The Burmese Junta’s Abuse of Investment Laws

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Burma continues to be a pariah state for its gross violations of human rights. The refusal of the Burmese military junta to honour the results of the May 1990 elections made its isolation complete: so much so that Burma was denied ASEAN membership for a long time. The junta has even gone so far as to abuse its own laws, including those regulating foreign investment. As there are already many international reports on the link between foreign investment and violations of human rights in Burma, this paper will mainly focus on the aspect of Burma’s investment laws itself—what kinds of investment laws there are in Burma and how these are being abused by the junta.

Should Investors Come to Burma?

Should investors come to Burma? That depends on whom you ask. First, there are those who have few problems with investment, but do want to see evidence of political progress. Second, there are those who are less cautious, saying that whatever political game the junta is now playing, more business activity will inevitably enrich the population. Even if the generals take most of the profits, the man in the street will still benefit. Big business is the leading proponent of this line. Oil company Unocal from the United States, for example, built the Yadana offshore gas pipeline to Thailand. This is now among the junta’s most profitable business operations. The American sanctions barred companies from setting up new business deals, but Unocal was allowed to remain. Although there is astounding evidence that forced labour was used to construct the pipeline, Unocal
still denies all of it. Some companies investing in Burma, such as Halliburton, say they “have nothing to do with the government. We just go where the oil is”.1 Other companies, such as IHC Caland, simply say they are “not interested in politics, only in business”.2 However, politics and business always go together in Burma. The Confederation of British Industry (CBI) has criticized the British government’s call for companies to pull out of Burma because of the junta’s bad human rights record. The CBI said, “In the absence of clear legal sanctions from the UK or UN, it should be left up to companies to make commercial decisions about where they do business”.3 In other words, where there is profit to be made, to hell with the people. And third, there are those who see compromise as impossible—investment merely strengthens the dictatorship. Daw Aung San Suu Kyi, as a major proponent of this line, sees international sanctions as most effective against the economic system put in place by the junta. The junta’s system prevents the growth of the middle class. A strong middle class has the potential to lead the country to democracy. Foreign investment (or ‘destructive engagement’) is making only the generals richer while the mass of the people remain poor.4

With an economy in the doldrums and biting sanctions, the Burmese generals are bending over backwards. Business interests indeed helped spur the recent talks between the junta and Daw Aung San Suu Kyi. The dialogue may lead to nothing, but the fact that it is even taking place has already warmed the international climate toward the junta. The question remains whether this is the beginning of real change for Burma, or just a tricky opening move by the junta. The generals see sanctions as obstacles to economic development and thus a threat to their future hold on power. But is the time ripe for a sustainable boom? Out of self-interest, the junta has sent signals that it is preparing to come in from the cold. However, ethical dilemmas remain, and the junta has not made life easier for investors.

Foreign investment in Burma is small compared to that in neighbouring countries. Investing in Burma is economically uncertain and politically contentious. A genuine free market does not exist. The military regime still dictates prices, wages and exchange rates. There is little credibility in administrative and legal structures. And corruption is rampant. Burmese tax laws, for instance, are meaningless—the whim of the military tax inspector is what determines how much one pays. So, will investment make a difference to the lives of ordinary Burmese? Will forced labour be used to build this new Burma? Will increased business result in a rapprochement between the National League for Democracy and the generals? China, India, South Korea, Japan and the ASEAN countries have already made up their minds and do not seem to worry much about ethics. For them, business opportunities are too attractive to ignore.
What would most help the citizens of Burma is the restoration of civilian, democratic governance and the Rule of Law, and an end to widespread corruption. Although that seems a big wish list, it helped convince many companies to leave Burma. Pepsi, for instance, which had an estimated 80 per cent share of the soft-drink market, sold its joint venture stake with a local company in 1996. The next year it pulled out of Burma completely by canceling supplies of Pepsi syrup. The company said its decision was “based on our assessment of the spirit of current U.S. government policy”. But as a matter of fact, its involvement in Burma had resulted in boycotts by American students (the company’s main domestic market) which soon translated into shareholder concern. Many companies have pulled out of Burma: Levi Strauss, Amoco, Shell, Compaq, Apple, Kodak, Heineken, Texaco, ARCO, Hewlett-Packard, Philips, Toyota, Carlsberg, Motorola—not only because the Burmese junta violates human rights, but also because the junta violates (its own!) investment laws. Did the withdrawal of these companies make a difference? Possibly, but for almost every company that left, another arrived. Singapore companies have hotels, garments, banking, travel services and defense supplies. A French-Burmese fisheries joint venture started operations in November 2000. Oil and gas companies Unocal, Total, Premier, Nippon and Petronas, and Japanese conglomerates Mitsui and Sumitomo, are well-established.

However, foreign investment is still only strengthening the military without any benefit to the population. Foreign investors are not at liberty to choose their business partners in Burma, just as the Burmese people are not allowed to choose their government. Some companies, such as Unocal and Total, believe that their presence in Burma is justified because it is “beneficial to the local population”. But just as the companies are not allowed to choose their business partners, they are not allowed to freely choose their employees. The companies must accept employees suggested by the military junta. The junta promulgated the following “Procedures for Recruitment of Workers” in 1992: “A private and cooperative business undertaking, employing five workers and above, has to notify the Township Labour Office of his intention to recruit workers in the prescribed form. The Labour Office will prepare a list of candidates who meet the requirements mentioned in the form and send these candidates to the employer. The employer is to select the most suitable person from among the candidates submitted by the Labour Office”.

The question remains whether the junta’s shabby investment laws are bothering all investors. For example, according to a Bangkok businessman, current Burmese investment law is made up of two rules only: “Stick to those two and you can do business in Burma. Rule number one is to get along with the junta, so don’t talk about democracy, constitutions or Aung San Suu Kyi. Rule number
two is that only the first rule matters”. More insight into the junta's investment laws can be found in the following overview.

The Union of Myanmar Foreign Investment Law

The unreliable Union of Myanmar Foreign Investment Law (SLORC Law No. 10/88) was promulgated on 30 November 1988, “for the promotion of inducement of foreign investment”. The junta hoped that this law would promote exports, exploit domestic resources, acquire high technology and regional development. Chapter 4, Section 5 of the Law says, “Foreign investment may be made in any of the following forms: (a) investment made by a foreigner to the extent of 100 per cent foreign capital; (b) joint venture between a foreigner and a citizen”. Section 6 gives further details: “… if a joint venture is formed the foreign capital shall be at least 35 per cent of the total capital. (?) In forming as mentioned above, in carrying out the business and in liquidation on the termination of business, other existing laws of the State shall be complied with”. Considering the other existing laws—not necessarily inherently faulty, but implemented by a military-controlled judiciary—this means that the military has absolute control over the foreign partner too.

The junta can appoint a Foreign Investment Commission, which has wide powers under Section 8 of the Foreign Investment Law, including the power to “form such committees and bodies as may be necessary”. However, there is nothing in the section which permits the Commission to participate in the liquidation process or to appoint the specific bodies that it has formed. Consequently, if these bodies are taking part in the liquidation, it could be unlawful since the Burma Companies Act also does not provide for such bodies to participate in the liquidation. The appointments are not being made by the liquidator but by the Commission. What the Commission is actually trying to achieve by making the appointments is unclear. Making these appointments may not even be within its objectives under the Law.

Section 14 of the Law deals with the termination of the business before the expiry of the term. The section specifies that the Commission may allow the termination of the business under certain circumstances. However, the section also says that it applies when there is a “desire to terminate the business by mutual agreement”. The section describes four special circumstances that are valid reasons for terminating a contract prematurely: “(a) substantial and continuous losses by the enterprise; (b) breach of contract by one of the parties; (c) force majeure; (d) incapability of fulfilling the original aims and objectives of the enterprise”. Although all agreements under this Law are subject to the Contract Act of 1872, and although Section 22 of the Foreign Investment Law guaran-
tees that there will be no nationalization of the enterprise during the term of the contract, under Section 32 the government may change the rules “as may be necessary”.

The State-owned Economic Enterprises Law

The State-owned Economic Enterprises Law (SLORC Law No. 9/89)\(^8\) was promulgated to identify the “Economic Enterprises to be Carried Out Solely by the Government”, such as banking and insurance services, post and telecommunications, air transport and railways, the exploration and production of oil and natural gas, and the extraction of teak. Under Section 8 of this Law, a state enterprise is a “corporate body having perpetual succession … and shall have the right to sue and be sued in its corporate name”. Therefore, it would appear that a state enterprise is like any other private company. However, when one looks at Sections 14 and 15 of the Procedure Relating to State Enterprises, it says that the government can dissolve the state enterprise at any time. So there is a contradiction and the state enterprise is clearly not a completely independent entity. This is also confirmed by other sections which suggest that the state enterprise is really an extension of a state department.

The Burma Companies Act

Although the Burma Companies Act of 1914 was amended by the State-owned Economic Enterprises Law in 1989, it still regulates the constitution and incorporation of companies and the (re)organization and reduction of share capital. According to the junta, the legal requirements for companies to comply under the Companies Act are eightfold.\(^9\)

First, (with reference to Section 73 of the Act), “The name of the company must be painted or affixed on the outside of its registered office and every place of business. It must also be mentioned on its seal and in all letterheads, notices, advertisements and other official publications”. Second, (with reference to Section 72 of the Act), “Every company must have a registered office in Myanmar to which all communications and notices may be addressed. A notice of situation of the initial registered office must be furnished to the Companies Registration Office when filing the incorporation documents”. Third, (with reference to Sections 77(c), 83 and 84 of the Act), “Every private company is required to have at least two directors. A public company must have a minimum of three directors. An undischarged insolvent is not eligible to be a director”. Fourth, (with refer-
ence to Sections 34, 53 and 54 of the Act), “Every company will have to give notice to the Companies Registration Office of any allotment of shares within one month of the date of allotment”.

Fifth, (with reference to Section 76(1) of the Act), “Every company must hold an annual general meeting to lay its audited accounts before its shareholders. A newly incorporated company is required to hold its first annual general meeting within 18 months of incorporation. Every company must file an Annual Return within 21 days after its annual general meeting”. Sixth, (with reference to the Arbitration Act of 1944), “Every company is required to lodge a copy of every extraordinary and special resolution with the Companies Registration Office within 15 days from the date of passing thereof”. Seventh, (with reference to Section 130 of the Burma Companies Act), “Every company must maintain proper books of accounts which are required to be kept at the registered office of the company”. Eighth, “There are offences [sic] for any non-compliance with the law”. Or would they mean ‘offences’? Anyway, this last ‘requirement’—not referring to any law—remains dangerously vague.

Vagueness is a major characteristic of the junta’s position regarding the Burma Companies Act. In some government publications it appears that the Act was completely repealed by the State-owned Economic Enterprises Law, while other publications describe the two laws as existing side by side. Section 162 of the Burma Companies Act is particularly vulnerable to abuse by the junta, as it lays down either of the circumstances in which a company may be wound up by Court: “A company may be wound up by the Court: (a) if the company has by special resolution resolved that the company be wound up by the Court; (b) if default is made in filing the statutory report or in holding the statutory meeting; (c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; (d) if the number of members is reduced, in the case of a private company, below two; or, in the case of any other company, below seven; (e) if the company is unable to pay its debts; (f) if its licence is withdrawn in accordance with the provisions of Section 55 of the Union Bank of Burma Act of 1952; (g) if the Court is of opinion that it is just and equitable that the company should be wound up”. So, since there is no independent judiciary in Burma, the junta has total control over foreign investors.

Other Investment Laws in Burma

Other current investment laws include the Burma Insolvency Act of 1920, which regulates the power of Court to decide all questions arising in insolvency. The Private Industrial Enterprise Law of 1990 and the Promotion of Cottage Investment Law
Industries Law of 1991\textsuperscript{15} were enacted for the consolidation and promotion of large, medium and small-scale private industries. The Myanmar Hotel and Tourism Law of 1993\textsuperscript{16} is meant to promote the development of hotels and tourism and to generate badly-needed foreign exchange. The Commercial Tax Law of 1990\textsuperscript{17} is supposed to “replace the commodity and service tax for better coverage of taxes”. The Tariff Law of 1992\textsuperscript{18} was promulgated “to streamline the customs tariff rates”. The Central Bank of Myanmar Law of 1990\textsuperscript{19} and the Financial Institutions of Myanmar Law of 1990\textsuperscript{20} are “to streamline Myanmar’s monetary policy and extend banking services”. But with the junta’s notorious contempt for law, the existence of all these laws really does not mean anything.

### Burma and the ASEAN Investment Agreements

After considerable lobbying the Burmese junta managed to join ASEAN on 23 July 1997. Ten years earlier, the then member states had entered into a treaty known as the ASEAN Agreement for the Promotion and Protection of Investments.\textsuperscript{21} By virtue of its accession to ASEAN, Burma became a party to this treaty. The junta also signed the Protocol for the Accession of the Union of Myanmar to ASEAN Agreements. There were no objections by the other Southeast Asian member states. Under International Law, accession to a treaty which has no express clause of accession happens once another nation executes an act of accession to it with the assent of other parties. Moreover, it is mentioned in the preamble to the Framework Agreement on the ASEAN Investment Area,\textsuperscript{22} “… affirming their commitment to the 1987 ASEAN Agreement for the Promotion and Protection of Investments, and its Protocol to enhance investor confidence for investing in ASEAN”.

Hence, on affirmation the treaty became binding on Burma. The military junta did not dispute the validity and legality of the treaty in respect of Burma. On the contrary, Burma was deemed to have ratified it when Brigadier General David Abel signed it (without lodging any reservations on behalf of the junta) on 8 October 1998.

### The Yaung Chi Oo Case: A Warning to Foreign Investors

When the Burmese junta decided to open its doors to foreign investment in 1993, the Yaung Chi Oo Trading company (based in Singapore—another member of ASEAN) was interested in doing business with the state-owned Mandalay Beer Brewery. Unlike other countries in Southeast Asia, which have concen-
trated on industrial development, the Burmese junta wanted to promote the development of its agricultural, livestock and fishery sectors. So the junta introduced changes to encourage private sector and foreign participation in Burma’s food sector.\textsuperscript{23} Hence, the Yaung Chi Oo company entered into a joint venture for beer and soft drink production and distribution in Burma, with the Myanmar Ministry for Foodstuff Industries on 1 October 1994. The Foreign Investment Law under which the joint venture agreement was made, guaranteed “no nationalization or expropriation during the contractual period”. According to the contract, the tenure was for a period of five years.

The five-year period would have expired on 1 October 1999, but on 11 November 1998 the joint venture came to an abrupt end when armed soldiers seized the brewery on the orders of the SPDC (State Peace and Development Council, which is the name of the Burmese military junta). The SPDC forcibly took over the business with all its assets and ejected all personnel, with no compensation. Yaung Chi Oo’s bank accounts were frozen and the owner was threatened with arrest.\textsuperscript{24} All this was totally against the contract and against the Foreign Investment Law. The guarantee of non-nationalization during the period of contract was ignored. Hence the seizure was sheer expropriation—or banditry in broad daylight.\textsuperscript{25}

The owner of Yaung Chi Oo has since been vainly battling in Burma’s courts over the seizure. But the junta subverted the legal process laid down by its own law and relied on Section 14 of the Foreign Investment Law which deals with the termination of the business before the expiry of the term. However, the section also says that it applies when there is “a desire to terminate the business by \textit{mutual agreement}”. Here, this crucial preliminary element is missing. Yaung Chi Oo does not want to terminate, only the junta does. Moreover, there is nothing to suggest that any of the special circumstances mentioned in Section 14 have been met. Sometimes a state may have a right to nationalize or take over the assets of foreign investors, but such nationalization or take-over is unlawful if it is discriminatory or lacks a public purpose. The Burmese junta has argued that taking over the Mandalay Beer Brewery was for a public purpose and not discriminatory. But if the junta wants to succeed in this argument, they must be able to show that the seizure of the brewery was for some economic or public purpose, and not for the personal gain of some of its leaders.

Some say that the basic reason for this incident is the unreliable Foreign Investment Law (SLORC Law No. 10/88) to which investors have been lured, and the arbitrary legal system in Burma. The ‘joint venture’ in which foreign investors are trapped is a contract between one of the Burmese Ministries and the foreign business partner, which comes under the Foreign Investment Law. Although Section 22 guarantees that there shall be no nationalization during the tenure of the contract, Section 14 of the Law gives overriding power to the Myanmar Investment Commission, i.e. the military, to decide matters and termi-
nate the contract before the expiry of the contract period. Under the Law, the investment commission is composed of the 11 ministers concerned with trade, and it decides disputes between trading partners in which the ministries have direct interests and where the foreign trading partners are not at all represented. Hence, in the instant case, the violator of the law will be the judge. Why foreign investors agree to such laws cannot be understood—perhaps this merely represents their race for profits.

Others maintain that this incident was not caused by the Foreign Investment Law but is simply the outcome of a power struggle between two factions in the military junta—one led by Lt-Gen Khin Nyunt (the Intelligence chief, who is for economic openness and favours the Singapore-based partner) and the other led by Gen Maung Aye (the Army chief, who is opposed to too much openness too fast). According to the owner of Yaung Chi Oo, “Because we were so successful, the brewery became an easy target for greedy soldiers and bureaucrats. We fell on the wrong side of the power struggle and as a result lost our business. Unfortunately in Burma that’s what matters—political connections, not law”.

Yaung Chi Oo’s calls for help to ASEAN have so far been met with silence. It remains the question whether ASEAN is able to protect foreign investment in the region. The Yaung Chi Oo case is a compelling one. It also serves as a test of Burma’s commitment to ASEAN. The junta first saw ASEAN membership as a key to participation in economic growth. But since joining the Association, the junta sees membership as a liability: repressive policies in Burma have consistently been placed under an unwanted spotlight. ASEAN Secretariat officials in Jakarta say the Association would be charting new territory if they took on the case. So far ASEAN has shown consistent impotency in mediating regional disputes on both political and economic fronts.

Recently, Yaung Chi Oo found a hearing for its grievances at the International Court of Justice in The Hague. The International Court is currently looking into the matter. The seizure of the brewery tarnishes the ‘open market economy’ policy declared by the Burmese junta. While Yaung Chi Oo seems to be the first foreign investor to have been targeted for nationalization, Burma’s reputation as an attractive destination for foreign investment has already turned sour. Indictments of the junta’s business practices are coming from many quarters. The Organization for Economic Cooperation and Development has added Burma to its blacklist of countries deemed uncooperative in fighting money laundering. Ever since the 1990s, bureaucratic hassle, corruption, lawlessness and enduring worries of political instability have slowed foreign investment to a trickle. Now, the junta’s apparent unwillingness to abide by both its own and international laws protecting foreign investment will make the protagonists of constructive engagement think twice.

**Rule of Law** means many things. It means that the government is subject to the same rules as the citizens, that the judiciary is independent, that contracts are enforceable in court. It should not be underestimated how important this is for the economic development of a country.
Political Reforms and Economic Development

After a prolonged period of stagnant mindset, the junta has shown a change by entering into talks with the leader of the democratic opposition, Daw Aung San Suu Kyi. The talks are viewed with guarded optimism. Moreover, the junta would be wise if they kept commercial disputes to the domestic forum and came to fair and just settlements acceptable to all parties. This would send bright signals to foreign investors that the junta is willing to restore the Rule of Law. Political reforms and economic development go hand in hand, with Rule of Law being the fulcrum. It would also provide an opportunity to the junta to demonstrate its commitment to ASEAN. The junta may recall that many foreign companies have already decided to pull out and close business in Burma.

The junta’s honesty to put business on legal rails is being tested. This has to comply with international standards and adhere to the principles of transparency and accountability. The alternative is stagnation and ruin. Rule of Law, in this context, means many things. It means that the government is subject to the same rules as the citizens. It also means that the judiciary needs to be independent. It means that contracts and agreements are enforceable in court. It means that legislation should be well-written and never changed retrospectively. It should not be underestimated how important this is for the economic development of a country. With the current situation, apart from the international sanctions, Burma scares away foreign investors because these potential investors know that the contracts they sign are not enforceable in court.

Endnotes

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has even published these Procedures on the Internet (www.myanmar.com/gov/trade/lab.htm, visited on 30 July 2001).


8. The State-owned Economic Enterprises Law (SLORC Law No. 9/89) includes Notification No. 15/89 (6 December 1989) regarding permission procedures and the formation of Supervisory Committees.


11. The Union Bank of Burma Act of 1952 was repealed by the Central Bank of Myanmar Law of 1990 (SLORC Law No. 15/90).


19. The Central Bank of Myanmar Law of 1990 (SLORC Law No. 15/90) was enacted on 2 July 1990. In addition, in exercise of the powers conferred by Section 102 of this Law, the Ministry of Planning and Finance issued the Central Bank of Myanmar Rules through Notification No. 31/91, dated 9 April 1991.

21. ASEAN Agreement for the Promotion and Protection of Investments, done in Manila on 15 December 1987, amended in Jakarta on 12 September 1996. This was based on the Framework Agreement on Enhancing ASEAN Economic Cooperation, done in Singapore on 28 January 1992, which acknowledged the importance of sustaining economic growth and development in the ASEAN member states through joint efforts in liberalizing trade and promoting investment flows.


26. Ibid., p. 65.
