

To: UN Working Group on Business and Human Rights

From: [Katherine McDonnell](#), Just Ground; [Ben Hardman](#), EarthRights International

Re: Input on the Working Group's report on development finance institutions (DFIs) and human rights

Date: March 3, 2023

This submission is informed by EarthRights International's work supporting communities impacted by the Thilawa Special Economic Zone (TSEZ), a project funded by the Japan International Cooperation Agency (JICA).

DFIS' RESPONSIBILITY TO RESPECT HUMAN RIGHTS

1. Are you aware of any DFIs that have existing human rights, sustainability, or environmental and social (E&S) policies? If so, how effectively do they integrate a commitment to respect human rights, as per the UNGPs?

JICA adopted Guidelines for Environmental and Social Considerations in 2010 and issued [revised Guidelines](#) in 2022. The updated Guidelines are deficient in several respects, including, but not limited to:

- When a project will lead to negative impacts that cannot be avoided or mitigated, the Guidelines do not explicitly require compensation, but instead state, "compensation measures must be examined" when significant impacts remain.
- For projects that impact indigenous peoples, the Guidelines state, "efforts must be made" to obtain their Free, Prior, and Informed Consent (FPIC), but do not explicitly require FPIC for the project to proceed.
- The Guidelines frequently use language that could be construed as merely precatory, for example stating that JICA "encourages" project proponents to consult with local stakeholders.
- The Guidelines state that JICA seeks to "reach a consensus" on environmental and social considerations, which fails to consider how power imbalances can undermine true consensus and force impacted people to accept outcomes that are not rights-compatible.
- Additional shortcomings related to the JICA Guidelines and their Objections Procedures are noted further in the Access to Remedy section, below.

5. Can you provide insight into how and to what extent DFIs practice human rights due diligence (HRDD) or environmental and human rights impact assessment prior to, as well as during and after, their investments?

As documented in [EarthRights' 2019 comments to JICA's review of its Guidelines \(pp A10-A14\)](#), although JICA's 2010 Guidelines included requirements for EIAs and involuntary resettlement, these were not followed in relation to the Thilawa Special Economic Zone (TSEZ). The comments describe: 1) inadequate analysis of human rights, environmental and social considerations; 2) failure to provide timely support and adequate compensation to the resettled community; 3) failure to ensure that affected persons were provided with adequate information to participate in decision making; and 4) failure to hold project stakeholders accountable. Regarding 4), JICA consistently deferred to national laws and mechanisms that fall far short of international standards as a basis for dismissing human rights impacts.

Following the coup that began in Myanmar on 1 February 2021, a JICA-funded project obtained exemptions to sanctions, enabling it to [make payments](#) to military-controlled entities, thereby funding military atrocities.

6. How can the above-mentioned processes ensure meaningful participation of impacted communities, particularly marginalized groups and individuals in the most vulnerable situations?

The JICA [Guidelines](#) require significant improvement in light of how their processes failed to ensure meaningful participation in Thilawa. For example:

- The space where engagement takes place must be safe. Impacted community members must not fear intimidation or reprisals for their participation, particularly for raising questions or concerns.
- When reprisals occur, JICA must take relevant action against the party responsible.
- Concerns raised directly to JICA regarding the conduct of its technical support teams and/or clients must be taken seriously and addressed.
- There must be special attention to and accommodations for the needs of marginalized groups.
- Information regarding the project and consultations must be shared with the impacted communities with adequate time to review materials and make arrangements to attend.
- Materials should be available in the language of all impacted communities, particularly when there are linguistic minority communities who may not read or speak the main language.
- Engagement must be understood to mean more than just letting impacted communities speak. Meaningful engagement involves active listening, taking

questions and concerns seriously and ensuring that participants can contribute to decision making on the matter.

7. In your view, to what extent do DFIs impose human rights requirements on clients as a condition of financing? And are you aware of any DFI that provides technical assistance or other support to help clients become more sustainable and compliant with the UNGPs?

As noted above, JICA's [Guidelines](#) fail to implement human rights standards, and do not explicitly make compliance a condition of project funding. EarthRights has [issued a report](#) documenting how JICA failed to ensure that project stakeholders followed its 2010 Guidelines in the development of the TSEZ, resulting in significant harm to Thilawa communities. Despite the ongoing human rights impacts of the project, JICA has [publicly referred](#) to the “miracles” of the TSEZ based on its economic value, without reference to human rights. Similarly, its [review](#) of its implementation of the Guidelines made only cursory references to the project. This signals that human rights issues are not treated with priority.

For the TSEZ, [JICA provided technical assistance through a “JICA expert team” \(JET\)](#), who conducted activities ranging from drafting EIAs and Resettlement Work Plans to assisting with the Income Restoration Plan and overseeing the development of a complaints procedure. Both the content of these materials and the community engagement around them fell very short of alignment with the UNGPs. Thus, the technical assistance provided by JICA appeared to be more focused on pushing the project forward than compliance with the UNGPs.

JET's involvement also contributed to an ongoing lack of clarity around roles and responsibilities of the actors involved in the TSEZ. JET was often the most present project stakeholder, but responded to community demands by stating it had no authority or that issues were outside its remit. This made it confusing for others to know if and how to engage with them. The issue was exacerbated by JET's dismissive attitude towards community members.

ACCESS TO REMEDY

1. Are you aware of any cases submitted to judicial and/or non-judicial mechanisms (e.g., NHRIs, NCPs, etc.) regarding human rights abuses involving DFIs?

For impacts arising from the TSEZ, cases submitted include:

- An [unsuccessful complaint to JICA's Objections Procedure](#) in June 2014.

- [Complaints submitted through an Interim Joint Problem-Solving Mechanism](#) proposed by community members and negotiated by members of a Multi-Stakeholder Dialogue Group (MSAG) in 2015 and 2016. However, no action was taken on those complaints, and shortly thereafter the MSAG disbanded.
- Complaints submitted through the Thilawa Complaints Management Process ([TCMP](#)), a complaints mechanism developed by JET and launched in late 2017, seemingly to negate community efforts to operationalise a community-driven OGM (CD-OGM) (discussed in more detail below).
- Various legal claims related to the TSEZ were also filed, but the Myanmar legal framework on land rights and its legal system both fall far short of international human rights standards.

2. What is your experience engaging with avenues available to victims to bring complaints, including through grievance mechanisms, to hold DFIs accountable for human rights abuses linked to investment-related projects?

Looking at Thilawa, JICA failed to ensure access to remedy and impeded community-led efforts to put in place an effective operational-level mechanism. [Initial engagement efforts with JICA were unwelcome](#), as were [efforts to engage with other project proponents](#). As a result, community members filed a [complaint through JICA's Objections Procedure](#).

The Objections Procedure was wholly ineffective, with the JICA examiner [failing](#) to acknowledge the harms or non-compliance and providing no remedy. EarthRights International set out the examiner's failings in [a 2014 response](#) as did [the complainants](#) and [Mekong Watch](#). This included JICA's effective endorsement of widespread military-era land seizures.

In addition JICA's [updated Objections Procedures](#), also have numerous shortcomings, including, but not limited to:

- Their objective is, "To facilitate consensual dialogues between the parties concerned for the prompt resolution of disputes", which, as noted above, fails to consider how power imbalances may lead to outcomes that are not rights-compatible.
- They state that a complaint "must be submitted by two or more" project-affected people, and only allow representatives to submit complaints, "If it is unavoidable in view of the particular circumstances of the region in question."
- They require that JICA's Examiners, who handle complaints, and the JICA operational departments responsible for projects "must endeavor" to share information on the complaint procedure, but do not explicitly require that

potential complainants be informed regarding measures to ensure their confidentiality.

- While they contain provisions protecting the identity of complainants, they also require that complainants first attempt to engage with project proponents and the JICA Operational Department responsible for the project, which likely means that complainants can be identified based solely on the nature of their complaint, which may discourage would-be complainants.
- The JICA Examiners have the final word on whether to accept a complaint and on whether JICA has complied with the Guidelines. Complainants can submit an opinion in response to these decisions, but Examiners need only “faithfully consider” or “pay due respect” to those opinions.

3. What measures and/or mechanisms exist to ensure access to effective remedy when DFI-supported projects are associated with adverse impacts on communities and the environment? What measures and/or mechanisms should be in place?

As noted above, JICA’s Objections Procedures are ineffective. In 2019, EarthRights made [submissions](#) as part of JICA’s review of its guidelines. This highlighted that 5 years after the findings of the JICA examiner were released, the issues facing communities had not been addressed (as set out in question 5 above).

Significant shortcomings regarding access to remedy remain in JICA’s revised [Guidelines](#), including, but not limited to:

- They require that project proponents establish a grievance mechanism but provide vague, general language that the mechanism must be accessible, information about it made available through consultations with local stakeholders, and that it should not put complainants at a “disadvantage.” There is no reference to the UNGPs’ effectiveness criteria for OGMs, nor any prohibition of retaliation or reprisals.
- They merely state that project proponents “should make efforts” to: respond promptly to grievances, make monitoring results available to local stakeholders, and reach agreement on procedures to solve problems.

4. Are you aware of any operational-level grievance mechanisms established by DFIs to address human rights concerns related to their investment? If so, are these mechanisms effective in terms of process and remedial outcomes?

Operational-level grievance mechanisms are often designed and imposed on affected communities without consultation and are ineffective as a result. In Thilawa, JICA effectively obstructed the establishment of a community-led operational-level

grievance mechanism for the TSEZ, instead assisting the project proponent in imposing a deficient mechanism on the impacted communities.

As noted above (Questions 1 and 2), communities affected by the TSEZ filed a complaint with JICA's Objections Procedure in 2014. One outcome was that [a multi-stakeholder dialogue \(MSAG\) group was established](#).

At the same time, impacted community members were also advocating for community-driven OGM (CD-OGM), designed by them to meet their needs and ensure access to remedy in Thilawa. Community representatives and EarthRights International discussed the CD-OGM with JICA representatives on many occasions between 2015 and 2018. The CD-OGM was included in the presentations by community leaders at the [2015](#) and [2017](#) UN Forum, where representatives from JICA and its Expert Team (JET) either presented or were in attendance. [A draft of the proposed CD-OGM](#) was shared with JICA and the other project proponents in late 2016, and throughout 2017 community leaders sought feedback from JICA and others, with the hopes of coming to an agreement on a final version.

The CD-OGM was also discussed in the MSAG, and prompted the negotiation of an [Interim Joint Problem-Solving Mechanism was negotiated](#). Once community members sought to use the Mechanism, the MSAG did not meet again and the Mechanism was never fully operationalized.

In addition, [a subsequent evaluation report of the MSAG](#) trivialized the severity of the harms by: emphasizing "interest-based" negotiations, making no mention of human rights, and chastising rights holders for demanding remedy. Specifically, it failed to recognize companies' responsibility to respect human rights and provide remedy, and merely recommended that "companies should be encouraged to act within the law and in respect of international standards concerning their socio-economic and environmental actions." It also did not address that remedy that had still not been provided and instead noted that "[c]ommunities need to become self-reliant - in economic, social and infrastructural terms."

After the dissolution of the MSAG, project stakeholders and JET organized a new multi-stakeholder dialogue space, excluding key community actors who had been involved in the CD-OGM process and in the MSAG.

Rather than engaging with the communities efforts to design a CD-OGM, in 2017 the project proponents, with JET support, instead commissioned the design the [Thilawa Complaints Management Procedure \(TCMP\)](#). Those involved in the CD-OGM advocacy were excluded from this process. The community and EarthRights

International only learned about the TCMP shortly before it was made public at the 2017 UN Forum.

While the TCMP was not formally established by JICA, JET oversaw its development. As outlined in the critique by [EarthRights International](#) and the letter written by [the community leaders who led the design of the CD-OGM](#), the TCMP is ineffective in terms of process and outcomes. Community members sought to better align it with the proposed CD-OGM. In response, in February 2018, JET [indicated](#) that the TCMP would be developed with input from the impacted community. However, the project stakeholders continued to exclude the community leaders, despite their continued engagement efforts.

In 2018 and 2019, EarthRights procured an external expert on dispute resolution and company- community engagement to meet with stakeholders and review the CD-OGM and TCMP. The expert recommended that JICA and the other project stakeholders engage with the community leaders for a re-designed mechanism that suited all parties, but they refused to do so.

5. What are the most significant challenges observed with regard to ensuring access to effective remedy for victims of human rights abuses affected by DFI-funded projects?

Taking Thilawa as an example, numerous challenges can be identified, including, but not limited to:

- Reliance on national laws and processes that do not meet international standards.
- DFI Guidelines that do not meet international standards.
- Limiting the scope of available remedies, for example, by refusing to address land confiscation issues, or other central concerns of impacted communities.
- Lack of clarity around the responsibilities of the different project actors, who may seek to evade responsibility by blaming others.
- Lack of consequences for non-compliance with investor guidelines, which leads to trust deficits in the community and undermines engagement.
- Refusal by DFIs to exercise influence over project actors to ensure proper due diligence and access to remedy when that due diligence fails.
- Funders and project proponents' tendency to distort the purpose of remedy, by treating it as CSR or a gift rather than a human rights obligation.
- Failure by DFIs to ensure that their staff and technical consultants carry out their duties in a rights-respecting manner.
- Bad faith, or a lack of sincerity on the part of funders or project proponents, along with dismissive attitudes to problems shared by the community.

Any other comments or suggestions about the forthcoming report are also welcome.

DFI's must:

- Have guidelines/procedures that comply with international human rights standards;
- Make funding conditional on clients' compliance with such guidelines;
- Have independent mechanisms that can assess whether DFI's have taken necessary steps to enforce compliance and that can make binding awards where DFIs have failed to do so.

Specifically regarding OGMs:

- Clients must be required by guidelines and loan agreements to have adequate OGMs as a condition for project funding.
- Adequate access to remedy must be defined by standards acceptable to the impacted community, which must also have the right to design the OGM themselves or in collaboration with the client.