ISSUE: 2023 No. 74
ISSN 2335-6677

PERSPECTIVE

RESEARCHERS AT ISEAS – YUSOF ISHAK INSTITUTE ANALYSE CURRENT EVENTS

Singapore | 19 September 2023

Are the National Unity Government's Responsible Investment Policies Fit for Purpose?

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Facebook Page of the National Unity Government at https://www.facebook.com/NUGmyanmar accessed on 15 September 2023.

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ISSN 2335-6677

EXECUTIVE SUMMARY

- After the February 2021 coup, Myanmar's National Unity Government (NUG) issued new responsible investment policies that call for companies to end tax payments to the military and divest from all military-backed companies.

- The NUG's policies require that if companies are unable to end tax payments to the military, then they should consider initiating a 'responsible exit' in consultation with the parallel government and leave the Myanmar economy until democracy is restored.

- While the NUG claims that its policies on responsible investment are aligned with international standards such as the United Nations Guiding Principles on Business and Human Rights (UNGPs), the UNGPs and other standards do not specifically prescribe against paying taxes to authorities, nor do they state that doing so constitutes a human rights violation under international law.

- By advising that all companies making tax payments to the junta exit the economy, rather than just targeting those that actively support or collude with the military, the NUG's responsible investment policies may generate a counterproductive effect of foreign investors exiting the Myanmar economy, and thereby decrease the number of economic opportunities available to many 'ordinary citizens' in Myanmar.

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INTRODUCTION

More than two years after the Myanmar military orchestrated a *coup d'état* that usurped state power from the National League for Democracy (NLD) government that had just won its second landslide election, the country's economy remains in dire straits. According to a 2021 World Bank report, Myanmar's GDP shrunk by more than 18% in the immediate aftermath of the coup.[1] This past fiscal year (2021-22), the country's GDP rose only by a modest 3%, meaning that, cumulatively, the country's economy will remain substantially smaller than before the coup took place, for the foreseeable future.[2]

Due in large part to the February 2021 coup, poverty across Myanmar has grown at an alarming rate, with the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) recently estimating that 14 out of country's 15 states and regions had recently entered the critical threshold for malnutrition.[3] Even relatively prosperous urban areas such as Yangon have not been spared, with new statistics from the United Nations Development Programme (UNDP) showing that roughly a quarter (24.1 percent) of those living in eight of the city's poorest townships have gone without any income from February 2022 to 2023, a period of more than 12 months.[4] Rising poverty levels, and other devastating economic impacts of the February 2021 coup on ordinary people across Myanmar have raised a number of critical questions among foreign companies still operating in the country.

Principally, many companies have faced the dilemma of whether to remain in Myanmar or to initiate an exit from the economy. The National Unity Government of Myanmar (NUG), a parallel government established by NLD lawmakers deposed by the junta following the February 2021 coup, prescribes that if a company cannot avoid paying taxes or making other types of payments to the junta, it should strongly consider initiating a 'responsible exit' from the Myanmar economy.[5] Specifically, the NUG's policies state that all foreign companies operating in the economy should withhold payment "of all taxes and other fiscal obligations to military-controlled authorities…until the lawful and legitimate government is restored."[6]

Pragmatically, however, several long-standing investors who operated in the Myanmar economy prior to the military takeover have been forced to pay taxes to the junta since the coup. Due to a variety of reasons such as the growing risk of retaliation against its workers and employees, many companies have made tax payments even if they are not otherwise supportive of the military government. In fact, the number of firms being forced to make tax payments to the junta recently reached a post-coup high after the junta imposed more stringent tax enforcement measures that make it substantially more difficult for firms to avoid and/or delay making payments.[7]

Thus, by advocating for all companies that cannot reasonably suspend their tax payments to the junta to exit the Myanmar economy, the NUG's current approach to responsible investment is counterproductive, as the withdrawal of otherwise responsible companies from the Myanmar economy is likely to exacerbate poverty and negatively impact normal people.

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CORPORATE EXODUS

Since the February 2021 coup, as many as 30 multinational companies have either chosen to exit Myanmar or temporarily suspend their operations in the country — dealing a blow to normal Myanmar people whose livelihoods depend on the employment opportunities provided by the private sector.[8] While the exact reasons why companies are leaving Myanmar are varied and largely sector-specific, their decision-making is being underpinned by the opinions of investors and civil society groups – some of which are advising companies either to temporarily cease their operations or initiate a 'responsible exit' from the Myanmar economy to avoid financially supporting the military junta or becoming complicit in human rights abuses committed against the country's civilian population.[9] This is the position adopted by the NUG, whose official guidance on responsible investment instructs companies to consider initiating a 'responsible exit' in consultation with the parallel government if a company finds that it cannot reasonably suspend financial support, including the payment of taxes, to the military after conducting a self-assessment of its business activities.[10]

The NUG's *Three-Pillar Framework Guiding Responsible Investment and Continued Operations*, the parallel government's primary policy framework first articulated in July 2021, states that its policies on responsible investment are aligned with the United Nations Guiding Principles on Business & Human Rights (UNGPs) and the OECD's Guidelines on Multinational Enterprises (OECD Guidelines), two of the most authoritative international standards governing responsible business conduct.[11] Yet, beyond stating that companies should aim to identify, prevent, mitigate and account for the adverse human rights impacts throughout their operations, neither the UNGPs or OECD Guidelines explicitly provide companies with guidance on responsible disengagement, nor do they suggest that the payment of taxes constitutes an adverse human rights impact under international law.[12]

Officially, the NUG's policies on responsible investment state that their primary aim is to "cripple the military council by limiting its access to all financial flows, including tax revenues, contractual payments, debt, and any type of financial aid, so as to degrade and destroy their machinery of oppression and control."[13] By calling on foreign companies that pay taxes to the military to cease their operations and exit the economy, the NUG's policies seem to be more aimed at waging an economic war against the junta – one that squeezes the Myanmar military of revenues and legitimacy.

TAXES AND RESPONSIBLE INVESTMENT

In April 2023, the activist group *Justice for Myanmar* (JFM) criticized ThaiBev, Carlsberg, and Heineken, three of the largest beer conglomerates operating in Myanmar, for paying tens of millions of dollars in tax revenues to the junta, known formally as the State Administration Council (SAC).[14] JFM and other civil society groups echoed the arguments of the NUG by stating that these companies continue to provide the SAC with a financial lifeline that aids and abets the human rights violations they commit against civilians across Myanmar. The decision of JFM to target the three beer companies over their tax payments reignited vigorous debate among policymakers and academics about whether the payment of taxes or other revenues to the junta actually constitutes a human rights violation under international law. It also raised

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questions about what extent companies should ultimately be responsible for reducing their tax payments to the junta.[15]

Most literature on the subject is focused on the fact that many forms of tax avoidance—and not tax payments—are a violation of international human rights law. Magdalena Sepúlveda Carmona, the former UN Special Rapporteur on extreme poverty and human rights, for example, argued in a 2014 report that businesses which purposefully avoided paying taxes to authorities may be in violation of their responsibility to respect human rights under Principle 13 of the UNGPs.[16] Although it must be noted that the situation in Myanmar is significantly complicated by the fact that the military's takeover is likely illegal under the country's 2008 Constitution, and the SAC is therefore an illegitimate government, there is simply no legal precedent by which tax payments to a *de facto* legal authority have constituted a human rights violation in the past.[17]

John Ruggie, the Harvard professor who was appointed by former UN Secretary General Kofi Annan to formulate the UNGPs, also did not believe that a company's presence in a country paying taxes made them complicit or legally liable for the human rights violations committed by the government who received the revenues.[18] In a 2008 report to the UN Human Rights Council, Ruggie noted that a company's "mere presence in a country, paying taxes, or silence in the face of abuse is unlikely to amount to the practical assistance required for legal liability."

Legality aside, however, the payment of at least some taxes to the military junta is currently the only viable means by which a company can safely operate within the Myanmar economy. Particularly, the threat of retaliation against a company and its workers for the non-payment of taxes to the junta remains a principal concern. In March 2021, after the Committee Representing the Pyidaungsu Hluttaw (CRPH) initiated a campaign to suspend the payment of all taxes across the country following the coup, the senior-most junta tax official said that Myanmar's tax office would "go after businesses and employers who don't levy taxes correctly on their customers or staff," clearly demonstrating the risk to foreign companies.[19] Even the NUG's own *Three Pillar Framework* on responsible investment states that companies must take the safety of its own employees into account when making investment decisions – recognizing the increasingly fraught tightrope companies must walk to both appease civil society and continue to safely operate.[20]

BALANCING MORALITY AND PRACTICALITY

The primary purpose of the divestment campaigns waged against foreign companies by the NUG and others within civil society has been to express disapproval of organizations with financial ties to the military and to apply social pressure on those that openly support the military regime. This approach, however, should not be replicated and broadly applied to companies and other commercial entities that merely pay taxes to the junta in accordance with local laws, and otherwise positively contribute to Myanmar society. If it can better emphasize the distinction between so-called 'good faith' actors attempting to operate responsibly with those that are complicit in or supportive of the military's activities, civil society can more effectively target and stigmatize organizations that maintain ties with the military, and actively work with those that make positive contributions to Myanmar society and its economy.

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Making this distinction is becoming increasingly important, because when a socially responsible investor withdraws, there is a possibility that another investor, unconcerned with ethical considerations, will seize the opportunity. When Telenor, a leading responsible business in Myanmar left the country in 2022, for example, a joint venture between M1, a Lebanese investment company with ties to military generals, and a Myanmar company acquired the company's assets. Another telecommunications firm, Ooredoo Myanmar, may have also been acquired by a subsidiary that maintains ties to former military generals with links to junta leaders.[21] Thus, as the above examples demonstrate, as long as economic incentives remain in place, companies that are not bound by social responsibility will be eager to capitalize on the departure of those that are.[22]

Creating a scarcity of foreign investment via social pressure will ultimately result in a weakened private sector, which in turn, will give way to the military's increasing share of control over the distribution of goods and services across Myanmar communities. Ordinary citizens, who rely on essential products and services, may eventually have no choice but to consume products produced directly by the military or its business affiliates due to the lack of viable alternatives circulating in the economy. Meanwhile, the lack of a robust private sector will also likely lead to the erosion of the middle class and a responsible civil society, both of which are critical for Myanmar's future development.

TOWARDS A NEW APPROACH TO RESPONSIBLE INVESTMENT

While it is by no means ideal for companies to be making tax payments to the military junta, the NUG's current approach of tagging all such payments as an 'irresponsible' business activity lacks nuance, and ultimately, is counterproductive. While one could argue that tax payments continue to finance the junta's reign of terror, it is clear that such payments pale in comparison to the level of harm that would be inflicted on ordinary people were companies be forced to exit the economy instead. Moreover, the SAC's increasingly aggressive crackdowns on companies that attempt to delay or otherwise refuse to make tax payments make it increasingly untenable for any company to abide by the NUG's policies in the future. Such considerations should compel the NUG to modify its current approach.

Going forward, the NUG may need to view tax payments made by companies to the military junta as a necessary evil, while at the same time actively work with these companies to set guardrails and reduce their effective tax burden. Rather than advocate for companies to completely withdraw, for example, the NUG could request companies to inform them of whether certain tax payments made to the military were done 'under protest', and to provide evidence that demonstrates other ways in which the company may be actively working to reduce their financial flows to the SAC. This approach would be consistent with international standards such as the UNGPs, which state that in cases where laws may require companies to take actions contrary to their responsibility to respect human rights, they should aim to "respect the principles of the greatest extent possible in the circumstances … and be able to demonstrate their efforts (Principle 23)."[23]

By removing tax payments as an 'irresponsible' business activity and providing a pathway by which companies can actively engage with the NUG without fear of reputational or operational damage to their business, the NUG can more effectively promote responsible investment, bring

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their policies in line with international standards, and help to ensure that companies still invested in Myanmar's economy continue to remain there.

CONCLUSION

While the NUG's policies on responsible investment may have made sense immediately following the coup as it sought to quickly cripple the ability of the junta to raise revenues, a new approach is now needed as the NUG's "defensive war" against the military enters its third year and Myanmar's economy continues to suffer. Standing strong after shattering the expectations of Western analysts who doomed the revolution to fail, the NUG has much to be proud of.[24] Yet, its leaders must also recognize that in order to sustain its revolution, the NUG must make a conscious effort to retain the companies already invested in Myanmar's economy. Currently, the NUG's *Three Pillar Framework* on responsible investment rightfully highlights that its Ministry of Planning, Finance, and Investment will not recognize new investments made by companies with the SAC following the February 2021 coup.[25] It does, however, acknowledge the legitimacy of pre-existing investments inked between companies and the previous civilian government. The very fact that the NUG's policies aim to restrict new inbound investment should prompt it to retain and actively engage with the companies still operating there, rather than attempt to force them out. Thus, as businesses inch toward a resumption of their operations, and ramp up their post-coup economic activity in Myanmar, the NUG might be wise to recognize that their presence in the economy is a net positive – even if they are occasionally forced to make tax payments to the military junta.

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ISSUE: 2023 No. 74
ISSN 2335-6677

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