



Decision to exclude Adani Ports and Special Economic Zone Limited

June 2021

Introduction

KLP and the KLP Funds (hereafter, "KLP") have decided to exclude Adani Ports and Special Economic Zone Limited (Adani). This due diligence-based divestment has been implemented on the grounds that Adani's operations in Myanmar and its business partnership with that country's armed forces constitutes an unacceptable risk of contributing to the violation of KLP's guidelines for responsible investment.

Adani is India's largest commercial port operator. It manages 12 ports in India, with logistics accounting for an important part of its business activity.¹ Adani has entered into a business partnership with the military-owned conglomerate Myanmar Economic Corporation (MEC) for the construction of a new container port in the city of Yangon.

KLP was invested in Adani at the time the company was excluded. Adani is listed on the Mumbai Stock Exchange.

Background

2.1 The situation in Myanmar

After several decades under a variety of military regimes, Myanmar adopted a new constitution in 2008, which established joint civilian and military rule. According to the new constitution, the armed forces (Tatmadaw) control the entire security apparatus, including the Ministry of Defence. The armed forces also hold 25 per cent of the seats in parliament, enough to block changes to the constitution. The armed forces are not subject to civilian oversight.

Violent conflicts between the military and armed groups have existed in Myanmar for many years. This has had extremely negative consequences for the civilian population. Most of the conflicts have taken place in the north and east of the country. Since 2012, there has also been conflict in the west of the country, which has impacted the Rohingya minority particularly hard. The Rohingya are a stateless people who are largely Muslim. Following allegations of atrocities against the civilian population in Myanmar, the UN

¹ <https://www.adaniports.com/About-us>

Human Rights Council established the Independent International Fact-Finding Mission on Myanmar (IFFMM) in April 2017.²

Shortly afterwards, in August 2017, the situation escalated. The armed forces initiated what they called “clearance operations” directed at the Rohingya, during the course of which thousands were killed and at least 700,000 Rohingya were driven from their homes. The IFFMM presented its final report to the Human Rights Council in September 2018³. The report describes systematic and extremely serious abuses, mass rape, serious violence against children and the torching of entire villages. With respect to the so-called “clearance operations”, the IFFMM writes:

The “clearance operations” constituted a human rights catastrophe. Thousands of Rohingya were killed or injured. Information collected by the mission suggests that the estimate of up to 10,000 deaths is a conservative one. Mass killings were perpetrated in Min Gyi (Tula Toli), Maung Nu, Chut Pyin and Gudar Pyin, and in villages in the Koe Tan Kauk village tract. In some cases, hundreds of people died. In both Min Gyi and Maung Nu, villagers were gathered together before the men and boys were separated and killed. In Min Gyi, women and girls were taken to nearby houses, gang raped, then killed or severely injured. Houses were locked and set on fire. Few survived.

The IFFMM concluded that the norm violations could constitute crimes against humanity and war crimes, and that there were indications of genocide. The abuses were perpetrated primarily by the armed forces, and the report names several high-ranking generals who the IFFMM believe should be investigated and prosecuted through the international judicial system. In January 2019, on the basis of the situation described in the IFFMM’s report, the UN General Assembly issued a strongly worded criticism of the armed forces’ abuse of the civilian population.⁴

The General Assembly (...) strongly condemns the grossly disproportionate response of the military and the security forces, deplors the serious deterioration of the security, human rights and humanitarian situation and the exodus of more than 723,000 Rohingya Muslims and other minorities to Bangladesh and the subsequent depopulation of northern Rakhine State, and calls upon the Myanmar authorities to ensure that those responsible for violations of international law, including human rights violations and abuses, are held accountable and removed from positions of power.

² UN Human Rights Council, *Situation of human rights in Myanmar*, 24 March 2017, p. 3, <https://undocs.org/A/HRC/res/34/22>.

³ UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, 12 September 2018, <https://undocs.org/en/A/HRC/39/64>.

⁴ UN General Assembly, *Situation of human rights in Myanmar*, 22 January 2019, p. 4 <https://undocs.org/en/A/RES/73/264>

Based on the information provided by the IFFMM, cases are now underway in both the International Court of Justice (ICJ) for breach of the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG),⁵ and the International Criminal Court (ICC) for crimes against humanity.⁶ In the ICJ, Myanmar argued that while there is no proof of intent to commit genocide, it could not rule out the possibility that the armed forces may have used disproportionate force and that it did not distinguish clearly between armed combatants and the civilian population.

Myanmar acknowledges that this could constitute a violation of international humanitarian law⁷. In October 2019, the leader of the IFFMM warned that there was still a considerable risk of renewed attacks on the civilian population in Myanmar⁸.

There is an ongoing armed conflict in the country. On 1 February, the armed forces in Myanmar overthrew the country's democratically elected government in a military coup.⁹ This occurred when the country's parliament was due to have its first working day after the elections that were held three months before. Instead of being sworn in, several elected legislators were arrested and placed under house arrest. Internet and phone connections were blocked in several parts of the country. Since the coup, numerous demonstrations have been held nationwide. Demonstrators have been met with brutal force by the security services. The armed forces' violent suppression of popular protest has resulted in hundreds being killed, including extra-judicial executions, and thousands being arrested with no real opportunity for a fair trial, tortured and injured.¹⁰ After the coup, the armed forces gave power to the army's commander-in-chief, Senior General Min Aung Hlaing. In 2019, he was sanctioned and barred from entering the USA on the grounds of abuses against the Rohingya minority, in which he is alleged to have played a decisive role.¹¹ The situation in the country remains extremely serious, with systematic

⁵ The International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, 2 January 2020
<https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

⁷ The International Criminal Court,

⁶ The International Criminal Court, *ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar*, 14 November 2019
<https://www.icc-cpi.int/Pages/item.aspx?name=pr1495..>

⁷ The International Court of Justice, 2020, p. 16.

⁸ UN High Commissioner for Human Rights, *UN Independent International Fact-Finding Mission on Myanmar calls on UN Member States to remain vigilant in the face of the continued threat of genocide*, 23 October 2019
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25197&LangID=E>.

⁹ <https://www.nytimes.com/article/myanmar-news-protests-coup.html>

¹⁰ <https://aappb.org/>

¹¹ [Public Designation, Due to Gross Violations of Human Rights, of Burmese Military Officials - United States Department of State](#)

human rights violations, including the brutal suppression of freedom of expression.¹² No solution to the conflict in the country is in sight. On the contrary, it is escalating.

The ongoing situation in Myanmar has been condemned by numerous countries, the UN Secretary-General, multilateral institutions, and civil society organisations. The UN Security Council, comprising 15 member states including Norway, passed a unanimous resolution condemning the use of violence.¹³ In response to the situation, a growing number of sanctions targeting senior military figures and entities affiliated with the armed forces have been imposed. This includes a freeze on the assets of both individuals and companies. On 25 March 2021, the Biden administration imposed sanctions on the military's two largest conglomerates: Myanmar Economic Holdings Public Company Limited (MEHL) and Myanmar Economic Corporation Limited (MEC).¹⁴ On 20 April, the EU followed suit.¹⁵ Several other countries, such as the UK, Canada, Australia and New Zealand have implemented similar sanctions.¹⁶

2.1 The Myanmar armed forces' economic interests

At the request of the UN Human Rights Council, the IFFMM submitted several follow-up reports in August and September 2019, including a report on the Myanmar armed forces' economic interests.¹⁷ This report states that the Tatmadaw's two most important holding companies, Myanmar Economic Corporation (MEC) and Myanmar Economic Holdings Limited (MEHL), own at least 120 businesses in the construction and property sectors.

In the report, the IFFMM writes: "*MEC is reportedly fully owned and controlled by the Ministry of Defence and, as such, is a direct source of revenue for the military*" (...)*Today, MEC is a holding company with businesses in the mining, manufacturing,*

<https://www.state.gov/designating-officials-and-military-units-in-response-to-escalating-violence-in-burma/>

¹² <https://www.reuters.com/world/asia-pacific/myanmar-military-fails-quiet-protests-four-months-after-coup-2021-06-01/>

¹³ <https://news.un.org/en/story/2021/03/1086962>

¹⁴ [Treasury Sanctions Military Holding Companies in Burma | U.S. Department of the Treasury](#)

¹⁵ [Myanmar/Burma: EU imposes sanctions on 10 individuals and two military-controlled companies over the February military coup and subsequent repression - Consilium \(europa.eu\)](#)

¹⁶ [UK sanctions major military business interests in further measures against Myanmar military regime - GOV.UK \(www.gov.uk\)](#)

¹⁷ UN Human Rights Council, The economic interests of the Myanmar military - Independent International Fact-Finding Mission on Myanmar, 5 August 2019, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf

and telecommunications sectors, as well as companies that supply natural resources to the Tatmadaw, and operate factories producing goods for use by the Tatmadaw”.

It is also stated that: *“Current and former high-ranking Tatmadaw officials, including those accused of some of the gravest crimes under international law, have apparent significant control and influence over the two holding companies and therefore over their subsidiaries”*.¹⁸ Senior General Min Aung Hlaing is mentioned explicitly as one of these military leaders.

The report also provides a list of companies which have business partnerships with the military conglomerate MEC, including Adani.¹⁹ In the report “Port of Complicity”, the voluntary organisations Australian Centre for International Justice (ACIJ) and Justice For Myanmar (JFM) have published details of the collaboration between Adani and MEC. These details are based on leaked documents.²⁰

With regard to the foreign companies that have such business partnerships, the IFFMM concludes as follows: *Through such joint venture and commercial relationships, the Mission finds that any foreign business activity involving the Tatmadaw and its conglomerates MEHL and MEC poses a high risk of contributing to, or being linked to, violations of international human rights law and international humanitarian law. At a minimum, these foreign companies are contributing to supporting the Tatmadaw’s financial capacity*²¹.

Furthermore, the IFFMM issued an urgent call to terminate all economic cooperation with the Myanmar armed forces: *“No business enterprise active in Myanmar or trading with or investing in businesses in Myanmar should enter into a business relationship of any kind with the security forces of Myanmar, in particular the Tatmadaw, or any enterprise owned or controlled by them, including subsidiaries, or their individual members.”*²²

The IFFMM underlines that trade and commercial activity are positive for Myanmar, but that it should be undertaken without cooperation with the military conglomerates.

Adani’s links to MEC

In May 2019, Adani signed a development, operating and transfer agreement with MEC. The agreement entails the construction of the country’s largest commercial container

¹⁸ UN Human Rights Council, 5 August 2019, pp. 19–21

¹⁹ UN Human Rights Council, 5 August 2019, p. 52

²⁰ [Port-of-Complicity-Report-FINAL-High-Resolution.pdf \(acij.org.au\)](https://www.acij.org.au/Port-of-Complicity-Report-FINAL-High-Resolution.pdf)

²¹ UN Human Rights Council, 5 August 2019, p. 5

²² UN Human Rights Council, 5 August 2019, p. 6



port Ahlone International Port Terminal 2.353 in the city of Yangon. This port is being built on land owned by the armed forces, which has been leased from MEC for a period of 50 years. Adani has committed to investing USD 290 in the project, in addition to an annual payment to MEC to lease the site. According to Adani, the leasing fee has already been paid in full.²³ On the other hand, the IFFMM also states that it has failed to discover the origins of MEC's ownership of the land the port is being built on.

The armed forces currently own three commercial ports in Yangon, which are all, for the moment, in operation. The first phase of Adani's port is scheduled for completion in 2021. When completely developed, the port will cover an area of 5 hectares (approx. 12 acres). Its dock will be 635 metres long and will be able to handle three vessels at a time.²⁴ USD 30 million has been paid in leasing fees, plus a further USD 22 million in "land clearance charges".²⁵ On its website, Adani has referred to media coverage stating that the land is owned by MEC.²⁶

The IFFM's report states that: *"These examples raise serious concerns that foreign companies are leasing MEHL, MEC or Tatmadaw-owned property for significant sums, without facing due scrutiny as to how their payments are benefitting the Tatmadaw."*

Following publication of the Port of Complicity report in March 2021, Adani issued a public statement on its website. According to this statement, the port agreement was "facilitated by Myanmar Investment Commission". It also said that the company would "engage with the relevant authorities", and that it intends "to contribute towards the nation's economic and social development goals".²⁷

Subsequent to this, Adani was also removed from the S&P Dow Jones Sustainability Indices due to the company's "commercial relationship with Myanmar's military".²⁸

Information from the company

KLP has engaged in written communication with the company about the agreement in Myanmar since March 2021. In April, a meeting between KLP and the company's management was also held. Adani declared that the company takes human rights

²³ UN Human Rights Council, 5. August 2019, p. 52, [Port-of-Complicity-Report-FINAL-High-Resolution.pdf](#) p. 12

²⁴ [Port-of-Complicity-Report-FINAL-High-Resolution.pdf](#) p.12

²⁵ [Port-of-Complicity-Report-FINAL-High-Resolution.pdf](#) p.15

²⁶ Times of India, 'Adani to Develop Container Terminal Port in Myanmar' (15 May 2019).

²⁷ [Media Statement from Adani Group on Myanmar Situation \(adaniports.com\)](#).

²⁸ https://www.spglobal.com/spdji/en/documents/indexnews/announcements/20210412-1355163/1355163_djsi-adani-20210412.pdf



seriously, and that it has a human rights policy.²⁹ Adani maintained that its agreement was with Myanmar Investment Commission, and that they had won the contract after a global tender competition. The company considered this agreement to be a major commercial opportunity, but also wanted to contribute towards economic development in Myanmar. Moreover, the company had fulfilled all its financial obligations under the agreement and there would be no further financial transactions, even though the agreement has a term of 50 years. The company emphasised this point several times during the meeting.

The company confirmed that no due diligence assessments relating to human rights were performed before the agreement was entered into.

The company also confirmed that the port will be used for commercial purposes, and that this was expressly regulated by the agreement. On the other hand, the company could not rule out the possibility that the armed forces might issue orders for it to be used for military equipment, for example, given the authority they have in the country. However, the actual agreement could not be shared with KLP on commercial grounds.

The company disclosed that it takes this matter seriously after MEC was sanctioned by the US Department of the Treasury's Office of Foreign Assets Control (OFAC) on 25 March 2021.³⁰ The company has significant financial interests in the USA, and is therefore keen to assess whether its agreement in Myanmar could be encompassed by the OFAC's sanction. For this reason, Adani obtained a legal opinion from a US law firm in April, which concluded that the risk was considered low. This assessment was shared with KLP, but only for KLP's use in-house. At the same time, Adani was recommended to send a query to the OFAC to clarify the situation. The company stated that such a query would be sent and has confirmed in subsequent communications that it is in the process of doing so. If the OFAC confirms that Adani's operations in Myanmar may be covered by sanctions, the company will terminate the agreement relating to the port in Yangon with immediate effect, since its impact on access to capital in the USA would render it commercially untenable.

At the same time, the company said it found it hard to see that a commercial partnership could contribute to human rights violations. The company had no comments on the abuses the armed forces in Myanmar have perpetrated, but said they were keeping abreast of the ongoing situation following the military coup. Furthermore, the company

²⁹ <https://www.adaniports.com/-/media/Project/Ports/Investor/corporate-governance/Policies/Human-Rights-Guidelines---APSEZ.pdf>

³⁰ <https://home.treasury.gov/news/press-releases/jy0078>



considered that, in general, any national armed forces would have many business partnerships.

KLP's assessment

It follows from KLP's Guidelines for Responsible Investment that: "*KLP shall conduct due diligence in its investments and can decide due diligence-based divestments from companies if there is an unacceptable risk to contribute to complicity with KLP's guidelines based on a combination of country, sector or company risk.*"

KLP has assessed whether Adani, through its business partnership with MEC, could constitute an unacceptable risk of violating KLP's guidelines, including contributing to serious violations of the rights of individuals in situations of war and conflict.

1. Country risk

It is clear that there is an ongoing armed conflict in Myanmar, and that there could be a risk of civil war breaking out. Abuses perpetrated on the civilian population in connection with the military coup constitute an unacceptable and serious threat, whose scope could increase. In addition, the atrocities perpetrated against the Rohingya people by the Myanmar armed forces, such as mass killings, sexual violence and torture, continue. It is well documented that these constitute serious violations of humanitarian law and human rights. Given the seriousness and the scope of the norm violations, the parties responsible are under investigation for crimes against humanity and genocide. The IFFMM's reports emphasise that the risk of future norm violations is high, since there is a considerable risk of new abuses being perpetrated by the armed forces. The military coup has once again confirmed that the armed forces are capable of using arbitrary and disproportionate force against portions of the civilian population, with respect for fundamental human rights being completely ignored. Although the international community has condemned the abuses, the situation continues without any prospect of a speedy resolution in sight.

2. Sectoral risk

The agreement entails the construction of the country's largest port, a massive infrastructure project. The port is being built in a city where the armed forces already own three commercial ports. It is, moreover, being built on land owned by the armed forces, which means the military has good control over all activities undertaken there. Adani itself admits that the highest risk it faces is to ensure that illegal goods are not transported into the country via the port. Furthermore, Adani has admitted that if the armed forces were to decide to use the port for military purposes, the company would not be able to prevent it, nor are there any mechanisms that would enable it to do so.



There is an imminent danger that the armed forces could use the port to import weapons and equipment, or as a naval base. This equipment plays a crucial role in the attacks carried out by the armed forces. In this way, the port could be used by the army to continue its violations of human rights. These factors show that the company is operating in a business sector where there is a high risk of contributing to human rights abuses.

3. Company risk

In order for a company to be deemed to be contributing to serious infringements of the rights of the individual in situations of war or conflict and other human rights abuses, there should be a link between them and the company's operations. The company must either have actively contributed to the abuses or known about them but failed to take the necessary steps to avoid contributing to them. The risk that the company's practices will continue in the future forms an important part of the assessment.

As previously mentioned, the IFFMM has determined that a business partnership with MEC could constitute a high risk of contributing to the violation of international humanitarian law and human rights abuses.

At the same time, it is important to point out that not all unethical acts perpetrated by a business partner will constitute grounds for complicity. This will rest on a specific assessment, in which the extent of the company's links to the abuses, their scope and seriousness will be important factors.

When Adani signed the agreement, information about the armed forces' abuses was publicly available. This should have given Adani reasonable grounds to act with particular prudence with respect to MEC, which owned the land. The company must exercise particular care when it operates in locations where there is war or conflict. Nor has the company adequately performed the necessary human rights due diligence assessments. There are reasonable grounds to suspect that the company puts commercial considerations before the risk to human rights. The agreement's potential termination was conditional on the financial consequences following from sanctions imposed by the OFAK, and not on the behaviour of the armed forces.

Even though no further financial transactions are carried out, the agreement is valid for a term of 50 years, which means that the risk of contributing to future violations does exist. In addition, the agreement's object concerns a permanent and important piece of infrastructure, which may be used beyond the term of the agreement. In KLP's view, the company has failed to take such steps with respect to the agreement as would constitute due diligence but has instead continued its business partnership with MEC. Adani has therefore not acted with sufficient prudence in its choice of business partner in a country where there has been an ongoing conflict, involving systematic and extremely serious abuses that affect a very large number of people, for many years.



Conclusion

On the basis of the above assessment, Adani Ports and Special Economic Zone Limited has been excluded from investment by KLP and the KLP Funds with effect from June 2021.