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# HOW THE EU CAN SUPPORT REFORM IN BURMA

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## SUMMARY

Burma is reforming. After being released from house arrest in November 2010, the leader of the National League for Democracy, Aung San Suu Kyi, is expected to be elected as a member of parliament in a by-election on 1 April. But although this is a momentous event, it risks diverting attention away from important issues that have not yet been resolved. Some European Union member states are now calling for a “big bang” approach – that is, immediately lifting sanctions. This approach is based on the assumption that reforms so far undertaken are “irreversible”, as the Burmese government claims. But there are political, legal, historical and practical reasons why the EU should remain cautious.

The EU should therefore respond to Burma’s changes not by a full and unconditional lifting of sanctions but by taking a gradual and measured approach, which would make clear that the key to full normalisation will be verifiable and irreversible reforms rather than mere promises of them. The EU should use benchmarks and conditionality to ensure that the Burmese government follow up on human rights issues and make further progress on reform. The EU should lead its companies in a race to the top by ensuring that European companies in Burma adhere to binding standards of corporate social responsibility and accountability.

Burma is experiencing swift political changes. But although the speed and scope of developments has gone beyond expectations, there remain important issues that have not yet been resolved. Many political prisoners have been released – but not unconditionally – while others remain in jail. A new labour law has been passed, but the International Labour Organisation (ILO) remains concerned that the related right to bargain collectively has yet to be enshrined in law. Forced labour also remains a serious problem in many parts of the country, and a new plan for its eradication within three years has yet to be put to the test. A new law on freedom of assembly falls short of international standards. Although the regime has agreed ceasefires with many ethnic groups, fighting and atrocities continue in Kachin, Karen and Shan states.

After being released from house arrest in November 2010, the leader of the National League for Democracy, Nobel Peace Prize winner Aung San Suu Kyi, is running for a seat in parliament in a by-election on 1 April. But although this is a momentous event, it risks diverting attention away from important issues that have not yet been resolved. The promised “irreversibility” of the reform process has yet to be confirmed. Even Aung San Suu Kyi has noted that “until we know that the army is solidly behind the reform movement, we cannot say the process is irreversible”.<sup>1</sup> Moreover,

<sup>1</sup> Z. Linn, “Can Burma’s President persuade his army to obey his order?”, *Asian Tribune*, 4 March 2012, available at <http://www.asiantribune.com/news/2012/03/03/can-burma%E2%80%99s-president-persuade-his-army-obey-his-order>.

although Aung San Suu Kyi leads the democratic opposition, she does not necessarily represent minority ethnic groups.

So far, the EU has already reciprocated the positive steps that have been taken by the Burmese government. In January, EU foreign ministers lifted visa bans on a large part of the current government's leaders. Several European ministers have also visited Burma, including British Foreign Secretary William Hague (a traditional hardliner on sanctions), French Foreign Minister Alain Juppé and Danish Minister for Development Co-operation Christian Friis Bach. All three countries have raised their levels of humanitarian aid to Burma. The European Commissioner for Development, Andris Piebalgs, has also promised new levels of EU assistance approximating to €150 million for the next three years.

The next big question is what to do about the EU's sanctions against Burma. They include an arms and military equipment embargo; trade, export and investment sanctions on the extractive and logging industry; suspension of development aid (only humanitarian aid is allowed); a visa ban and asset freeze on military leadership; and a ban on investment in named state-owned industries<sup>2</sup>. EU foreign ministers will discuss sanctions at a meeting on 23 April and are expected to agree a revision of the existing sanctions regime, which requires unanimity in order to be continued. Provided reform continues, the sanctions are likely to be lifted at some point in the not-so-distant future. In doing so, the EU should articulate benchmarks of progress in the reform process and target its capacity-building efforts and assistance to achieving those benchmarks.

The EU's foreign policy chief, Catherine Ashton, is also due to visit Burma in late April, by which time the by-elections will have taken place and the role of the opposition in general, and of Aung San Suu Kyi in particular, will be clearer. Before she visits Burma, Ashton is due to participate in the EU–ASEAN (Association of Southeast Asian Nations) foreign ministers' meeting in Brunei on 26–27 April. This meeting will be an opportunity for the EU to co-ordinate its approach to Burma with its ASEAN partners. In particular, they could take a joint stance on development assistance and on foreign investment, guided by the highest standards of accountability and corporate social responsibility.

The EU now has a unique chance to take a coherent approach to sanctions in line with clear and agreed benchmarks, increasing options for institutional capacity-building and development assistance, and shaping a new sustainable-business approach to investing in Burma. EU member states have an opportunity to redefine their relationship with Burma using benchmarks that will ensure that European engagement benefits all Burmese. An EU approach that

displays more caution than optimism would indicate to partners that Europe is able to act progressively without engaging in a Burmese "gold rush", and will help secure a reform path that is progressive and irreversible.

## The presumption of irreversibility

EU debates about Burma have long been framed in terms of a polarised debate between engagement on the one hand and sanctions on the other. But the real choice now is between an immediate and wholesale lifting of sanctions and a steady incremental approach. Those member states previously against sanctions are now calling for a "big bang" approach – that is, immediately lifting sanctions. This approach is based on the assumption that reforms so far undertaken are "irreversible", as the Burmese government claims. But there are political, legal, historical and practical reasons why the EU should be cautious about these claims.

### *Political*

Although there are reformers within the government and the ruling elite, their position is by no means secure. A gradual approach to lifting sanctions will support their efforts as long as it is combined with closer scrutiny to support the sustainability of those efforts. There are also groups of stakeholders in top positions that see the changes underway as being against their interest, particularly if reform touches more deep-rooted issues such as the military's role in the economy.

### *Legal*

Reforming legislation takes time, especially when it is done through a relatively new parliament. The recently adopted labour law, with its inherent flaws, displays that. The ILO's committee of experts has expressed serious concerns surrounding freedom of association, forced labour and trade union registration. The government's argument that law and order concerns allow the suspension of the right to freedom of association is a cause for concern. Similarly, political prisoner release, though welcome, was not unconditional. The prisoners were released under section 401 of the criminal procedure code rather than under an unconditional amnesty, so their sentences still stand. Other laws, including on investment and freedom of expression, fall below international standards. Civil and political rights are not guaranteed and the legal framework has not improved. The most prominent example of the reversibility of current reforms is that, under article 445 of the constitution, the government still has impunity for acts committed for reasons of state security.

The National Human Rights Commission (NHRC) is another case in point. A body set up in part to respond to UN rapporteur Tomas Ojea Quintana's call for a Commission of

<sup>2</sup> The withdrawal of preferential market access (under the Generalised System of Preferences) in the 1990s due to forced labour issues is effectively out of EU member states' hands. A global review is underway that requires consultation with the ILO and would only result in trading preferences being reinstated in 2014.

Inquiry into possible international crimes, it has yet to show that it has the independence, capacity or procedures to support its mandate. Its chair, U Win Mra, has made public statements claiming independence from the government, though he also stated in February 2012 that the commission would not look into “human rights violations and atrocities supposed to be committed against ethnic groups”. Even the NHRC’s initiation, by a government notification rather than a legislative act, calls into question its legitimacy. Most conspicuously absent is the UN requirement that such national human rights bodies follow a mandate based on universal human rights standards. Instead, the NHRC explicitly takes its mandate from the rights expressed in the 2008 Burmese constitution.

### *Historical*

Burma watchers and internal experts note the similarities between recent events and the professed opening in the early 1990s, which was followed by a crackdown, increased violence and an extended period of isolation. The international community has to be wary of this potential and keep the pressure on the government to reform. Burma’s upcoming chairmanship of ASEAN may signify that it is rejoining the international community, but it does not give it *carte blanche* for normalised relations. The historical evidence also highlights the reputational risk at stake for the EU. Premature lifting of sanctions might be followed by limited or no further progress on reforms and a reassertion by hardliners or an escalation of serious human rights abuses in ethnic areas. All or any of these possibilities might put the EU in the awkward position of having to re-impose sanctions that it had prematurely lifted.

### *Practical*

The lack of real reform should act as the primary incentive for caution. There are reports from Kachin state of ongoing atrocities, which may constitute war crimes and crimes against humanity. In addition, ongoing fighting in Shan state and confusion over ceasefire agreements in Karen state do not tally with statements by officials in March that almost all planned ceasefires were in place. According to the “Peace Plan” presented by Burmese President U Thein Sein in parliament on 1 March, ethnic groups will be allowed to form political parties, join parliament and contribute to amending the constitution. But nothing so far indicates that there will be elections before the next planned one in 2015. Even then, the military will still hold 25 percent of seats and thus have an effective veto on constitutional amendments. A peace plan that doesn’t tackle the role of the military in politics is unlikely to have any chance of long-term success.

## A gradual and measured approach to lifting sanctions

Given these ongoing issues, the EU should reject the “big bang” approach and instead take a gradual and measured approach to Burma. EU foreign ministers should not be hasty in lifting sanctions, which would remove what EU leverage remains and leave reformers inside Burma’s government without the prospect of further international recognition of their efforts. A gradual approach to lifting sanctions would demonstrate support for the situation on the ground and for the promising steps already taken, and make clear that the key to full normalisation will be verifiable and irreversible reforms rather than mere promises of them.

In particular, the EU should set benchmarks for further democratic and economic reform and explain what steps would lead to the full removal of sanctions. These should include some of the basic legal reforms that would allow for freedom of association and speech, the rule of law and investment in line with international standards. According to such a benchmarked approach, the EU might lift some sanctions in April (the ban on development assistance should go, so that capacity-building by European actors can be pursued) but leave in place the arms embargo, the asset freeze and the visa ban on top military strongmen.

Restrictions should remain on the export of equipment, or related financial or technical support for the timber industry and mining of metals or gemstones (imports of which are also banned), and the prohibition of EU firms from entering into joint ventures with, or holding securities in, Burmese firms in these sectors. Their lifting would require evidence of credible reforms to international standards on labour laws, budget management and environmental protection.

The EU should also apply conditionality in relation to progress on democracy, human rights and the rule of law. The EU’s development assistance should be linked to the governance situation in the country and to political dialogue with Burmese authorities, as recommended in the EU’s recent statement on development policy.<sup>3</sup> In particular, decisions about the level of development assistance should be made with reference to:

- access for the International Committee of the Red Cross to prisons and lists of prisoners, and the immediate and unconditional release of remaining political prisoners;
- an end to human rights violations, military attacks on civilians and military impunity;
- unrestricted humanitarian access for the UN and other humanitarian agencies to ethnic areas.

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<sup>3</sup> “Increasing the impact of EU Development Policy: an Agenda for Change”, European Commission, Brussels, 13 October 2011, COM(2011) 637, p. 5.

## Other measures

In addition to taking a gradual and measured approach to lifting sanctions, the EU could support the transition in Burma through other measures on corporate social responsibility and accountability, democracy and ethnic conflicts, and donor co-ordination.

### *A race to the top on corporate social responsibility and accountability*

European firms are potentially big investors in Burma. They should enter the Burmese market with high and jointly agreed standards on transparency and accountability (particularly as local legislation is inadequate) and thus beat China and other investors in a race to the top of setting business standards with social accountability. These standards should reflect OECD guidelines, the UN's Global Compact, extractive industry disclosure regulations and the EU's non-financial disclosure guidelines on corporate social responsibility. In this way, the EU would be taking practical steps to avoid the pitfalls it has witnessed in other countries that are rich in natural resources but do not have the capacity to fully benefit from revenues generated. This approach will strike fertile ground in Burma, where public protests triggered by environmental and local concerns on a large Chinese-led dam project led to subsequent government suspension of the project and was another of the budding signs of reform.

In order to improve corporate social responsibility and accountability, the EU should:

- convene an EU–Burma summit under the auspices of High Representative Catherine Ashton that would bring together businesses and NGOs. The aim would be to require European companies to adhere to the full set of international corporate social responsibility guidelines. This could develop further the work currently being undertaken by trade unions and NGOs in developing a binding framework for business and human rights in Burma. The EU would be a natural champion for such a novel and proactive approach, which would also be in line with current legislative proposals on extractives disclosure (which are similar to, if not more potentially more targeted than, those in US legislation such as the Dodd–Frank Act). The EU should seek to extend this approach to other international companies and co-operate with the US, Japan and ASEAN.
- improve transparency and accountability in gas and oil revenues. Burma has large oil and gas revenues, which could secure for it a sustainable future. But, at the moment, revenues from oil and gas circulate in obscure circuits outside official budgets. European capacity-building should work

towards transparency and furthermore work for the establishment of a national fund that could transfer revenues directly into health and social services and infrastructure improvements that would benefit the whole population.

### *Democracy and ethnic conflicts*

As the new relationship with Burma develops, the EU should exert pressure on both the government and the opposition to deliver on ethnic reconciliation as an integral part of the democratisation agenda. The European External Action Service might also be called upon to employ its conflict prevention and mediation instruments towards Burma. The EU could also try to play a distinctive mediation role by using some of its eminent peace negotiators such as Martti Ahtisaari, who mediated in Aceh in 2004.

### *Donor co-ordination*

Development assistance is now flooding into Burma. Donor co-ordination and trilateral co-operation with ASEAN will be essential to avoid duplication of resources and to ensure that aid targets the most essential areas, and to ensure that agreed standards are followed and that implementation is transparent. In leading the drive for increased development assistance, the EU has a responsibility to ensure effective co-ordination and, in particular, to increase humanitarian assistance to ethnic areas. A particular area of concern is the Burmese refugees on the Thai border where support also from the EU seems to be dwindling while the situation for a return to Burma isn't yet ready. This is creating the possibility of refugees returning to unsafe ethnic conflict zones or an increase of illegal economic activity in Thailand.

## About the author

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© ECFR March 2012.

ISBN: 978-1-906538-52-1

Published by the European Council on Foreign Relations (ECFR),  
35 Old Queen Street, London, SW1H  
9JA, United Kingdom

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