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Re: Response to the Examiners' Investigation Report on the Thilawa Special Economic Zone Development Project

We write to you in response to the Investigation Report prepared by the Examiners on the Thilawa Special Economic Zone (SEZ) Development Project in Myanmar. Although the Report gives a thorough review of the problems alleged by the Requestors, including responses by the Yangon Regional Government and JICA's Operational Department, we feel that the Examiners have failed to report on the realities of the situation on the ground or address the problems the Project Affected Persons (PAPs) are facing. The Examiners have made suggestions for continued monitoring of certain situations and improved dialogue. However, these proposals will not fundamentally improve the situation of PAPs without adequately addressing the issue of land and current living and livelihood conditions in the relocation site. JICA has an important role and responsibility to ensure that this development project complies not only with its Guidelines for Environmental and Social Considerations (the "Guidelines") but also with international standards. We submit that JICA has failed to ensure that the Myanmar Government complies with the Guidelines and has chosen to overlook the realities being faced by the PAPs.

We would like to raise some concerns about the investigation results outlined in the Examiners' report. We are also submitting two reports by EarthRights International (ERI): "An Analysis of the Affected Communities' Rights and Remedies Under Myanmar Law and JICA's Guidelines" and "Analysis of the Environmental Impact Assessment for Phase I of the Thilawa Special Economic Zone Project in Myanmar", which go into more depth on the issue of land confiscation and the Environmental Impact Assessment for Phase I of the project.

I. Relocation and Land Related Issues

JICA and the Examiners have accepted at face value the Myanmar Government's claims that the land located in the Class A area was expropriated in 1997, and that the right to own and use the land is vested in the Myanmar Government. The Examiners have failed to adequately and independently investigate these claims. First, the land that was confiscated over the course of several months in 1996 and 1997 only amounts to roughly half of the current SEZ area; the remainder was only confiscated in 2013. Serious problems in the way in which the military regime at the time attempted to expropriate the land in 1996/97 have not been addressed in the Examiners' report, nor have similar concerns about the 2013 confiscation. These include allegations of coercion, a lack of free, prior informed consent, inadequate compensation and issues regarding the use and ownership over the land in the subsequent years. In ERI's report, "An Analysis of the Affected Communities' Rights and Remedies Under Myanmar Law and JICA's Guidelines," we explain how the 1996/97 and 2013 attempts to confiscate lands ignored procedures and requirements under Myanmar law. Furthermore, the government has failed to provide all relevant information, including but not limited to maps of confiscated land, official



notices of confiscation and evidence of compensation payments. JICA should not accept as conclusive proof any information or documents regarding the land confiscation that have not been verified by PAPs or other independent actors, such as civil society groups and independent lawyers.

The Examiners have also failed to recognize the ways in which the damages suffered by the PAPs are interlinked with the confiscation of their farmland. While the Examiners acknowledge that those villagers previously reliant on land have lost their land-based livelihoods prior to the development of new opportunities, they do not hold JICA responsible for addressing these issues, as the agency should be under the Guidelines.¹ There is a lack of assessment of the obstacles faced by villagers to adapt to new livelihoods without access to land and as a result of inadequate vocational training, missing start-up capital for small businesses and unavailable support for transportation to low-paying work sites. Many families at the Myaing Thar Yar resettlement site have already run out of funds, have indebted themselves to predatory lenders in arrangements that put their homes at imminent risk, and have no realistic prospect of finding employment in time to prevent further serious hardship to their families. If adequate compensation had been provided for lost land, then families might have been able to withstand the sub-standard levels of compensation for crops, livestock and houses.

We find that the Examiners' conclusions ignore the reality on the ground for the displaced PAPs. The many ongoing problems including the lack of livelihood, poor housing and sanitation, lack of access to clean water, and the vicious cycle of poverty in which many families are now trapped, are all problems resulting from their relocation. JICA has a responsibility to address these issues.² The mere existence of the Resettlement Work Plan (RWP) at the time of the relocation is taken by the Examiners as sufficiently meeting JICA's obligations, even though the RWP has still not been fully implemented a year later and is acknowledged elsewhere in the Examiners' report as inadequate. The lack of a comprehensive and properly implemented income and livelihood restoration program is ignored. The Examiners have failed to engage with the substance of JICA's obligation under the Guidelines to ensure that affected persons should enjoy a standard of living that is at least equal to their standard of living prior to displacement.³

II. Climate of Fear

The Examiners state that residents signed documents accepting compensation for the 1997 land confiscation, but fail to address claims that these documents were signed under coercion. It is concerning that the Examiners' conclusion that the PAPs' signatures are enough to absolve JICA of responsibility for independently confirming compliance with the Guidelines,⁴ especially given that they were obtained at a time in which a military government ruled under a pervasive climate of fear. Additionally, affected community members did not sign relocation agreements in 2013 freely or based on adequate information. The Examiners' finding that transcripts of consultation meeting minutes do not contain threats or coercion is not adequate proof that the PAPs were not coerced. Although the Examiners state that some PAPs thought they were forced to sign the agreements without taking sufficient consideration time, the Examiners inexplicably find that there is no evidence that the Myanmar Government, officially or systematically, coerced or

¹ JICA Guidelines for Environmental and Social Considerations, Appendix 1 § 7 ¶ 2.

² *Id.*

³ *Id.*

⁴ *Id.*



threatened the PAPs to consent. The climate of fear and lack of trust towards government officials will continue to pose significant challenges to any dialogue between stakeholders that the Examiners have proposed.

III. Environmental Impact Assessment (EIA) for Phase I

The Examiners' finding regarding environmental and social impact assessments is worrying as they have failed to analyze the EIA document, which falls drastically short of international standards, and did not address the deficiencies of the EIA including the lack of consultation with affected communities. Relying on JICA's Operational Department's "confirmation" that the EIA and RWP do not deviate from the relevant World Bank Operational Policies does not amount to sufficient investigation into JICA's adherence to the Guidelines.⁵

Our analysis of the EIA for Phase I of the Thilawa SEZ outlines the many reasons why the report is inadequate, including a lack of information about the industries that will operate in the SEZ, a failure to consider energy and water sources, a lack of assessment of cumulative impacts of the project in conjunction with Phase II and other projects in the area, inadequate mitigation measures and inadequate consultation with and participation of PAPs. Furthermore, an assessment of social impacts is an integral part of the EIA process; however, there is virtually no social assessment included in the EIA. The Examiners attempt to refute this inadequacy by stating that the RWP was being conducted at the same time as the EIA, and therefore there wasn't enough information for the consultants to include social impacts on PAPs in the EIA. The unavailability of information at the time of the EIA does not eliminate the necessity of an examination of social impacts as part of the EIA; rather, it points to the inescapable conclusion that the EIA was flawed as a result of the rushed timeframe and incomplete information with which it was completed. Moreover, the Examiners have not adequately explained how the RWP dealt with the lack of a social impact assessment.

ERI's report, "Analysis of the Environmental Impact Assessment for Phase I of the Thilawa Special Economic Zone Project in Myanmar", provides a detailed analysis of the shortcomings of the EIA and its failure to meet the international standards including JICA's Guidelines.

IV. Failure to Address the Situation in Phase II of the Project

JICA and the Examiners must understand and acknowledge the problems that have arisen in Phase I of this project in order to address the current situation as well as the potential future problems relating to Phase II of this development. Communities in the Phase II area have already been negatively impacted as a result of the halt of irrigation water from the Zarmani Reservoir, which has made it impossible for them to farm during three dry seasons already. It is unacceptable that the Examiners refuse to acknowledge this clear damage to PAPs. This issue and those already exhibited in Phase I must be addressed at the earliest possible chance to ensure the devastating impacts that the PAPs have suffered during the Phase I relocation will not be repeated in Phase II.

⁵ *Id.* § 1.5, 2.3, 2.4 and 2.5.



V. Recommendations

JICA's obligations under the Guidelines are not being met by merely providing experts, monitoring and deferring responsibility to the Myanmar Government. Thus far, JICA and the Examiners have ignored evidence of the realities on the ground regarding the difficulties that the PAPs face and JICA's non-compliance with the Guidelines in terms of the environmental and social impacts of the Thilawa SEZ project. As a result of this non-compliance with JICA's Guidelines and the Examiners' failure to acknowledge this, the affected communities in Thilawa have and will continue to face substantial damages. We therefore recommend that JICA:

- Reassesses the issues of land confiscation and the environmental and social impacts on affected communities in order to ensure that stakeholders including the Yangon Regional Government and the Thilawa SEZ Management Committee implement the Thilawa SEZ project according to JICA's Guidelines.
- Conduct an independent inquiry into the land rights of all persons who have been resettled or are facing resettlement for the purposes of the Thilawa project, 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 in lieu of monetary compensation for land; where 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.
- Pause development of the Thilawa SEZ project until a thorough and proper EIA is conducted in line with international best practice and JICA's Guidelines.
- Review the agency's portfolio of projects and planned projects to ensure all EIAs comply with international standards including JICA's Guidelines.