



A BRIEFER ON THE THILAWA SPECIAL ECONOMIC ZONE

Analysis of the Affected Communities' Rights and Remedies
Under Myanmar Law and JICA's Guidelines

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EarthRights International.

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We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns, and have offices in the Amazon, Southeast Asia, and the United States.

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COVER: A family in the relocation site for Phase I residents of Thilawa.

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Kyaw Win (pictured) and his family are the last remaining villagers in Phase I.

“On 31 January 2013, the notice letter came to our village...it said we have to leave our house during 14 days. If we do not move to another place, we will be sentenced to one month in prison...We are growing up in this land. The people from our community worried to move another place during 14 days.”

– *Kyaw Win, one of the last remaining villagers in Phase I.*

I. Summary

Twice the Myanmar Government attempted to confiscate residential and farm land for the Thilawa Special Economic Zone (SEZ), and twice they failed to properly follow Myanmar laws. In both the 1996/97 and 2013 attempts to confiscate lands, the government and private parties ignored the procedures and requirements of Myanmar law, including the Land Acquisition Act. The Myanmar Government failed to properly notify affected communities or provide adequate compensation for relocation. Furthermore, the Thilawa SEZ Management Committee, the Yangon Regional Government, and the Japan International Cooperation Agency (JICA) violated JICA's Guidelines for Environmental and Social Consideration (the "Guidelines"), resulting in significant harm to Thilawa communities. Accordingly, local communities request that these violations be acknowledged and adequately remedied by the Myanmar Government, the Thilawa SEZ Management Committee, and JICA as required by Myanmar law and JICA's Guidelines.

II. Background

The Thilawa SEZ is situated 23km southeast of Yangon and covers a total of 2,400 ha. Included in the Thilawa SEZ area are Shwe Pyi Thar Yar, Aye Mya Thida, Thida Myaing, Phaya Kone, Ahlwan Sut and That Yar Kone villages, which are home to 1,123 households and a total population of 4,313 people.

The Myanmar Government claims that, over several months from 1996 to 1997, the military government known as the State Law and Order Restoration Council (SLORC) confiscated 1,230 ha of land in the current SEZ area for the proposed Thanlyin - Kyauk Tan Industrial Zone.¹ An estimated 800 households were ordered to relocate. At the time, some of the affected residents were provided compensation, in the amount of 20,000 kyats (approximately US\$28)² per acre for the rice paddy and 10,000 kyats (approximately \$14) per acre for other farmland. Some displaced households were also provided with replacement land, but only a plot of 40 x 60 square feet (approximately 223 square meters) on which to build new homes. The military government never developed the proposed industrial zone, and some residents returned to live on and/or farm the land shortly after the confiscation. According to some of the residents, in 2003 the chair of the Yangon Southern District ordered some residents to farm land that had been vacant since 1996/97. A number of returned residents continued to pay taxes for using the land until 2013.

In early 2013, the Myanmar Government, now under civilian rule, attempted to confiscate

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- 1 The Thanlyin - Kyauk Tan Industrial Zone was planned for development by Singapore-based SMD International PTE. Ltd., in cooperation with the Department of Human Settlement and Housing Development, under the Ministry of Construction.
 - 2 In 1996/97, Myanmar used a multiple exchange rate system. The military government used the exchange rate of 6.24 kyats to the US dollar. See The World Bank, Official exchange rate (LCU per US\$, period average), available at, <http://data.worldbank.org/indicator/PA.NUS.FCRF?page=3> (last visited November 3, 2014). However, the actual exchange rate on the ground was approximately 700 kyats to the US dollar. See Koji Kubo (Institute of Developing Economies, JETRO), Sources of Fluctuation of Exchange Rate and Policy Reform in Myanmar, September 2012, available at, http://portal.hss.ntu.edu.sg/eaea2012/submitpapers%5Cpapers%5C229%5CID289_Kubo_Sources.Of.Fluctuation.Of.Exchange.Rate.And.Policy.Reform.In.Myanmar.docx.

the land again. This time, the government set out to re-confiscate the area that the SLORC took in 1996/97 and to take an additional 1,200 ha for the development of the Thilawa SEZ. On May 24, 2013 and August 9, 2013, the Ministry of Home Affairs published notifications in the National Gazette that land would be confiscated in the SEZ area. The May notice covered 1,214 acres (491 ha) and 63 acres (25.5 ha), and the August notice covered 1,822 acres (737 ha) of land. Residents were not notified of the Gazette publication or the intended confiscation at these times. Subsequently, residents have been unable to discern what land the notices cover, as the locations do not correlate with any publicly accessible maps and the government has denied villagers' requests to obtain an official map to understand these locations.

The Thilawa SEZ will proceed in two development stages: a smaller Phase I on 400 ha of land from which residents have already been evicted, and a larger Phase II on 2,000 ha of land from which residents had yet to be evicted at the time of writing. The primary stakeholders in the SEZ include the Yangon Regional Government, responsible for acquiring the land and relocating affected villagers; the Thilawa SEZ Management Committee, tasked with management of the SEZ and its investors; JICA, a Japanese governmental agency that is developing and investing in the SEZ and the Myanmar Japan Thilawa Development, Ltd. (MJTD), a special purpose company founded by investors from Myanmar and Japan. MJTD's shareholders comprise of the Thilawa SEZ Management Committee (10%); JICA (10%); MMS Thilawa Development Co., Ltd. (MMST), a consortium of Japanese corporations Mitsubishi, Marubeni, and Sumitomo (39%); and the Myanmar Thilawa SEZ Holdings Public Limited (MTSH), a consortium of nine private Myanmar companies (41%).³

Residents first found out about the Myanmar Government's plans for the Thilawa SEZ after it signed a Memorandum of Cooperation (MoC) with Japan in December 2012. On January 31, 2013, the Thanlyin and Kyauk Tan Township Administrators sent eviction notices to residents in both the initial Phase I and the Phase II areas. These notices ordered residents to abandon their homes within 14 days, or face imprisonment for 30 days. This deadline passed without event after the Japanese Government called on the Myanmar Government to act in accordance with international environmental standards and hold a community consultation, as stated in the MoC between the two governments.⁴

Despite the request from JICA, there were no meaningful consultations about the Myanmar Government's resettlement plans over the course of 2013. On September 25, 2013, at a meeting at the local housing department, residents from the Phase I area of the project were told to sign resettlement and compensation agreements. Some objected and sought to negotiate, but by the beginning of November, all families in the Phase I area had signed agreements. In ERI's interviews with these families, many claimed to have been pressured, and not to have understood the documents they signed. According to Physicians for Human Rights (PHR), up to 30% of community members do not read Burmese.⁵ Some residents were threatened with the destruction of property, withdrawal of compensation

3 MTSH comprises of Golden Land East Asia Development Ltd., Myanmar Sugar Development Public Co., Ltd., Myanmar Edible Oil Industrial Public Corporation, First Myanmar Investment Co., Ltd., Myanmar Agricultural & General Development Public Ltd., National Development Company Group Limited, New City Development Public Co., Ltd., Myanmar Technologies and Investment Corporation Ltd. and Myanmar Agribusiness Public Corporation Ltd.

4 The MoC concluded between Japanese and Myanmar governments states that "Both sides recognize that the development of the Thilawa SEZ should be in line with the international environmental standards." See Memorandum on the Cooperation for the Development of the Thilawa SEZ, December 21, 2012, available at <http://www.meti.go.jp/press/2012/12/20121227003/20121227003-2.pdf>.

5 Physicians for Human Rights, THILAWA, A FORESEEABLE DISASTER: FORCED DISPLACEMENT IN A BURMESE SPECIAL ECONOMIC ZONE, November 2014, available at <http://physiciansforhumanrights.org/library/reports/a-foreseeable-disaster-in-burma.html>.

offers and arrest if they refused to sign the agreements.

Families were told that they would be required to relocate by November 8, 2013, but that deadline was extended at the last minute amidst revelations that the resettlement site was completely undeveloped, and no homes had been built for the displaced residents. After a period of hasty construction in November 2013, the majority of residents living in the Phase I area of the SEZ were relocated to Myaing Thar Yar relocation site, where conditions are far below the living standard residents had in their former homes. The houses at the relocation site are packed next to each other, without enough land to keep animals or grow crops even for subsistence. The housing area is prone to flooding, raising concerns about the integrity of the structures and health impacts from water-borne and other diseases. PHR has found that the water sources and latrines provided by the Thilawa SEZ Management Committee did not conform to international standards.⁶ Residents still do not have adequate access to clean drinking water.

According to the Yangon Regional Government, compensation for the displaced residents' crops was provided under the 2012 Farmland Act. Compensation was also provided for livestock, but not for the confiscated land. However, many residents were not told how their compensation was calculated, and where information is available, there was a wide discrepancy in the amounts residents received for comparable houses, other structures, crops and livestock lost due to relocation. Each of 68 households residing in the Phase I area was provided a 25 x 50 foot (approximately 116 square meters) plot of land for housing and given the choice of a small house or compensation to build a house on this plot. They were also promised provision of clean drinking water and vocational trainings as compensation. However, a recent site visit revealed that, of the four original water pumps in the relocation area, only two are functioning. The two original open water wells have algae growing on the surface, and four newly dug water wells produce water that is odorous and still unusable. Five water pumps were recently installed to attempt to remedy this problem, however, residents report that there is insufficient supply from these pumps and one is not working at all.

Vocational trainings have been limited to small numbers of displaced residents, with some of the trainings providing skills that are not relevant to the community. Furthermore, no start-up capital has been provided for them to establish small businesses or re-establish their former livelihoods. Many of the families displaced by the SEZ farmed prior to being relocated; others worked on local shrimp farms or as casual or contract laborers in local factories and small-scale commerce. Nearly all of the displaced households report lost income, without land to farm or raise livestock. Others cannot afford transportation from the relocation site to factories and construction sites, where they previously worked or where some were offered temporary employment. As a result, only 4 families have members working in the SEZ construction sites. There has been inadequate assistance from SEZ stakeholders to help residents find employment or replacement sources of income.

In July 2014, months after being relocated, a number of residents at Myaing Thar Yar relocation site received notice letters that their land was being confiscated under the Land Acquisition Act. These letters were sent to the residents' new homes in the relocation site, and not to the site of the land claimed for confiscation, which was already being prepared for development.

6 Physicians for Human Rights, THILAWA, A FORESEEABLE DISASTER: FORCED DISPLACEMENT IN A BURMESE SPECIAL ECONOMIC ZONE, November 2014, available at <http://physiciansforhumanrights.org/library/reports/a-foreseeable-disaster-in-burma.html>.



A displaced resident from Phase I.

“When I was doing farming, our family situation was good. We had regular work and income. We were happy growing vegetables... Now I do not have any job. We did not receive compensation for our farming land.”

– An anonymous displaced resident from Phase I
(not pictured)

One household, the family of Kyaw Win, have remained on their land in the Phase I area. His experience reflects the situation of other families who agreed to the compensation offer without adequate information or ability to object. Kyaw Win was made to sign an agreement to accept compensation for his house and cattle, but he was unable to read the agreement and was not allowed to keep a copy. After accepting the first installment of his compensation and beginning to build a new house in the Myaing Thar Yar relocation site, he realized that the compensation would not be enough to finish the house or to buy replacement land to grow crops and raise livestock. He has therefore refused to take the second and third installments and has remained in his home. On September 26, 2014, Kyaw Win, his wife and son were arrested and charged for trespassing under section 447 of the Myanmar Penal Code. As of the time of writing, the case was ongoing.

III. Proper Procedures Under Myanmar Law Were Not Followed in Thilawa

Land confiscation, land use changes, and compensation for confiscated land are governed by a number of Myanmar laws, including the 1894 Land Acquisition Act; the 1953 Land Nationalization Act; the 2012 Vacant, Fallow and Virgin Lands Management Law; and the 2012 Farmland Law. The land confiscation and compensation offered to residents from the Thilawa SEZ area did not comply with these laws.

A. APPLICABLE DOMESTIC LAWS

To confiscate land under Myanmar law, the government must follow the processes set out in either the 1894 Land Acquisition Act or the 1953 Land Nationalization Act.

1. THE 1894 LAND ACQUISITION ACT

The 1894 Land Acquisition Act requires that for any land that the President believes may be necessary to confiscate for a public purpose:

- (1) A notification of the intent to confiscate the land must be published in the National Gazette; and,
- (2) The "Collector" must give public notice of the confiscation at a convenient place in the locality where the land will be confiscated.⁷

Any interested person – including any person who would be entitled to compensation if the land were confiscated – has the opportunity to object to the land acquisition. The objection must be provided in writing to the Collector within 30 days of the

⁷ The "Collector" includes any officer appointed by the President to perform the functions of a Collector under the 1894 law. *See* The Land Acquisition Act (1894) § 4(1)-(2) and 3(c). The Collector for the Thilawa SEZ is the Southern Yangon District Officer, designated by the Ministry of Home Affairs on behalf of the President, in both confiscation notices issued in the National Gazette in May and August 2013.

public notice.⁸ The Collector must then allow the objector to be heard, and if after further inquiry, if the Collector thinks it necessary, he or she must submit the case for final decision to the President of the Union.⁹

After a final determination that the land is needed for a public purpose or company, the 1894 Law requires a declaration that the land will be confiscated. Before this declaration can be made, there must be plans by a company or the government to pay compensation for the confiscated land¹⁰ The declaration should be published in the National Gazette and describe the district or division where the land is; why the land is needed; the approximate area; and if a plan for the area exists, where it can be inspected.¹¹

Public notice of the confiscation should state the particulars of the land, and set a time and place for all interested in the land to appear before the Collector and present a request for compensation.¹² Once compensation is determined, the Collector must also notify all affected by the award, and interested persons may request the matter be referred to a court.¹³ Only in “cases of urgency” when directed by the President of the Union can land be taken without compensation, and even then, only after at least 15 days from the publication of notice.¹⁴

In any court proceedings to establish compensation, the court cannot award an amount exceeding any claim for compensation made by an applicant, or less than the amount offered by the Collector.¹⁵ In lieu of compensation, the Collector may also provide grant of other lands in exchange, the remission of land-revenue on other lands, or other equitable payment, with the approval of the President of the Union.¹⁶

The President may also grant authority to any officer of any company to provide notice of the acquisition and enter the land for surveys.¹⁷ Once the President is satisfied that the land will be used for workmen’s dwellings or construction of a work likely to prove useful to the public, the company will enter into an agreement with the Government to pay for the cost of acquisition of the land and which describes the terms under which the land shall be held by the company.¹⁸ Such an agreement should be published in the Gazette.¹⁹

8 *Id.* § 5A(1)-(3).

9 *Id.* § 5A(2).

10 *Id.* § 6(1).

11 *Id.* § 6(2).

12 *Id.* § 9(1).

13 *Id.* § 12(2), 18(1).

14 *Id.* §17(1).

15 *Id.* § 25(1).

16 *Id.* § 31(3).

17 *Id.* § 38(1).

18 *Id.* § 41.

19 *Id.* § 42.

2. THE 1953 LAND NATIONALIZATION ACT

Although the 2012 Farmland Act revoked the 1953 Land Nationalization Act (“1953 Law”), developers of the Thilawa SEZ have cited the 1953 Law as justifying changes to land use designations. It is unclear when this occurred, and if provisions of the 1953 Law were also involved in the confiscation of land at the site, as proper procedures to do so were not followed.

The 1953 Law provides that the President shall resume possession of all agricultural lands, subject to several exemptions, by issuing orders with specified dates and locations.²⁰ Exemptions include land owned by farming families who have possessed the land since 1948 or inherited such land, of which most of the family must be citizens.²¹

Under the 1953 Law, the President or an authority appointed by the President may, if necessary, designate any agricultural land to use for a specific means or method other than agriculture.²² Thus, the 1953 Law gives the President, or an appointee, the authority to change the land use from agriculture to some other purpose. This land use change must either be made directly by the President or his appointee, or via a request to the President or his appointee, who can then give official permission via a form as prescribed by the Rule of Land Nationalization Law.²³ The 1953 Law has been referenced as grounds for using the confiscated agricultural land for the industrial uses at the SEZ, presumably for land use changes prior to 2013. However, there is no documentation of this land use change and residents continued to use the land for agricultural purposes and pay taxes for it.

3. 2012 FARMLAND LAW

The 2012 Farmland Law creates a system for land registration that provides farmers documentation of their land use rights. With documentation, the holder of the registration can sell, lease, or pass on rights to the land.²⁴

The Farmland Law defines “farmland” to include a variety of types of agricultural land, but excludes any land within a town or village boundary used for dwelling or religious purposes.²⁵ Land use certificates are granted to citizens or guest-citizens who are members of an agricultural household.²⁶

If farmland is confiscated or repossessed in the interest of the State, then the State must pay compensation.²⁷ To use farmland for purposes other than farming requires permission from either the Central Farmland Management Body, for paddy land, or

²⁰ See Land Nationalization Act (1953) § 5(1)-(2)a.

²¹ *Id.* § 6(1).

²² *Id.* § 39.

²³ See Rule of Land Nationalization Law (1956) § 83 (form 33).

²⁴ See Farmland Law (2012) § 9.

²⁵ *Id.* § 3(a).

²⁶ *Id.* § 6.

²⁷ *Id.* § 26.

the respective Region or State Government for other types of land.²⁸ After this permission is granted, if six months passes and the land is not used in the prescribed manner, then the Central Farmland Management Body may confiscate the farmland.²⁹

The Central Farmland Management Body is formed by the Union Government and is chaired by the Union Minister for the Ministry of Agriculture and Irrigation.³⁰ In addition to confiscating unused farmland, this Body is tasked with prescribing duties to other farmland management bodies, controlling the land registration process, revoking the right to farm if applicable, and performing other duties the government requires with respect to farmland.³¹

The Farmland Law also requires that the least amount of land needed should be confiscated and that if projects are terminated or not developed, then farms must be returned to the original farm owner.³² The Farmland Rules, which implement the Farmland Law, specify compensation amounts for confiscated land and crops. Section 67 of these rules requires that any confiscated paddy, crops, trees and plants be compensated at three times the market value; any buildings associated with farmland at two times the market value; and land compensation should be set at fair market value.³³

4. 2012 VACANT, FALLOW AND VIRGIN LANDS MANAGEMENT LAW

The 2012 Vacant, Fallow and Virgin Lands Management Law (“VFVL Law”) permits leases of land designated as vacant, fallow, or virgin. Vacant and fallow lands are defined as land abandoned by tenants that may have once been used for agricultural purposes. Virgin land refers to new land or woodland where cultivation has never occurred, and can include land that has been legally cancelled from reserved forest, grazing round, or fishing pond land.³⁴ The Central Committee, which manages land falling under the VFVL Law, may grant permission to use the land to applicants, including joint venture investors.³⁵ The Central Committee is formed by the President and can also permit the use of land after agreement of the Myanmar Investment Commission for foreign investment.³⁶

After the Central Committee has granted the right to use the land, the grantee must use the land according to the intended purpose within four years of the grant.³⁷ Furthermore, for those lands granted before 2012, if the land has not been used for its intended purpose, then it shall be automatically deemed as land confiscated by

²⁸ *Id.* § 30.

²⁹ *Id.* § 31.

³⁰ *Id.* § 15(a).

³¹ *Id.* § 17.

³² *Id.* § 32.

³³ *See* Farmland Rules (2012) § 67.

³⁴ *See* Vacant, Fallow and Virgin Lands Management Law (2012) § 2(e)-(f).

³⁵ *Id.* § 2(a), 5.

³⁶ *Id.* § 3, 7.

³⁷ *Id.* § 16(b).

the State.³⁸

5. 2014 MYANMAR SPECIAL ECONOMIC ZONES LAW

The 2014 Myanmar Special Economic Zones Law (“SEZ Law”) creates a “central body” that administers and manages all SEZs in Myanmar.³⁹ The central body in turn forms a central working body and a management committee for each SEZ, composed of personnel from relevant government departments and one representative of the relevant Region or State Government.⁴⁰ For the Thilawa SEZ, the central body created the Thilawa SEZ Management Committee to oversee management. Part of the Management Committee’s duties include supervising environmental conservation and protection in the SEZ in accordance with existing laws and scrutinizing the system to dispose of industrial waste from factories.⁴¹ Similarly, under the SEZ Law an investor must follow the standards and norms contained in the Myanmar Conservation Law and international standards and norms and must prevent social and health impacts in accordance with existing law.⁴²

The SEZ Law requires the developer or investor to pay expenditures for transfer, resettlement and compensation if houses, buildings, gardens, paddy fields, fruit bearing plants and plantations on the land are required to be cleared or transferred.⁴³ Furthermore, the investor or developer must negotiate with the management committee to ensure that those forced to leave the land do not fall below their previous standard of living and that their fundamental needs are fulfilled.⁴⁴

The SEZ Law also provides that the confiscation or transfer of land for the SEZ is the responsibility of the Ministry of Home Affairs to arrange.⁴⁵

B. THE MILITARY REGIME DID NOT LEGALLY CONFISCATE THE LAND IN 1996/97

The 1996/97 confiscation of land in what is now the Thilawa SEZ did not comply with the existing laws at the time. The SLORC did not notify residents as required under the Land Acquisition Act; it did not make any announcement in the National Gazette, provide a publicly available written notice, or provide any opportunity to object.⁴⁶ Instead, an official from the Department of Human Settlement and Housing Development told residents that the land was being confiscated for a national project and that they had to accept the military government’s terms for confiscation. In the context of military rule, no one dared to object. The SLORC did not invoke legal procedures, and its representatives demonstrated military force both at the meeting

38 *Id.* § 22(c)-(d).

39 *See* Myanmar Special Economic Zones Law (2014) § 3(n).

40 *Id.* § 9(a)-(b).

41 *Id.* § 11(p).

42 *Id.* § 35.

43 *Id.* § 80(a).

44 *Id.* § 80(b).

45 *Id.* § 82.

46 *See* The Land Acquisition Act § 4, 5.

that announced the land confiscation and in forcibly removing some families from their homes.⁴⁷ While the military government claimed the right to act as it pleased at the time, its failure to follow the law cannot justify the valid possession of the land by the current Myanmar Government.

Residents whose land was confiscated in 1996/97 were not consulted about the compensation process. They had no opportunity to discuss compensation amounts and could not object to the unilateral decisions the military government made about their land and compensation. Furthermore, the government forced villagers to accept limited compensation of 20,000 kyats (approximately \$28) per acre of farmland, which was not consistent with the market value of the land at the time.

When the proposed industrial zone project did not materialize, some residents returned to living on or farming the land shortly after the confiscation, while others returned after 2003 when the chair of the Yangon Southern District ordered them to farm land that had been vacant. Returned residents report that the government collected taxes for their plantations and crops. The collection of taxes by the government implies an acceptance that the villagers were free to live on and use the land once again. Given the government's taxation and acceptance of villagers' use of the land, it appears that even if the government had confiscated the land in accordance with the law in 1996/97, the land returned to its original owners when left unused for many years.

C. THE MYANMAR GOVERNMENT DID NOT FOLLOW PROPER PROCEDURES IN CONFISCATING LAND AND EVICTING RESIDENTS IN 2013

Similar to the attempted 1996/97 land confiscation, the Myanmar Government did not follow proper procedures to confiscate the land, evict residents and provide compensation in 2013. For most of the Thilawa residents, there was no public notice that their land would be confiscated. Instead, on January 31, 2013, all residents of Phases I and II received orders of eviction, requiring them to leave within 14 days or face the possibility of being imprisoned. These notices cited the 1889 Lower Burma Town and Village Lands Act, which provides procedures for evicting persons from state land.⁴⁸ The invocation of this law suggests that the government believed that it already owned the land, and was simply evicting people from government land. As noted above, however, while the SLORC forcibly and illegally confiscated 1,230 ha of land in 1996/97, neither government authorities nor the Thilawa SEZ Management Committee has suggested that the remainder of the 2,400 ha was ever previously confiscated. Thus even if the 1996/97 confiscation had been valid, the government had no claim to own half the land.

It was not until July 2014 – months after the residents from Phase I had already been relocated – that a number of residents received notice letters that their land was being confiscated under the Land Acquisition Act. These letters were sent to the residents' new homes in the relocation site, and not to the site of the land claimed for confiscation, which was already being prepared for development. For some residents who received these letters, they had left their land after it was improperly confiscated in 1996/97, but returned to live and farm the land in the years after. These

⁴⁷ Some houses were destroyed when families didn't move out immediately after the eviction orders were given. Army trucks arrived in the village and soldiers forced villagers onto the trucks.

⁴⁸ See The Lower Burma Town and Village Lands Act (1898) § 21.

letters are therefore a de facto admission by the Myanmar Government that the 1996/97 confiscation was null and void. These letters can also not be considered adequate procedure under the law as they did not provide prior notice or the opportunity for residents to object.

While National Gazette announcements were made on May 24, 2013 and August 9, 2013 – the government provided no notice at a convenient location for those affected by the confiscation, therefore violating the Land Acquisition Act.⁴⁹ As proper notice was not provided, affected people were not given the requisite 30 days to object and were instead told they were being evicted and must move or face prison time, both of which are further violations of the Land Acquisition Act.⁵⁰ Furthermore, the location of land planned for confiscation under the notices remains unclear. There is no map that provides locations associated with the land referenced in the notices and the government has denied residents' repeated requests to obtain such a map or clarify locations. Notices that do not provide enough information for residents to identify land to be confiscated cannot be considered adequate.

Moreover, even if Thilawa residents did properly receive notice of the acquisition of their land under the Land Acquisition Act, compensation has not been provided for the confiscated land, further violating domestic laws. The Farmland Rules include Table 12, a form for the Township Farmland Management Committee to calculate assistance and compensation for confiscated farmland, crops, buildings and other structures, but this table was not used in the Thilawa SEZ area. Furthermore, the Resettlement Work Plan (RWP) for the Thilawa SEZ, developed by the Yangon Regional Government, does not follow this table. The Yangon Regional Government has never explained why the compensation offered through the RWP diverges from Table 12 and fails to use the Table's transparent rules for calculating proper compensation.⁵¹ While it is true that many residents signed documents accepting the alternative offered to them, in most cases, they were not allowed to keep the document they were shown that explained the details of their compensation. Many residents could not read the documents and were not given an explanation about the content of the agreements they signed; many signed as a result of coercion or intimidation. As a result, residents didn't understand the agreements and did not know that they could object to the amount provided, as allowed under the Land Acquisition Act.⁵²

In their recent report, JICA's Examiners for the agency's Guidelines claimed that the villagers had no right to the land on which they lived and farmed as they did not register for land use certificates as they could have under the Farmland Law.⁵³ According to interviews with villagers, many tried to register according to the law, but were denied access to the registration process by township officials.

49 See Land Acquisition Act § 4(1).

50 *Id.* § 5(A).

51 See Farmland Rules § 66-68.

52 See Land Acquisition Act § 9(2).

53 See The Examiners for the JICA Guidelines for Environmental and Social Considerations, INVESTIGATION REPORT: THILAWA SPECIAL ECONOMIC ZONE DEVELOPMENT PROJECT IN THE REPUBLIC OF THE UNION OF MYANMAR, November 2014, available at http://www.jica.go.jp/english/our_work/social_environmental/objection/myanmar_01.html, p. 29 & n.66.

D. THE SEZ MANAGEMENT COMMITTEE AND INVESTORS MUST CONSERVE AND PROTECT THE ENVIRONMENT, AND PREVENT SOCIAL AND HEALTH IMPACTS

In addition to the government's failure under the Myanmar land use and acquisition laws, neither the developers nor the investors in the Thilawa SEZ have taken responsibility to pay compensation and ensure that displaced people's standards of living are maintained, as required under the SEZ Law.⁵⁴ As the SEZ Law sets out, the Thilawa SEZ Management Committee must follow existing laws, and any investors must follow the standards described in the Myanmar Conservation Law and international standards and norms.⁵⁵ The Management Committee has an affirmative duty to supervise the conservation and protection of the environment, an obligation it has not yet taken seriously.⁵⁶ The Environmental Impact Assessment (EIA) for Phase I of the SEZ is deficient under international standards and best practices.⁵⁷ The EIA does not discuss what industries will operate in Phase I and therefore the potential impacts these industries might have, and does not look beyond the footprint of the SEZ. Management of waste, including hazardous waste, is also not adequately addressed in the EIA; there is a lack of clarity about which factories will be operating in the SEZ and how they will dispose of waste in a way that protects the environment and human health.⁵⁸ As of the time of writing, an EIA was reportedly being conducted for Phase II of the SEZ. Without an EIA that adequately identifies and analyzes impacts of the SEZ and sets out the methods for mitigating such impacts, the Management Committee is not fulfilling its duties as prescribed by the SEZ Law.⁵⁹

Investors are also required to comply with domestic laws relating to environmental conservation. The SEZ Law takes this a step further, requiring investors to follow international standards and norms as well.⁶⁰ Thus, even in the absence of clear environmental guidelines in Myanmar law, investors must comply with international standards for environmental protection, which includes proper assessment and mitigation of impacts.⁶¹ As described above, this has not yet occurred for the Phase I of the Thilawa SEZ. Construction continues on Phase I even in the absence of proper assessment of the impacts of the SEZ. Furthermore, investors must prevent social and health impacts in accordance with existing laws.⁶² Yet relocated villagers have suffered; they do not have adequate access to water, sanitation, or nourishment in the relocation site. These are grave social and health impacts caused by the SEZ development. Thus, the SEZ investors have breached their obligations under Myanmar law.

54 See SEZ Law § 80(a)-(b).

55 *Id.* § 11(p), 35.

56 *Id.* § 11(p).

57 As of the time of writing, the Myanmar Government was finalizing draft rules and guidelines to implement the country's first EIA law, which has not yet been adopted.

58 See EarthRights International, ANALYSIS OF THE ENVIRONMENTAL IMPACT ASSESSMENT FOR PHASE I OF THE THILAWA SPECIAL ECONOMIC ZONE PROJECT, November 2014 (forthcoming).

59 See SEZ Law § 11(p).

60 *Id.* § 35.

61 See, e.g. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters [Aarhus Convention], 25 June 1998. The Aarhus Convention is an environmental agreement that provides a rights-based approach and sets out best practices for public access to information and consultation in decision-making that impacts the environment.

62 *Id.*



A family in their home in the relocation site for residents of Thilawa.

“In the old place, I had 20 acres of land. That land was owned by my grandparents and my parents. Children could play and run freely. Here you see our land is very narrow space for the children to play.”

– Aye Khaing Win, a displaced villager from Phase I
(not pictured)

IV. JICA's Guidelines Were Not Followed in Thilawa

As the governmental agency responsible for coordinating official development assistance from Japan, JICA has Guidelines for Environmental and Social Consideration (the "Guidelines") to ensure that development projects are carried out in a sustainable manner that minimizes negative impacts on the environment and the lives of local residents. However, JICA failed to ensure that stakeholders, including the Yangon Regional Government and the Thilawa SEZ Management Committee, followed its Guidelines in the development of Phase I of the Thilawa SEZ. Neither JICA, the Yangon Regional Government, nor the Thilawa SEZ Management Committee made proper provisions prior to resettlement, and those villagers who have already been resettled face a reality that does not meet JICA's Guidelines or international standards. Resettled residents have not been adequately compensated for the loss of their land and assets, were not informed of the relocation plan or involved in decision-making. As a result of this non-compliance with JICA's Guidelines, the communities in Thilawa have and will continue to face substantial damages.

A. JICA HAS NOT HELD STAKEHOLDERS ACCOUNTABLE UNDER THE GUIDELINES

JICA is responsible for ensuring accountability in the implementation of cooperation projects.⁶³ Throughout the planning and implementation of the project, JICA has failed to ensure that the project proponent, the Yangon Regional Government, would mitigate the devastating impacts on the Thilawa communities. The RWP and the EIA for Phase I of the SEZ fail to meet JICA's standards, as described in further detail below.

B. INADEQUATE ANALYSIS OF ENVIRONMENTAL AND SOCIAL CONSIDERATIONS OR THE HUMAN RIGHTS SITUATION

JICA must provide support for and examine the environmental and social considerations of each project for which it provides assistance, including the Thilawa SEZ project.⁶⁴ This has not occurred in Thilawa; the RWP and EIA are inadequate, with limited to no analysis of the impacts to livelihoods or social issues associated with resettlement.

As described above, the EIA fails to live up to the purposes of conducting an effective EIA and does not meet international standards, basic best practices, or JICA's Guidelines. The project's EIA, which only considers Phase I of the Thilawa SEZ, does not account for the impacts of the SEZ project as a whole, its cumulative impacts, or the impacts of the industries that will operate at the SEZ. The EIA does not even attempt to identify or assess the types of industry or activity that will be located in the Thilawa SEZ. In addition, the EIA (1) fails to adequately describe the project; (2) was not based on adequate consultation with the public or affected communities; (3) does not fully analyze the project's power supply; (4) fails to consider air pollution sources or cumulative impacts; (5) inadequately discusses traffic, water supply and

63 See JICA Guidelines for Environmental and Social Considerations § 1.4 ¶ 3.

64 *Id.* § 1.5.

use, and solid waste management; and (6) does not properly consider resettlement and livelihood issues.⁶⁵

Furthermore, the RWP contains no justification of the levels and forms of compensation offered to villagers for various losses, does not consider land-based compensation and does not analyze the resources or options necessary to provide new sustainable livelihoods.

JICA must also take into account local human rights situations,⁶⁶ particularly the long and often violent history of repression of dissent under successive military regimes and the lasting impacts of this repression. Despite the increased space for peaceful political expression under the current political reforms, it remains difficult for citizens to express their concerns and opposition to government authorities. Residents of Phase I of the Thilawa SEZ were coerced by the Yangon Regional Government and local authorities into signing resettlement agreements and threatened with destruction of property and denial of compensation. JICA should have ensured that rather than coercing and intimidating the local population into acquiescing with the resettlement plans, the Yangon Regional Government engaged with the community and provided them with the information and opportunity to voice their concerns before resettlement occurred.

C. TIMELY SUPPORT AND ADEQUATE COMPENSATION WERE NOT PROVIDED TO THE RESETTLED COMMUNITY

Under JICA's Guidelines, resettled persons must receive support in a timely manner.⁶⁷ Assistance relating to resettlement is not timely if resettlement takes place before adequate compensation has been paid. In Phase I of the Thilawa SEZ project, residents were resettled hastily, despite the fact that the resettlement site was not properly developed and the plans for resettlement were not yet complete. The resettlement site still lacks adequate infrastructure, such as sewage and water drainage, and is prone to flooding even in the dry season. Government-built houses are small and unsuitable to house families with many children. Four water pumps were originally built at the site to provide access to water. Only two of the four are functional, and even these provide muddy water. At the time of resettlement, there were also two open wells that had algae growing on the surface. After the residents filed a complaint under JICA's Objection Procedures over the agency's violations of its Guidelines, four new wells were built, all of which contain odorous water. None of these provide water that is suitable for drinking. A recent site visit revealed that five new water pumps were installed to attempt to remedy this problem, but supply from these pumps remains insufficient and one is not working. At the time of resettlement, a number of residents were also unable to send their children to school due to high transportation costs and distance from the relocation site to their old school. They had also been denied enrollment at the school that is closest to the relocation site due to lack of capacity. However, days before the 2014 school year began, the local school was forced to accept the students' registration despite the considerable challenge that an additional 52 children will pose in the classroom.

⁶⁵ See EarthRights International, ANALYSIS OF THE ENVIRONMENTAL IMPACT ASSESSMENT FOR PHASE I OF THE THILAWA SPECIAL ECONOMIC ZONE PROJECT, November 2014.

⁶⁶ JICA Guidelines § 2.5.

⁶⁷ *Id.* Appendix 1, § 7 ¶ 2.

JICA's Guidelines were also violated because resettled persons were not provided compensation for assets at replacement cost.⁶⁸ None of the compensation provided—for homes, crops, and animals—replaces the value of what was lost by the displaced residents of Thilawa. As a result, residents have become impoverished, with many taking loans to make ends meet. At least 20 families have left the relocation site to find employment elsewhere.

Furthermore, JICA's Guidelines outline the host government's responsibility to provide compensation for lost land.⁶⁹ Yet the Yangon Regional Government has provided no compensation for land taken from displaced Thilawa residents. As described above, the land that the Yangon Regional Government claims was confiscated by the Myanmar Government was not legally confiscated. Those displaced or facing displacement are the rightful owners of the land and should be compensated for its loss.

JICA has also failed to improve or at least restore displaced people's standard of living, income opportunities and production levels, including through supporting means for alternative sustainable livelihoods.⁷⁰ No replacement land has been offered for farming. Most displaced families have lost their livelihoods, whether tied to the land or not, and training or new employment opportunities to date have been inappropriate and inadequate. While many families have received some form of transitional assistance, the amounts granted in the resettlement plan are inadequate to sustain families or enable them to transition to a new, sustainable livelihood.

D. VILLAGERS WERE NOT PROVIDED WITH ADEQUATE INFORMATION OR ALLOWED TO PARTICIPATE IN DECISION-MAKING

JICA is expected to ensure that stakeholders, including those displaced from the Thilawa SEZ area, are adequately informed of options in advance of resettlement.⁷¹ However, most families, including up to 30% who are unable to read Burmese, were unable to understand the resettlement and compensation agreements that were presented to them and which they were coerced into signing. They were also not allowed to retain copies of these agreements. Furthermore, JICA violated its own policies by failing to ensure the displaced persons were able to participate in the development and implementation of resettlement plans, which were dictated unilaterally to the Thilawa families. The development and implementation of the resettlement plans are also not in line with international best practices including seeking the free, prior, and informed consent of project affected persons.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.* § 2.1 and Appendix 1, § 7 ¶ 3 and 4.

V. Conclusion

As described above, residents from the first 400 ha relocated from the Thilawa SEZ area are facing unfair treatment and inadequate living standards because of a failure to comply with Myanmar domestic laws and JICA's Guidelines. Residents in the remaining 2,000 ha of the SEZ area face the same future unless JICA and the Myanmar Government start to follow the law and JICA's Guidelines.

Under Myanmar laws and JICA's Guidelines, the residents are entitled to adequate compensation for land and lost assets, livelihood opportunities including replacement land and adequate financial and other assistance to develop new sustainable livelihoods, and proper consultation in planning the project and their relocation. These are crucial to remedy existing legal violations, vindicate the rights and human dignity of Thilawa residents, and set a standard for the relocation of residents in subsequent phases of the project

VI. Recommendations

TO THE MYANMAR GOVERNMENT:

- › Cooperate with an independent inquiry facilitated by JICA into the land rights of all persons who have been resettled or are facing resettlement, including providing documentation of all orders, declarations and announcements relating to the confiscation of land in the Thilawa SEZ and surrounding areas.
- › Identify land that could be acquired and provided to resettled persons in lieu of monetary compensation for land; when replacement land is not available, ensure that any identified compensable land rights are appropriately compensated.
- › Ensure that compensation for confiscated land was calculated and paid according to Myanmar laws (especially Table 12 of the Farmland Rules) and international standards.
- › Require the EIA for Phase I of the Thilawa SEZ to be re-assessed in consultation with all stakeholders including affected communities and civil society organizations, in order to adequately assess all environmental, social and human rights impacts and identify methods to mitigate such impacts.
- › Require the EIA for Phase II to provide for access to information and adequate consultation with all stakeholders including affected communities and civil society organizations, transparency throughout the process and with the final EIA report, and adequate assessment and identification of methods to mitigate all environmental, social and human rights impacts.
- › Ensure that developers and investors comply with domestic laws and international standards, including the Myanmar Conservation Law.
- › Work collaboratively with the affected communities, civil society and all stakeholders to establish a mechanism to address grievances arising from the Thilawa SEZ, including those related to land confiscation and compensation.

TO THE JAPAN INTERNATIONAL COOPERATION AGENCY:

- › Conduct an independent inquiry into the land rights of all persons who have been resettled or are facing resettlement, including (a) the circumstances under which the Myanmar Government may have acquired the land; (b) whether appropriate compensation was paid for any land that was acquired; (c) whether, under Myanmar law, the residents retained or recovered any compensable land rights that were in force when they were resettled for the purposes of the Thilawa project.
- › Work with the Yangon Regional Government to identify land that could be acquired and provided to resettled persons in lieu of monetary compensation for land; when replacement land is not available, ensure that any identified compensable land rights are appropriately compensated.
- › Work with the current and resettled residents of the Thilawa project site and the Yangon Regional Government to identify the appropriate level of compensation for loss of crops, livestock, and other assets, and increase the level of compensation paid accordingly.
- › Facilitate meaningful participation of current and resettled residents in all aspects of the planning, decision-making and monitoring of all phases of the project, and ensure that they can participate without fear of retaliation.
- › Work collaboratively with the affected communities, civil society and all stakeholders to establish a mechanism to address grievances arising from the Thilawa SEZ, including those related to land confiscation and compensation.

TO THILAWA SEZ DEVELOPERS AND INVESTORS

- › Ensure that displaced residents are provided adequate compensation for their land, crops and property, and that their standard of living has not decreased after their relocation.
- › Work collaboratively with the affected communities, civil society and all stakeholders to establish a mechanism to address grievances arising from the Thilawa SEZ, including those related to land confiscation and compensation.
- › Follow the Myanmar Conservation Law and international standards and norms in order to prevent environmental, social and health impacts on the affected communities.



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