity groups in Flanders (Belgium) strengthened

by 340 local volunteer committees that work together for more sustainable development worldwide.

www.11.be