

BURMA: Letter to President Obama on GSP Trade Benefits

September 18, 2013

The Honorable Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Ave, NW
Washington, DC 20500

Dear President Obama,

We are writing about the ongoing review to reinstate trade benefits for Burma under the Generalized System of Preferences (GSP). Promoting trade with Burma creates human rights risks, particularly in problem sectors such as extractive industries and plantation agriculture, that could undermine the careful economic reengagement policy your Administration has charted thus far. Therefore, if GSP benefits are restored to Burma, we urge your Administration to take the steps outlined in this letter to manage the human rights impacts of that decision.

Our groups cover a spectrum of organizations focused on the promotion and protection of human rights in Burma. We coordinate closely with Burmese civil society to ensure that the voices and concerns of Burmese communities are heard in the policy deliberations that affect them. If your Administration reinstates Burma as GSP beneficiary country, we urge you to:

- require concrete, measurable progress on labor and land rights and environmental protection prior to reinstatement; and
- exclude products of extractive industries and plantation agriculture from any initial grant of GSP eligibility, and create a more deliberate path to GSP for those sectors.

Background

Burma's GSP benefits were suspended in 1989 because of concerns over forced labor; your Administration has recently initiated a review at the request of the Burmese Government.¹ Despite the rapid changes, however, we firmly believe that your Administration cannot yet promote trade in Burma through GSP without risking serious human rights impacts – including the very same forced labor issues that led to Burma's suspension in the first place.

Serious human rights abuses remain common in Burma, particular in conjunction with foreign investment in sectors such as extractive industries and plantation agriculture. Goods produced in these sectors are generally covered by GSP, including crude oil, gems and minerals, and farm products such as sugar, banana, cassava, rubber, and palm oil. Many of these products are on the Department of Labor's list of goods that are produced with child and/or forced labor in Burma.²

We focus here on three interconnected forms of human rights abuses that are strongly linked to trade and investment in Burma. First, and most prominently, is the epidemic of land-grabbing.

¹ See *Generalized System of Preferences (GSP): Initiation of a Review of the Union of Burma and the Lao People's Democratic Republic for Possible Designation as Beneficiary Developing Countries*, 78 Fed. Reg. 22593 (Apr. 16, 2013).

² U.S Dep't of Labor, *List of Goods Produced by Child Labor or Forced Labor* 16-17 (2012).

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Farmers – often from vulnerable minority groups – are forced off their land, which is used for infrastructure projects or given to rich businessmen or foreign investors for agriculture or extractive operations.³ Millions of acres have been confiscated in recent years, with the highest rates of displacement in ethnic minority zones.⁴ Land-grabbing by powerful economic interests without due process or compensation has been reinforced by a trio of new laws that allow a centralized and politically chosen bureaucracy to designate land as vacant or abandoned and then dispose of it through long-term leases to well-connected third parties.⁵

Second is the violation of internationally recognized workers' rights. Community-based organizations have documented ongoing episodes of military-imposed labor at mines and hydrocarbon pipelines.⁶ Although a number of unions and collective-bargaining agreements have been formed since Burma's political transition began, the agreements are not enforced, and workers and organizers are regularly intimidated for trying to secure labor protections.⁷ Moreover, labor rights violations are systemically connected with land-grabbing; not only are both a product of the weak rule of law in Burma, but evicted farmers often end up as day laborers on their own land, subject to exploitation and outside the protection of the law.⁸

Third, demonstrators and other persons trying to assert their rights are violently repressed on a regular basis. Burmese security forces used smoke bombs containing phosphorus to attack people at the Letpadaung Copper Mine near Monywa who were protesting land confiscation and environmental impacts in November.⁹ Attorneys seeking to provide assistance in the case have been detained. Workers protesting in hopes of securing enforcement of collective bargaining agreements have been subject to criminal complaints by their employers and ended up in jail.¹⁰

Our Proposals

In the event that your Administration decides to reinstate Burma's GSP benefits, we propose a concrete, achievable framework to manage the potential human rights impacts of such a decision. We are mindful that you have recognized that the prevalence of human rights abuses and conflict

³ See, e.g., Land Research Action Network, *Land Not For Sale in Myanmar* (Oct. 12, 2012), at <http://www.landaction.org/spip.php?article666>.

⁴ See *id.*; DISPLACEMENT SOLUTIONS, MYANMAR AT THE HLP CROSSROADS: PROPOSALS FOR BUILDING AN IMPROVED HOUSING, LAND AND PROPERTY RIGHTS FRAMEWORK THAT PROTECTS THE PEOPLE AND SUPPORTS SUSTAINABLE ECONOMIC DEVELOPMENT 5-6 (Oct. 2012).

⁵ See *id.* at 11-13.

⁶ See, e.g., EARTHRIGHTS INTERNATIONAL, THE BURMA-CHINA PIPELINES: HUMAN RIGHTS VIOLATIONS, APPLICABLE LAW, AND REVENUE SECRECY 11-12 (Mar. 2011); TA'ANG STUDENTS AND YOUTH ORGANIZATION, PIPELINE NIGHTMARE: SHWE GAS FUELS CIVIL WAR AND HUMAN RIGHTS ABUSES IN TA'ANG COMMUNITY IN NORTHERN BURMA 25 (Nov. 2012). For more on forced labor and trafficking associated with foreign investment, see U.S. Campaign for Burma's Post-Hearing Brief, submitted to the GSP Subcommittee on July 25, 2013.

⁷ See Julie Turkowitz, *Frontier Economy: With a boom on the line, Yangon's workers fight for rights*, GLOBAL POST, July 15, 2013, at <http://www.globalpost.com/dispatch/news/regions/asia-pacific/myanmar/130709/yangon-economy-labor-rights>.

⁸ See Joint Government of the Republic of Union of Myanmar/International Labour Organization Strategy for the Elimination of Forced Labour (July 2012), Index 4K3, available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-yangon/documents/genericdocument/wcms_191415.pdf.

⁹ See *Burma Police Used Phosphorus at Mine Protest, Official Report Confirms*, ASSOC. PRESS, Mar. 12, 2013, at <http://www.irrawaddy.org/archives/29039>.

¹⁰ See Turkowitz 2013, *supra* note 7.

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still constitute an extraordinary threat to the foreign policy and national security of the United States.¹¹ As a result, the U.S. Government has required that all U.S. persons investing more than \$500,000 in Burma publicly report on their policies and procedures to manage human rights impacts and mitigate disputes from land acquisition.¹²

GSP is expressly connected with human rights; in order to be eligible for benefits, a country must be taking steps to respect internationally recognized workers' rights.¹³ U.S. trade policy should not undermine our broader foreign policy interests and concerns; with this in mind, we present our proposals to ensure a coherent economic reengagement policy towards Burma.¹⁴

1. *Prior to reinstatement, require concrete, measurable progress on human rights, including land rights and internationally recognized workers' rights.*

We understand that the period prior to reinstatement of GSP benefits has in some cases provided an opportunity to require improvements from candidate countries. Your Administration should therefore refrain from restoring Burma's beneficiary status until it has taken the following steps:

Implement key portions of the joint strategy with the ILO to eliminate forced labor. This would include:

- identifying and discharging all child soldiers and protecting them from harassment on charges of desertion;
- allowing the UN Country Task Force to meet with non-state armed groups to develop a plan for the elimination of the use of child soldiers;
- investigating, prosecuting, and punishing those who subject others to sex trafficking and forced labor;
- developing referral and protection services for victims of trafficking;
- forming tripartite consultative committees throughout Burma, including along pipelines;
- confirm and implement policies to combat the subjection of persons whose land has been confiscated to labor violations;
- confirm and implement policies banning the use of civilians as forced porters, guides, or guards by the Armed Forces.

Allow the ILO full access to military-controlled sites. This should include ethnic areas and zones of conflict, pipelines, mines, and major infrastructure projects.

Establish an Ombudsman to protect and assist those asserting their legal rights. The Burmese Government should take concrete steps to prevent those who seek remedies from the courts or

¹¹ President Barack Obama, Letter -- Continuation of the National Emergency with Respect to Burma (May 2, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/02/letter-continuation-national-emergency-respect-burma>.

¹² U.S. Dept. of the Treasury, Office of Foreign Assets Control, Gen. License No. 17 ¶(e) (July 11, 2102), *at* <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/burmag17.pdf>; U.S. State Dep't, Responsible Investment Reporting Requirements, *at* <http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf>.

¹³ 19 U.S.C § 2462(b)(2)(G) & (H).

¹⁴ For more details on these proposals, please see EarthRights International and U.S. Campaign for Burma's Post-Hearing Briefs, submitted to the GSP Subcommittee on June 25, 2013.

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other official bodies (such as labor arbitration committees) from being intimidated, criminalized, or retaliated against.

Eliminate the pending, unjustified deadline for registering land. In addition to enacting land laws that enshrine land tenure insecurity, the Burmese Government has imposed an arbitrary deadline land registration. The meaning of the deadline is unclear, but it may be that if farmers do not register their land by the end of April 2014, they will be unable to do so in the future. If this deadline remains in place, millions of farmers may lose the opportunity to formalize title to their land; it should therefore be eliminated or, at least, the Burmese Government should publicly clarify that it does not cut off the right to register land.

Reform the land laws. The current, inadequate land laws fail to recognize communal and traditional forms of land tenure, such as *taungya* shifting cultivation, which is prevalent in upland minority areas. The laws should be reformed to provide rights to those who practice such forms of land management. Moreover, the land laws currently do not allow for judicial oversight of land allocation, putting the process entirely in the hands of politically appointed committees. The laws should therefore be amended to provide for legal recourse in the case of wrongful land confiscation, and establish a non-politicized mechanism for resolving land disputes.

Double the size of the Labor and Environmental Inspectorates. The Burmese Government's capacity to enforce the labor and environmental laws it does have in place is practically non-existent. It should therefore commit to significantly expanding the size of its regulatory apparatus before GSP status can be reinstated.

Root out corruption in the Customs Department and eliminate abuses in export licensing. Corruption in the import/export process at the Myanmar Customs Department and the abusive and politically controlled practice of granting export licenses prevent ordinary Burmese people from enjoying the benefits of increased trade. The Burmese Government should therefore launch a credible investigation into the Customs Department and eliminate abusive export licensing.

- 2. Withhold eligibility for problem sectors and establish a more deliberate path for reinstating high-risk items*

Your Administration should withhold eligibility for otherwise GSP-eligible articles that are listed on the U.S. Department of Labor 2012 List of Goods Produced by Child Labor or Forced Labor until Burma demonstrates progress on eliminating systemic abuses. To this list, we would add crude oil, precious metals, minerals, gems, palm oil, rubber, banana, and cassava, and sugar, which are often produced through large-scale land acquisition and in ethnic minority zones.

In order to create a rational process to reinstate GSP eligibility for these key articles, your Administration should establish an inter-agency review process to determine when the supply chain for the article in question is in substantial compliance with international human rights standards. The U.S. Trade Representative should hold sector-specific hearings to receive evidence of human rights risks (or, conversely, responsible practice) for each designated article. Importers of such articles should be required to certify that they have undertaken human rights due diligence consistent with the U.N. Guiding Principles on Business and Human Rights and

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other relevant guidelines, and that to the best of their knowledge there have been no violations of internationally recognized human rights in connection with the production or export of the article. They could also be invited to submit reports analogous to those that investors must submit under the Reporting Requirements, in order to facilitate review of the article in question.

Legal Justification

Your Administration has the authority to take the steps outlined above. Under the Trade Act, GSP beneficiary status is expressly conditioned on, *inter alia*, a determination that the country is taking steps to respect internationally recognized workers' rights and is implementing commitments to eliminate the worst forms of child labor.¹⁵ The President is also directed to take into account "the level of economic development of such country, including its per capita gross national product, *the living standards of its inhabitants, and any other economic factors which the President deems appropriate[.]*"¹⁶ Thus the President may also deny GSP status based on "other economic factors." The economic consequences of land grabs and other human rights violations for Burma's most vulnerable people are surely an economic factor that the President should take into account. Such concerns are sufficient to implicate the President's power to "limit the application of duty-free treatment"¹⁷ in order to mitigate these consequences.

Moreover, the International Emergency Economic Powers Act gives the President authority to regulate transactions in property belonging to foreign nationals or U.S. persons that are subject to the jurisdiction of the United States, in order to manage an extraordinary threat to U.S. foreign policy.¹⁸ This was the basis of the State Department's decision to require public reporting from U.S. investors in Burma, and it provides an independent basis for you to limit GSP treatment based on human rights concerns and to require certification from importers.

Conclusion

The undersigned organizations are hopeful that U.S. economic reengagement with Burma will bring benefits to the people of Burma and reduce the incidence of serious human rights abuses. However, we cannot support trade promotion measures that ignore the likelihood of increased land-grabs, violations of internationally recognized workers' rights, and suppression of those who seek to assert their rights in the courts. If your Administration is inclined to reinstate Burma's beneficiary status under GSP, we therefore strongly urge you to adopt the measures outlined above, and stand ready to assist you in implementing them.

Respectfully submitted,

ALTSEAN-Burma
Burma Campaign UK
Burma Environmental Working Group
Burma Partnership

¹⁵ 19 U.S.C. § 2462(b)(2)(G) & (H).

¹⁶ *Id.* § 2462(c)(2) (emphasis added).

¹⁷ *Id.* § 2462(d)(1).

¹⁸ 50 U.S.C. § 1701(A)(i), (A)(ii), (B).

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Center for International Environmental Law
EarthRights International
Forum for Democracy in Burma
Fortify Rights
Human Rights Foundation of Monland
Institute for Asian Democracy
International Labor Rights Forum
Investors Against Genocide
Kachin Environmental Organization
Karen Environmental and Social Action Network
Karen Human Rights Group
Karenni Civil Societies Network
Land Core Group of the Food Security Working Group
Mae Tao Clinic
Maukka Education Magazine
Network for Democracy and Development
Orion Strategies
Physicians for Human Rights
Students and Youth Congress of Burma
Tavoyan Women's Union
United to End Genocide
US Campaign for Burma

CC:

Mr. William Jackson, Deputy Assistant U.S. Trade Representative for GSP and Chair of the GSP Subcommittee, Office of the U.S. Trade Representative
Mr. Michael O'Donovan, International Economist, Office of Trade and Labor Affairs, Bureau of International Labor Affairs, U.S. Department of Labor
Mr. Charles DeLuca, International Economist, Office of Trade Policy, U.S. Department of the Treasury
Mr. Omar Karawa, International Economist, Office of Agreements and Scientific Affairs, Foreign Agricultural Service, U.S. Department of Agriculture
Ms. Doreen Parekh, International Trade Specialist, Office of Multilateral Affairs, International Trade Administration, U.S. Department of Commerce
Mr. Craig Allen, Deputy Assistant Secretary for Asia, International Trade Commission, U.S. Department of Commerce
Mr. William Craft, Acting Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, U.S. Department of State
Mr. Paul Brown, Director of the Office of Multilateral Trade Affairs, Bureau of Economic and Business Affairs, U.S. Department of State
Ms. Andrea Cameron, Economic-Commercial Officer, Office of Multilateral Trade Affairs, Bureau of Economic and Business Affairs, U.S. Department of State