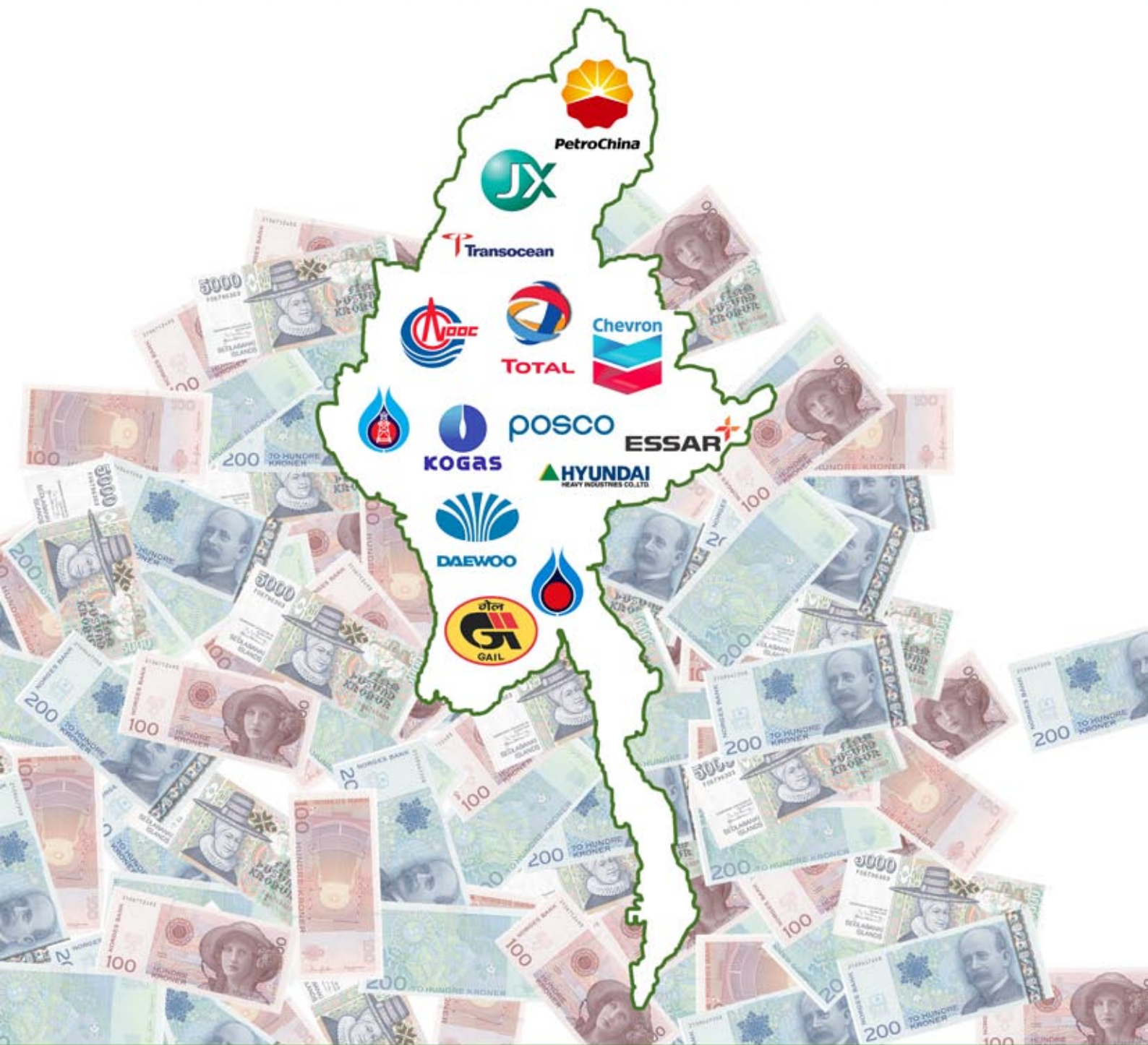


BROKEN ETHICS

The Norwegian Government's Investments in Oil and Gas Companies Operating in Burma (Myanmar)



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A Report by EarthRights International, December 2010



Research, Writing, and Production Team

Matthew Smith, Naing Htoo, Zaw Zaw, Shauna Curphey, Paul Donowitz, Brad Weikel, Ross Dana Flynn, and Anonymous Field Teams.

About EarthRights International (ERI)

EarthRights International is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as “earth rights.” We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, ERI seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in the communities where we work.

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Most importantly, EarthRights International acknowledges the people of Burma. Many individuals from the country took great risks to offer their testimony or provide insight into Burma’s oil and gas sector, for no reward other than participating in the truth-telling process. Their names and other identifying information have been kept confidential for their own safety, but, in time, respect for human rights and the environment in Burma will be theirs.

Southeast Asia Office
P.O. Box 123
Chiang Mai University
Chiang Mai, Thailand
50202
Tel: +66.1.531.1256
infoasia@earthrights.org

U.S. Office
1612 K Street NW, Suite 401
Washington, D.C.
20006
Tel: +1.202.466.5188
Fax: +1.202.466.5189
infousa@earthrights.org

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Executive Summary

In 1990, the Norwegian government created the Norwegian Petroleum Fund, later renamed the Pension Fund-Global (the Fund), as a repository of the Norwegian people's substantial oil and gas wealth that would be invested in global capital markets. In 2002, the government appointed a committee to examine the ethics of the Fund's investments, which resulted in the creation of the Ethical Guidelines (the Guidelines), which are a set of rules to determine whether the Fund's holdings in companies meet certain ethical standards.¹ In 2004, the Norwegian Council on Ethics (the Council) was formed as an independent body to assess whether the Fund's investments were in line with the Guidelines.²

In considering compliance with the Guidelines, the Council first determines whether there is a connection between a company's operations and violations of human rights, environmental, or other ethical standards.³ If the necessary connection exists, then the Council considers whether there is an unacceptable risk that the company's operations – and thus also the Fund – will contribute to ongoing or future violations.⁴ If these criteria are met, the Council may recommend that the Norwegian Ministry of Finance either exclude the company from the Fund or put it under observation. Based on the Council's recommendation, the Ministry of Finance has the authority to avail itself of at least three options: exclude the company from the Fund, put it under observation, or recommend active ownership in the company through Norges Bank Investment Management (NBIM), which is a department in Norway's central bank. Norges Bank Investment Management manages the Fund under the supervision of the Ministry of Finance.⁵

1 Council on Ethics for the Government Pension Fund Global (hereinafter Council on Ethics), *Preparatory Work*, at www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/History/Preparatory-work.html?id=446890 (last visited Nov. 24, 2010).

2 Council on Ethics, *History*, at www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/History.html?id=445813 (last visited Oct. 26, 2010).

3 Norwegian Ministry of Finance, Guidelines for Observation and Exclusion from the Government Pension Fund Global's Investment Universe, § 2(3) (2010), available at www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277 (hereinafter Ethical Guidelines).

4 *Id.*

5 Norges Bank, *Investment Management*, at www.norges-bank.no/

The Fund's investments in companies operating in Burma (Myanmar) have been an area of particular attention for the Council and the Norwegian Ministry of Finance. In a 2005 response to a request by the Ministry of Finance,⁶ the Council published its recommendation against excluding the French energy company Total from the Fund for complicity in human rights abuses associated with its Yadana gas project in Southern Burma. In 2007, again by request of the Ministry of Finance, the Council considered whether investments in Burma *per se* constituted grounds for exclusion from the Fund.⁷ Taken together, the Council's assessments set forth its reasoning and standards when looking at projects in Burma's energy sector.

This report analyzes whether the Fund's investments in 15 companies involved in Burma's oil and gas sector are in line with the Ethical Guidelines and the Council's standards for investment, and whether the companies should be subjected to the Council's recommendation for observation or exclusion from the Fund.

This report provides evidence linking the oil companies Total S.A. (France), Chevron Corporation (U.S.), PTT Exploration and Production Company (PTTEP) (Thailand), the Petroleum Authority of Thailand (PTT), and JX Holdings, Inc. (formerly Nippon Oil Corp.) (Japan) with serious, ongoing human rights abuses in connection with the operation and maintenance of the Yadana and Yetagun natural gas pipelines in Burma. The Fund has a cumulative USD \$3.7 billion invested in these companies.

This report also reveals that the Norwegian Fund has a cumulative USD \$457 million invested in companies participating in the controversial Shwe gas and oil transport

[templates/section____76816.aspx](http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/templates/section____76816.aspx) (last visited Nov. 16, 2010).

6 Council on Ethics, Recommendation of 14 November 2005 concerning whether investments in Total, due to the company's operations in Burma, are contrary to the Petroleum Fund's ethical guidelines (unofficial English translation) available at www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/recommendations-on-human-rights.html?id=614303 (hereinafter Total Assessment).

7 Council on Ethics, Letter dated October 11, 2007, on the Council's assessment of companies with operations in Burma, (unofficial English translation) available at www.regjeringen.no/pages/2018769/Burma%20letter%20english.pdf (hereinafter Burma Assessment).

pipeline projects that extend from Burma to the China border, including Daewoo International (South Korea), POSCO (South Korea), Korea Gas Corp. (South Korea), GAIL of India, Ltd. (GAIL) (India), Hyundai Heavy Industries (South Korea), PetroChina (China), and Kunlun Energy Co. Ltd. (formerly CNPC Hong Kong Ltd.)(China). This report links these companies to current human rights abuses and an unreasonably high likelihood of future abuses associated with the projects. Documented abuses to date include violations of property rights through uncompensated land confiscation, and violations of civil and political rights through the military regime's persecution of local people suspected of opposing the projects. As this report shows, the Burmese Army (*Tatmadaw*) has committed these abuses on behalf of the companies' interests and investments.

Apart from direct human rights impacts, the Shwe gas and oil transport pipelines appear to be exacerbating rising ethnic tensions in Burma's contested borderlands, specifically in the ethnically diverse territories of Shan State. Pipeline construction will proceed through areas where several non-state ethnic armies are currently bracing for attacks from the Burmese military regime. In some cases, renewed fighting will end decades-long ceasefire agreements and risk more severe and widespread pipeline-related abuses.

Moreover, the Shwe gas consortium and several other companies in the Fund are engaged in onshore infrastructure construction in Burma, an activity that the Council determined poses an unreasonably high risk of leading to human rights violations. The Council designated new onshore construction in the country as grounds *in and of itself* for exclusion from the Fund. In a letter to the Norwegian Ministry of Finance in 2007, the Council stated that a company's plans for construction of onshore oil and gas infrastructure in Burma would alone be a sufficient ground for exclusion from the Fund, due to the significant risk of human rights abuses.⁸ This report documents how the companies involved in the Shwe gas and oil transport projects have already undertaken substantial offshore infrastructure development and have begun onshore construction activities – all with adverse human rights impacts.

Other companies detailed in this report that are involved in new or imminent oil and gas infrastructure construction in Burma include PTTEP (Thailand), China National Offshore Oil Company Ltd. (CNOOC) (China), and Essar Oil Ltd. (India). Another company of special ethical concern for its involvement in Burma is Transocean Ltd. (Switzerland), the offshore drilling company for the Shwe project and other natural gas projects in Burma.

This report also assesses the ethics of investing in oil and gas companies that generate sustaining revenues for a highly repressive regime, such as that in Burma, and the degree to which the Council factors such financial support into its ethical assessments of the Fund's holdings. Compared to companies in other sectors, many of the oil and gas companies named in this report provide extraordinary payments to the Burmese military regime through natural gas sales, signing bonuses, taxes, fees, tariffs, barter payments, and other categories that

collectively account for over 70% of all of Burma's foreign exchange reserves.⁹

In 2009, EarthRights International exposed that Burma's military regime keeps the country's gas revenues in accounts in offshore banks in Singapore – among other countries – and that significant portions of this revenue end up in bank accounts held for the benefit of individuals closely associated with the military regime.¹⁰ There is no evidence that this money ever enters Burma or in any way benefits the people of Burma.¹¹ According to a widely cited corruption index, Burma consistently ranks as the second most corrupt country in the world, tied in 2010 with Afghanistan and trailing only Somalia.¹² Unreasonably large military expenditures continue to undercut investments in social and health infrastructures, jeopardizing the country's future development.¹³ These gas payments also buffer the military rulers against economic sanctions imposed by the European Union, the United States, and other countries. EarthRights International maintains that the Council's assessments of the companies in this report must consider the impacts of the companies' uncritical financial support for the military regime in Burma.

Overall, this report finds that the Norwegian people, through their government's sovereign wealth fund, have USD \$4.7 billion invested in 15 companies – hailing from eight countries – involved in the oil and gas sector in Burma.

The Council on Ethics and the Ministry of Finance have already demonstrated a heightened interest in ensuring that Norway is not complicit in adverse human rights impacts through its holdings in companies that do business in Burma. EarthRights International therefore urges the Council on Ethics to uphold

9 International Monetary Fund (IMF), Staff Report for the 2008 Article IV Consultation, Jan. 7, 2009, at note 4. (Confidential report on file with EarthRights International) (hereinafter Article IV Consultation); *see also*, EARTHRIGHTS INTERNATIONAL, ENERGY INSECURITY: HOW TOTAL, CHEVRON, AND PTTEP CONTRIBUTE TO HUMAN RIGHTS VIOLATIONS, FINANCIAL SECRECY, AND NUCLEAR PROLIFERATION IN BURMA (MYANMAR), at 20 (July 2010) available at www.earthrights.org/publication/energy-insecurity-how-total-chevron-and-pttep-contribute-human-rights-violations-financi (hereinafter ENERGY INSECURITY) (explaining that the Yadana Gas Project, operated by Total, Chevron, PTTEP, and MOGE, has alone generated in excess of USD \$9 billion in gas sales to Thailand since 1998, over half of which went directly to the military junta).

10 EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT: THE HUMAN RIGHTS, ENVIRONMENTAL, AND FINANCIAL IMPACTS OF TOTAL AND CHEVRON'S YADANA GAS PROJECT IN MILITARY-RULED BURMA (MYANMAR), at 43 (Sept. 2009), available at www.earthrights.org/publication/total-impact-human-rights-environmental-and-financial-impacts-total-and-chevron-s-yadana (hereinafter TOTAL IMPACT).

11 *Id.* at 42-46; *see also* Sean Turnell, "Dissecting the Data: Burma's Macroeconomy at the Cusp of the 2010 'Elections.'" (unpublished manuscript) June 2010. On file with EarthRights International.

12 Transparency International, *Corruption Perception Index 2010 Results*, available at www.transparency.org/policy_research/surveys_indices/cpi/2010/results (last visited Nov. 27, 2010).

13 Samuel Blythe, *Troubling Times*, JANE'S DEFENSE WEEKLY, Nov. 10, 2010.

8 *Id.* at 3.

the integrity of the Ethical Guidelines and abide by its own procedures and guidelines regarding the Fund's holdings in companies operating in Burma. Unless it takes action to recommend exclusion or observation, Norway stands in violation of its Ethical Guidelines through its holdings in the following companies, listed in order of the size of the Fund's investments in the companies, expressed here in US dollars:

| Company | Country | Norwegian Fund Investment (USD) |
|---|-------------|---------------------------------|
| Total S.A. | France | \$2,639,516,440.43 |
| Chevron Corp. | U.S. | \$908,458,831.26 |
| POSCO | South Korea | \$244,529,195.58 |
| CNOOC | China | \$168,762,053.54 |
| Transocean Ltd. | Switzerland | \$167,951,391.91 |
| PetroChina Co. Ltd. | China | \$90,245,610.86 |
| Kunlun Energy Co. Ltd. (formerly CNPC Hong Kong Ltd.) | China | \$58,194,915.34 |
| GAIL India Ltd. | India | \$47,226,310.68 |
| JX Holdings, Inc. (formerly Nippon Oil Corp.)¹⁴ | Japan | \$45,636,490.85 |
| The Petroleum Authority of Thailand (PTT) | Thailand | \$38,565,728.42 |
| The PTT Exploration & Production PCL (PTTEP) | Thailand | \$33,173,944.98 |
| Hyundai Heavy Industries Co., Ltd. | South Korea | \$11,550,938.19 |
| Essar Oil Ltd. | India | \$9,880,367.35 |
| Daewoo International Corp. | South Korea | \$2,592,482.21 |
| Korea Gas Corp. | South Korea | \$1,316,941.57 |

According to the most current disclosure of the Fund's holdings, Norway's total investment in these companies is USD \$4.7 billion (26,805,109,703 NOK).¹⁵

¹⁴ JX Holdings, Inc. is a holding company created in April 2010 through share transfers by Nippon Oil Corporation and Nippon Mining Holdings. JX Holdings, Inc., *News Release*, Apr. 1, 2010, at www.hd.jx-group.co.jp/english/newsrelease/2010/20100401_01.html (last visited Nov. 24, 2010).

¹⁵ Conversion to USD based on the International Monetary Fund exchange rate on November 16, 2010.

Methodology

Information about the investments of the Norwegian Pension Fund-Global is in the public domain and was obtained directly from Norges Bank Investment Management (NBIM).¹⁶

It is very likely that, beyond the companies named in this report, the Norwegian Pension Fund-Global has holdings in numerous other corporations active in Burma's extractive industries, in violation of Norway's Ethical Guidelines. The extent of corporate involvement in Burma remains unclear due to a lack of freedom of information in Burma and the often secretive way in which a number of multinational corporations do business in the country.

It is also very likely that the Fund has holdings in corporations operating in other sectors in Burma, several of which stand in violation of Norway's Ethical Guidelines. Companies operating in Burma's hydropower and mining sector are of particular concern given the adverse human rights and environmental impacts of dam construction and mineral mining operations in the country. The Council has recognized these as sectors of heightened concern and additional investigation.¹⁷ Companies operating in these sectors are not a subject of this report but certainly merit immediate attention.

This report focuses on the oil and gas sector in Burma, an area in which EarthRights International has conducted extensive original field research. The organization began documenting human rights abuses connected to natural gas projects in Burma in 1994, collecting witness and victim testimony in the country and on the Thailand-Burma border, and the organization has collected information on this sector continuously since that time. This report draws heavily on EarthRights International's research and investigations from 2008-2010 in Burma and along the country's borders.

EarthRights International conducted interviews with current residents of and recent refugees from regions affected by gas pipelines, with defected soldiers from the Burma Army and Navy, former expatriate staff on extractive projects, and shareholders and investors in oil companies operating in Burma. Hundreds of formal interviews as well as numerous informal contacts and field reports conducted since 2008 were considered, although not all are quoted directly here.

16 Norges Bank Investment Management, *Government Pension Fund-Global Holdings as of 31 December 2009*, at www.nbim.no/en/Investments/holdings/ (last visited Nov. 24, 2010) (hereinafter Fund Holdings).

17 Council on Ethics, Burma Assessment, *supra* note 7 at 4 ("The Council has reason to believe that companies in the Fund's portfolio may be involved in construction of hydro electric power plants in Burma. Such projects have previously been known to lead to forced displacement of people and to forced labour. Also, the Council is informed that mining companies in the Fund's portfolio may have operations in Burma. It must be assumed that conditions related to mining in Burma can be severe, both in terms of environmental aspects, working conditions and effects on livelihood for the population in proximity of the mines. Nor can it be ruled out that forced labour is used, either in the mining operations themselves or when clearing areas for new mines.").

Reports from credible local human rights groups on impacts of oil and gas projects were also considered and noted in the report. This report also draws on several hundred other pertinent interviews conducted in Burma and on its borders from 1994 to 2010.

EarthRights International has over 15 years of experience documenting environmental and human rights abuses in Burma, as published in previous reports and publications, including *Energy Insecurity* (2010), *Total Impact 2.0* (2009), *Total Impact* (2009), *Getting It Wrong* (2009), *Complaint to the South Korean National Contact Point* (2008), *The Human Cost of Energy* (2008), *Turning Treasure Into Tears* (2006), *Total Denial Continues* (first edition 2000; updated second edition 2003), *More of the Same (Supplemental Report)* (2001), and *Total Denial* (1996). These and other publications informed this report and are available at www.earthrights.org/publications.

In addition to EarthRights International's investigative work, this report also draws from documents that became public through the 2004 *Doe v. Unocal* lawsuit, a landmark human rights case in which EarthRights International, representing Burmese villagers, sued Unocal Corporation in U.S. court for the company's complicity in human rights abuses along the Yadana pipeline. Total was also the subject of a human rights lawsuit brought by villages from Burma in French and U.S. courts. Both Total and Unocal agreed to confidential settlements with villagers who had suffered human rights abuses.

I. The Ethical Guidelines for Investment of Norway's Government Pension Fund-Global

In 1990, the Norwegian government established a sovereign wealth fund – now officially referred to as the Government Pension Fund-Global (the Fund). Norway deposits its excess oil and gas wealth in the Fund and then invests it in stocks and bonds for returns in global markets. As of July 1, 2010, the Fund was the world's second largest sovereign wealth fund.¹⁸ It was recently valued at approximately USD \$512 billion,¹⁹ and by 2020 it is forecasted to increase to over USD \$1,034 billion.²⁰ The Fund currently invests in more than 8,000 companies.²¹

1. The Creation of the Ethical Guidelines and the Role of the Council on Ethics

In 2004, under the administration of former Prime Minister Kjell Magne Bondevik, the Ministry of Finance adopted ethical guidelines for the Fund and created the Council on Ethics to evaluate whether the Fund's investments complied with those guidelines.²² The Ethical Guidelines grew out of the work of the government-appointed Graver Committee, which recommended that the Fund should withdraw investment in companies where “necessary to avoid complicity in unethical actions in the future.”²³ The Committee reasoned, “in principle, that owning shares or bonds in a company that can be expected to commit grossly unethical actions may be regarded as complicity in these [sic] actions.”²⁴

In relevant part, the Ethical Guidelines provide that a company is subject to exclusion from the Fund if there is an “unacceptable risk that the company contributes to or is responsible for . . . serious or systemic human rights violations, such as murder,

torture, deprivation of liberty, forced labour, the worst forms of child labour and other forms of child exploitation.” In addition, “particularly serious violations of fundamental ethical norms” are grounds for exclusion.²⁵

The Ministry of Finance charged the Council on Ethics (the Council) with the initial assessment of whether Norway's investment in a particular company violates the Ethical Guidelines. The Council draws from the preparatory work of the Graver Committee, as well as its own prior decisions, when making that assessment.²⁶ The Council, however, does not prescreen companies for their connection to or complicity in human rights violations or other violations of ethical norms. As a result, the Fund's investments are ethically indiscriminate until the Ministry of Finance or other sources, such as this report, bring a potential ethical violation to the Council's attention.

Upon completion of its assessment, the Council has three options: 1) take no action, 2) recommend that the Ministry of Finance subject the company to observation, or 3) recommend that the Ministry of Finance exclude the company from the Fund.²⁷ Observation is appropriate when doubt or uncertainty remain concerning whether an investment has violated the guidelines.²⁸

2. The Council's Interpretation of Corporate Complicity

Where a company has not directly committed human rights violations, the Council's prior decisions have set forth a four-part test to determine whether the company (and by virtue of its investment in the company, the Fund itself) is nonetheless complicit in abuses:

1. There must exist some kind of linkage between the company's operations [and the relevant human rights violations].
2. The breaches must have been carried out with a view to serving the company's interests or to facilitate conditions for the company.
3. The company must either have contributed actively to the breaches, or had knowledge of the breaches, but without seeking to prevent them.
4. [The abuses] must be either ongoing, or there must exist an unacceptable risk that norm breaches will occur in the

18 Netty Ismail, *Norway's Pension Fund to Boost Investments in Asia*, BUSINESSWEEK, July 1 2010, available at www.businessweek.com/news/2010-07-01/norway-s-pension-fund-to-boost-investments-in-asia.html.

19 Norges Bank, *Fund Tops 3 Trillion Kroner for First Time*, Oct. 19, 2010, at www.norges-bank.no/templates/article____77505.aspx (last visited Oct. 25, 2010).

20 Norges Bank Investment Management, *Projection for the size of the fund*, at: www.nbim.no/en/Investments/Market-Value/forecast-for-the-size-of-the-fund/ (last visited Nov. 25, 2010) Conversion to USD based on International Monetary Fund exchange rate on October 25, 2010.

21 Council on Ethics, Annual Report for 2009, at 5, available at www.regjeringen.no/pages/1957930/Etikkradet_E2009.pdf (hereinafter 2009 Annual Report).

22 Council on Ethics, *History*, at www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/History.html?id=445813 (last visited Oct. 26, 2010).

23 The Report from the Graver Committee § 4.2, June 11, 2003, available at www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/The-Graver-Committee---documents/Report-on-ethical-guidelines.html?id=420232 (hereinafter Graver Report).

24 *Id.* at § 2.2.

25 Norwegian Ministry of Finance, Ethical Guidelines, *supra* note 3, at § 2(3)(a).

26 See, e.g., Council on Ethics, Recommendation of 15 November 2005 on exclusion of Wal-Mart Stores Inc., at 5-7 (unofficial English translation) available at www.regjeringen.no/pages/1661427/Tilr%C3%A5dning%20WM%20eng%20format.pdf.

27 Norwegian Ministry of Finance, Ethical Guidelines, *supra* note 3, at § 4.

28 *Id.* at § 3.

future.²⁹

Under the last criterion, the Council may consider earlier abuses as indicators of future patterns of conduct.³⁰ In addition, the Council has indicated that “a limited number of violations could suffice if they are very serious, while the character of a violation need not be equally serious if it is perpetrated in a systematic manner.”³¹

The Council’s prior decisions have also delimited the reach of corporate responsibility in situations where there are multiple owners or other stakeholders in a particular project that has led to abuses. The Council has concluded that even when a company has a minority share in a joint venture agreement, it may nonetheless be held responsible for its partners’ violations where it has “exerted considerable influence on decisions” and has played “an active role in operation and development.”³² Moreover, the Graver Committee’s preparatory work for the guidelines stated, “the company’s legal structure cannot be decisive in the ethical assessment of complicity.”³³ Instead, decisive factors may include the size of the ownership interest, whether the companies act as one externally, and the degree of control over the entity involved in the abuses.³⁴ Finally, the Graver Committee also noted a customer relationship may also suffice for complicity where the customer relationship is important, long-term, or continued after abuses have been revealed.³⁵

3. Norway’s Options: Observation, Exclusion, or Active Ownership

After the Council’s assessment and recommendation, the Ministry of Finance, led by current Minister of Finance Sigbjørn Johnsen, an elected official, ultimately makes the decision on whether to observe or engage in active ownership of a company, or exclude it from the Fund.³⁶ The Guidelines require that, if the Ministry places a company under observation, it makes the decision public and then subjects the company to regular assessments.³⁷ If the Ministry decides to exclude a company, it makes that decision public two months

after the investments have been sold.³⁸ If the Ministry declines a recommendation from the Council for exclusion, it makes the recommendation public after reaching that decision.³⁹

In nearly every case that the Council has recommended exclusion, the Ministry has abided by the Council’s recommendations. At the end of 2009, the Ministry had excluded 48 companies from the Fund.⁴⁰

In a small minority of cases, however, the Ministry has opted to pursue active ownership as an alternative means to address the violation(s) of the Ethical Guidelines.⁴¹ In this situation, responsibility for active ownership falls to Norges Bank Investment Management, which manages the Fund on behalf of the Ministry of Finance.⁴² The Bank exercises its ownership rights through voting, company engagement, shareholder proposals, legal action, participation in policy and standard-setting, and cooperation with other shareholders.⁴³ Thus, the Bank uses the mechanisms available to it, as a shareholder, to achieve desired results in company behavior. In the past, the Bank has not disclosed information concerning its engagement with individual companies.⁴⁴

29 Council on Ethics, Total Assessment, *supra* note 6, at 12.

30 *Id.*

31 *Id.* at 9.

32 Council on Ethics, Recommendation of 15 February 2008, on exclusion of companies Rio Tinto Plc and Rio Tinto Ltd., at 11 (unofficial English translation) *available at* www.regjeringen.no/pages/2105350/Recommendation%20RT%20final.pdf (hereinafter Rio Tinto Assessment).

33 Graver Report, *supra* note 23, at § 5.3.2.3.

34 *Id.*

35 *Id.*

36 See Norwegian Ministry of Finance, Ethical Guidelines, *supra* note 3, at § 2. Council recommendations are available on the Council’s website, www.regjeringen.no/en/sub/styrer-radutvalg/ethics_council/Recommendations.html?id=423834 (last visited Oct. 26, 2010).

37 *Id.* at § 3.

38 *Id.* at § 5.

39 *Id.*

40 Council on Ethics, 2009 Annual Report, *supra* note 21, at 6.

41 See, e.g., Council on Ethics, Letter to the Ministry of Finance regarding recommendation to exclude the company Monsanto Co. from the investment universe of the Government Pension Fund – Global, June 10, 2008 (unofficial English translation) *available at* www.regjeringen.no/pages/2105482/Brev_til_FIN_vedr_Monsanto%20ENG.pdf (explaining that the Council recommended exclusion but the “Ministry of Finance deemed it opportune to attempt the exercise of ownership rights during a limited period of time in order to see if this would reduce the risk of the Fund contributing to serious violations”).

42 Norges Bank Investment Management, *Ethical Guidelines* (2010), *available at* www.nbim.no/en/About-us/Government-Pension-Fund-Global/ethical-guidelines/.

43 *Id.*

44 SIMON CHESTERMAN & THE ALBRIGHT GROUP, LLC, ASSESSMENT OF IMPLEMENTATION OF ARTICLES 3 AND 4 OF THE ETHICAL GUIDELINES FOR THE GOVERNMENT PENSION FUND – GLOBAL, at 23-24 (May 2008) *available at* www.responsible-investor.com/resource/research_page/albright_group_report_on_ethical_guidelines_of_the_norwegian_govt_pension_f/.

II. The Ethics of Doing Business in Burma

The Council on Ethics has recognized that Burma is ruled by a military junta “notorious for its violations of basic human rights and its suppression of all political opposition.”⁴⁵ The Council has further acknowledged that the regime engages in widespread and systematic human rights abuses, including “forced labor...in connection with infrastructure building, forced relocation of large population groups, along with atrocities such as torture, rape, murder and use of child soldiers by the military forces.”⁴⁶

Burma’s appalling human rights record has, on more than one occasion, prompted the Ministry of Finance to seek the Council’s assessment of the ethics of investing in companies doing business there. The Ministry’s requests led the Council to investigate the situation by contacting the concerned companies and other organizations, and by hiring a staff member to travel to the Thailand-Burma border to seek information from non-governmental organizations working on Burma issues.⁴⁷ EarthRights International participated in these investigations and in other communication with the Council. The Council also sent a staff member to India to investigate a potential pipeline project from Burma to India.⁴⁸

Although the Council on Ethics has acknowledged that the Fund’s portfolio has included at least 20 companies with operations in military-ruled Burma,⁴⁹ the Council has recommended exclusion of only one of those companies, to date. In 2008, the Council recommended that the Ministry exclude Dongfeng Motor Group Ltd., a Chinese company that sells military equipment to the Burmese authorities.⁵⁰ The Council’s recommendation to exclude Dongfeng – which led the Ministry to exclude the company from the Fund – was due to an amendment to the Guidelines that effectively stipulated that the Fund shall not invest in companies that sell weapons or military equipment to Burma.⁵¹

45 Council on Ethics, Total Assessment, *supra* note 6, at 5.

46 *Id.*

47 Council on Ethics, Burma Assessment, *supra* note 7, at 2.

48 *Id.*

49 *Id.* at 1. A cursory assessment, however, reveals that far more than 20 companies in the Fund’s portfolio are operating in Burma, although no organization or the Council on Ethics has published a comprehensive list.

50 Council on Ethics, Recommendation of November 14, 2008, on exclusion of the company Dongfeng Motor Group Co. Ltd., (unofficial English translation) available at www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/recommendations-on-companies-supplying-a/recommendation-of-november-14-2008-on-ex.html?id=548832.

51 *Id.* (citing Norwegian Ministry of Finance, Ethical Guidelines, *supra* note 3, at § 2(1)(c).) The amendment grew out of the Ministry’s own Guidelines for Management of the Fund which prohibit the Fund from investing in government bonds issued by Burma – and, as amended, from investing in companies that provide military equipment to Burma. See Ministry of Finance, Provisions on the Management of the Government Pension Fund § 3.2, available at <http://www.regjeringen.no/en/dep/fin/Selected-topics/the->

While the Council has only recommended exclusion of one company in Burma, its work on Burma has required it to consider to what extent a corporation may be responsible for the human rights violations committed by a repressive regime. The Council’s analysis of the situation in Burma led to the creation of its four-part test for corporate complicity, which serves as a precedent for its future analyses of companies that do business with governments with little regard for human rights. The Council’s work also highlights the extractive industries and infrastructure projects as areas of particular risk for human rights violations in Burma, as explained more fully below.

1. The Council’s 2005 Evaluation of Total in Burma

In 2005, the Council took up one of its first assessments of a company in the Fund’s investment portfolio when it scrutinized the French energy firm Total and the human rights impacts of the Yadana pipeline project in Burma. The Council concluded that Total had likely been complicit in the extensive use of forced labor connected to government-provided security services and infrastructure construction for the Yadana project, as well as the forced relocation and deportation of villagers, and other violence perpetrated by the military.⁵² The Council further found that it remained unclear what reasonable steps Total and its partners took, if any, to prevent the abuses: “What action the companies took to prevent human rights violations in connection with the construction of the pipeline...is disputed and unclear.”⁵³

In support of its conclusions, the Council placed particular emphasis on a civil lawsuit, *Doe v. Unocal*, in U.S. courts against Unocal (now Chevron), one of Total’s Yadana consortium partners.⁵⁴ EarthRights International and other organizations brought the case on behalf of villagers from the Yadana pipeline area. The Council looked to evidence from the litigation that indicated that the Yadana consortium had known about and accepted gross abuses by their Burmese regime partners.⁵⁵ The Council therefore presumed that Total “had the same knowledge of, and responsibility for, the human rights abuses in connection with the pipeline construction as Unocal.”⁵⁶

government-pension-fund/the-guidelines-for-the-management-of-the.html?id=434605 that excluded government. Government bonds from Burma are the only bonds singled out for exclusion under the Ministry’s guidelines. *Id.*

52 Council on Ethics, Total Assessment, *supra* note 6, at 14-17.

53 *Id.*

54 Background on the *Doe v. Unocal* suit, including court documents, is available at: <http://www.earthrights.org/legal/doe-v-unocal>. The U.S. litigation, brought under the U.S. Alien Tort Claims Act with ERI acting as co-counsel, ended in a landmark settlement for the plaintiffs.

55 Council on Ethics, Total Assessment, *supra* note 6, at 11-12.

56 *Id.* at 12.

However, the Council did not recommend that the Ministry exclude Total from the Fund because they found, “there was little risk of continued violations in the pipeline area after construction had been completed.”⁵⁷ The Council noted that Total had “a visible public profile” of its commitment to improving living conditions in the pipeline area and found that Total’s commitment was credible.⁵⁸ The Council also found that in the future “Total is hardly likely to put itself in a situation in which it is associated with the use of forced labour.”⁵⁹ The Council ultimately concluded that, “systematic abuses are not taking place in the pipeline area, and that Total have [sic] procedures in place for dealing with such abuses when they arise and have established procedures for preventing abuses from taking place.”⁶⁰

The Council’s conclusions about abuses in the area relied in part on surveys and reports conducted by a U.S. based group, CDA Collaborative Learning Projects (CDA), which traveled to Burma on five occasions and issued reports after each visit. In 2009, CDA’s work on the Yadana project was the subject of an 81-page report published by EarthRights International, titled *Getting It Wrong: Flawed “Corporate Social Responsibility” and Misrepresentations Surrounding Total and Chevron’s Yadana Gas Pipeline in Military-Ruled Burma (Myanmar)*.⁶¹

Based on seven years of research, the EarthRights International report concluded that CDA’s research in Burma was beset by deep flaws and methods that contravene international best practice; and that CDA’s conclusions should not be regarded by interested parties as definitive.⁶² CDA itself disavows claims that it is a human rights monitor and admits the organization did not assess the human rights situation in the pipeline corridor against international human rights law, or Burma’s

own laws and regulations.⁶³

2. The Council’s 2007 Evaluation of Companies Operating in Burma

In September 2007, the Norwegian Ministry of Finance asked the Council on Ethics to account for its work on assessing the ethics of the Fund’s investments in companies with operations in Burma.⁶⁴ The Council’s response focused mainly on companies with connections to Burma’s oil and gas sector.⁶⁵ The Council recalled its 2005 assessment of Total but affirmed its previous assessment that there were no grounds to exclude Total because there was little risk of ongoing or future violations associated with the Yadana pipeline project.⁶⁶

The Council also discussed companies, including Daewoo International and PetroChina Co. Ltd., that had engaged in negotiations regarding future construction of oil and gas pipelines in Burma. The Council noted Daewoo’s indictment in Korea for illegal sales of weapons technology to Burma and the possibility that the sales were connected to the award of natural gas production contracts to Daewoo, but found that the illegal activity was not a basis for exclusion because it had already ceased.⁶⁷ The Council also noted that, in response to an inquiry from Norway in 2006, Daewoo had indicated that it had not entered a contract for transporting natural gas, nor had it commenced any pipeline construction.⁶⁸ The Council ultimately found that recommendations for exclusion were not yet warranted because it appeared that no company in the Fund’s portfolio was actively engaged with the Burmese regime in onshore infrastructure construction.⁶⁹

The Council, however, recalled Burma’s human rights record and concluded that “the risk of grave human rights violations in connection with construction of infrastructure in Burma is considerable.”⁷⁰ The Council specifically noted the human rights impacts of onshore pipeline construction, hydroelectric dam construction, and mining operations.⁷¹ Moreover, the Council recognized that even though the Burmese military, not the companies, commits the violations, there is nonetheless a connection to the companies because “the violations take place to facilitate for companies’ future operations.”⁷² The Council therefore resolved to monitor the situation closely.

Finally, with regard to onshore pipeline construction in particular, the Council declared unequivocally:

If companies in the Fund’s portfolio were to enter into contract agreements regarding the construction

57 *Id.* at 17-22.

58 *Id.* at 17.

59 *Id.* at 17-18.

60 *Id.* at 21.

61 EARTHRIGHTS INTERNATIONAL, GETTING IT WRONG: FLAWED “CORPORATE SOCIAL RESPONSIBILITY” AND MISREPRESENTATIONS SURROUNDING TOTAL AND CHEVRON’S YADANA GAS PIPELINE IN MILITARY-RULED BURMA (MYANMAR), Sept. 2009, available at www.earthrights.org/sites/default/files/publications/getting-it-wrong.pdf (hereinafter GETTING IT WRONG).

62 *Id.* at 12-37. In the report, EarthRights International detailed several areas of concern with CDA’s methodology, finding that CDA flouted interviewing best practices by using interpreters from the former capital Rangoon, rather than from the local area. Some interpreters had no proficiency in ethnic languages and in some cases were provided by Total. In addition, CDA staff compromised the confidentiality of local villagers by traveling in the pipeline area accompanied by Total representatives and military intelligence in plain clothes. The scope of CDA’s work was incomplete because it ignored impacted because the oil companies had not designated them as part of the official pipeline corridor. In addition, CDA’s focus was questionable in that its teams spent a disproportionate amount of time in meetings with officials in Rangoon rather than speaking, in a secure environment, with civilians in the pipeline region. Finally, CDA did not interview a single soldier providing security for the project.

63 *Id.* at 28-29.

64 Council on Ethics, Burma Assessment, *supra* note 7, at 1.

65 *Id.* at 2-4.

66 *Id.*

67 *Id.* at 3-4.

68 *Id.* at 3.

69 *Id.* at 2-4.

70 *Id.* at 2.

71 *Id.* at 2, 4.

72 *Id.*

of such pipelines, the Council may recommend the exclusion of these companies already *from the time of entering into the agreements*. Because such undertakings would most likely involve an unacceptable risk of contributing to human rights violations, *it is not considered necessary to wait until the violations actually take place.*⁷³

Thus, the Council announced that any future agreement by a company to participate in the construction of an onshore pipeline in Burma could be grounds to recommend that the Ministry exclude that firm from the Fund. Importantly, the Council stressed that the mere signing of such an agreement would suffice for a recommendation to exclude a company from the Fund.

⁷³ *Id.* at 3.

III. The Yadana and Yetagun Pipelines: Companies' Knowledge of Continuing Abuses and Lack of Effective Action

The Yadana and Yetagun natural gas pipelines transport Burmese natural gas from offshore deposits in the Andaman Sea through overland pipelines that run approximately 40 miles (60 km) onshore in Burma's remote Tenasserim Division.⁷⁴ The two pipelines join at the Thai border and from there transport the gas to the Thai market.⁷⁵ The pipelines were constructed at the same time in the early 1990s, resulting in well-documented, severe human rights violations, as the Council on Ethics has recognized.⁷⁶

The Yadana project is operated by Total (France; 31.24%), Chevron (U.S.; 28.26%), PTT Exploration & Production (PTTEP) (Thailand; 25.5%), and the Myanmar Oil and Gas Enterprise (MOGE) (Burma; 15%).⁷⁷ The Yetagun Project is operated by Petronas (Malaysia; 40.91%), JX Nippon Oil & Gas Exploration (Japan; 19.31%),⁷⁸ PTTEP (Thailand; 19.31%), and MOGE (Burma; 20.45%).⁷⁹

As of December 2009, the Norwegian Pension Fund-Global had a cumulative USD \$3.6 billion dollars invested in the three multinational corporations operating the Yadana pipeline – Total, Chevron, and PTTEP. Likewise, the Fund had USD \$47 million invested in Nippon Oil (now JX Nippon Oil & Gas Exploration, a subsidiary of JX Holdings). The Fund also has USD \$39 million invested in the Petroleum Authority of Thailand (PTT), the purchaser of the Yadana and Yetagun natural gas. This equals a cumulative total of USD \$3.7 billion invested in the companies participating in the Yadana and Yetagun gas projects.

1. The History of the Council's Actions on Burma and Total

In 2005, the Council concluded that "human rights violations are not a significant feature in the pipeline area today."⁸⁰ While the Council recognized that the Burma military and security forces continued to commit human rights abuses elsewhere, it found no direct link between those abuses and pipeline

operations.⁸¹ The Council continued holding this view in its 2007 assessment of companies operating in Burma, stating that it was "not aware of any changes in the premises that led to [its 2005] conclusion."⁸²

These conclusions are puzzling in light of the well-documented and published evidence of abuses in connection to the Yadana and Yetagun pipelines before, during, and after the Council's 2005 conclusion regarding Total. At the time of the Council's 2005 assessment of Total, EarthRights International had published three reports documenting post-construction ongoing abuses related to the Yadana and Yetagun pipelines: *Total Denial Continues* (updated second edition 2003),⁸³ *More of the Same (Supplemental Report, 2001)*,⁸⁴ and *More of the Same (2000)*.⁸⁵ These reports documented clear and unequivocal trends in forced labor, killings, and other abuses connected to the projects.

After the Council's 2007 assessment of companies operating in Burma, EarthRights International published the following reports that further document ongoing abuses, including forced labor, killings, violations of property rights, and other ill-treatment by pipeline security battalions against local villagers in service to the pipeline projects: *Energy Insecurity* (2010),⁸⁶ *Total Impact 2.0* (2009),⁸⁷ *Total Impact* (2009),⁸⁸ *Getting It Wrong* (2009),⁸⁹ and *The Human Cost of Energy* (2008).⁹⁰ In addition,

81 *Id.*

82 Council on Ethics, Burma Assessment, *supra* note 7, at 2.

83 EARTHRIGHTS INTERNATIONAL, TOTAL DENIAL CONTINUES: EARTH RIGHTS ABUSES ALONG THE YADANA AND YETAGUN PIPELINES IN BURMA (2d ed. Dec. 2003) available at www.earthrights.org/sites/default/files/publications/TotalDenialCont-2ndEdition_2003.pdf (hereinafter TOTAL DENIAL CONTINUES).

84 EARTHRIGHTS INTERNATIONAL, SUPPLEMENTAL REPORT: FORCED LABOR ALONG THE YADANA AND YETAGUN PIPELINES (Feb. 2002) (supplement to MORE OF THE SAME: FORCED LABOR CONTINUES IN BURMA (Oct. 2001) available at www.earthrights.org/sites/default/files/publications/supp-to-more-of-the-same.pdf (hereinafter SUPPLEMENTAL REPORT)).

85 EARTHRIGHTS INTERNATIONAL, MORE OF THE SAME: FORCED LABOR CONTINUES IN BURMA, Oct. 2001, available at www.earthrights.org/sites/default/files/publications/more-of-the-same2.pdf (hereinafter MORE OF THE SAME).

86 EARTHRIGHTS INTERNATIONAL, ENERGY INSECURITY, *supra* note 9.

87 EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT 2.0: A RESPONSE TO THE FRENCH OIL COMPANY TOTAL REGARDING ITS YADANA NATURAL GAS PIPELINE IN MILITARY-RULED BURMA (MYANMAR) (Dec. 2009) available at www.earthrights.org/sites/default/files/publications/total-impact-2-0.pdf (hereinafter TOTAL IMPACT 2.0).

88 EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT, *supra* note 10.

89 EARTHRIGHTS INTERNATIONAL, GETTING IT WRONG, *supra* note 60.

90 EARTHRIGHTS INTERNATIONAL, THE HUMAN COST OF ENERGY: CHEVRON'S CONTINUING ROLE IN FINANCING OPPRESSION AND PROFITING FROM HUMAN RIGHTS ABUSES IN MILITARY-RULED BURMA (April 2008)

74 EARTHRIGHTS INTERNATIONAL, & SOUTHEAST ASIA INFORMATION NETWORK, TOTAL DENIAL: A REPORT ON THE YADANA PIPELINE PROJECT IN BURMA, at 1 (June 1996), available at www.earthrights.org/sites/default/files/publications/total-denial-1996.pdf (hereinafter TOTAL DENIAL).

75 EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT, *supra* note 10, at 15.

76 Council on Ethics, Total Assessment, *supra* note 6, at 14-17.

77 Total, *Description of the Yadana Project*, at http://birmanie.total.com/en/gazier/p_2_2.htm (last visited Nov. 9, 2010).

78 JX Nippon Oil & Gas Corp., *Business Activities: Myanmar*, at www.nex.jx-group.co.jp/english/activity/southeast_asia/myanmar.html (last visited Nov. 24, 2010).

79 PTT Exploration and Production Co. Ltd., *Yetagun Project*, at www.pttep.com/en/ourBusiness_EAndPprojectsDetail.aspx?ContentID=21 (last visited Nov. 9, 2010).

80 Council on Ethics, Total Assessment, *supra* note 6, at 22.

since 2005, EarthRights International has on several occasions briefed the Council privately about the ongoing human rights impacts around the pipeline projects, via email and in person in Oslo, Norway, Washington, DC, and Bangkok, Thailand.

2. Abuses Linked to Pipeline Operations Continue

Today, Burmese security forces providing protection for the Yadana and Yetagun projects continue to commit serious and widespread human rights abuses in the pipeline region. According to Burmese Army soldiers interviewed by EarthRights International, the sole mandate of soldiers in the pipeline area is to provide security for the pipeline and the companies, and soldiers commit abuses in the service of that mandate.⁹¹

The character and frequency of abuses have changed over time. There was a dramatic increase of abuses during the planning and construction phase of the project, with high incidents of forced labor, land confiscation, and violent abuses, which were followed by a decrease in some types of abuses during the production phase. Abuses, such as various forms of forced labor, occur in areas within the pipeline corridor in connection to the management of the pipeline projects. Recent testimonies collected by EarthRights International also indicate that abuses by pipeline security forces remain high in areas just outside the designated pipeline corridor.⁹²

At the time of writing, testimonies from the pipeline area continue to show that the companies work closely with and aid the local Burmese Army battalions, which are in turn committing systematic human rights abuses against local villagers. A Burmese civilian working as a security guard for Total in 2010 reported to EarthRights International that the oil companies' private security detail meets "almost every day" with the local Burmese military commander to "talk about the security issue" around the pipeline.⁹³ The guard added that, "sometimes the army will ask for and use the company trucks to transport their troops or material when they need it, if the army does not have enough trucks."⁹⁴

available at www.earthrights.org/sites/default/files/publications/Human-Cost-of-Energy.pdf (hereinafter, *THE HUMAN COST OF ENERGY*).

91 EarthRights International has documented the role of the military in connection to the oil companies' presence since the beginning stages of the Yadana and Yetagun Projects. The Burmese Army first entered the pipeline area en masse on behalf of the pipeline projects. Defected soldiers have stated clearly that their sole mandate was security for the pipeline and the companies, and that they committed human rights abuses in implementing their mandate. See, e.g., EARTHRIGHTS INTERNATIONAL, *TOTAL IMPACT*, *supra* note 10, at 34-40; EARTHRIGHTS INTERNATIONAL, *TOTAL DENIAL CONTINUES*, *supra* note 83, at 23-121.

92 See EARTHRIGHTS INTERNATIONAL, *ENERGY INSECURITY*, *supra* note 9, at 9-12.

93 Interview #039 in Kaleinaung, Burma (2010). On file with EarthRights International.

94 *Id.*

a. Targeted and Extrajudicial Killings

In five of the last ten years, EarthRights International has documented extrajudicial killings by pipeline security battalions.⁹⁵ This includes targeted and extrajudicial killings by Burmese soldiers in the official project corridor, including in Kanbaw, where Total and its consortium headquarters are located.⁹⁶ This does not account for undocumented killings or the related killings documented in the 1990s.

Most recently, in late February 2010, two villagers from the pipeline village of Ahlersakan were summarily executed by members of Infantry Battalion 282, a pipeline security battalion, after being suspected of connections to an ethnic armed group. Local villagers interviewed by EarthRights International confirmed that in February two men were arrested, killed, and buried by the Burmese Army. According to a local resident:

Two villagers... who just finished the militia training were killed by IB 282 soldiers. Their officer Balay (aka) Nyi Nyi Soe is the one who gave the order. They suspected these two villagers had connections to the Mon armed group, so they questioned them. They arrested them for one night and the next day the soldier came in to the village to get a digging tool. Later, people found out [from soldiers] that both of them were killed by the soldiers.⁹⁷

There appears to be total immunity for these crimes with no known investigations or criminal charges against soldiers or officers implicated in the killings.

b. Forced Labor for Pipeline Security

EarthRights International continues to document the Burmese military forcing villagers to perform direct pipeline security work, including participation in abusive security training programs and performing sentry duty. EarthRights International has documented these abuses in villages closest to the pipeline route, including Kanbaw, Zinba, and Kaleinaung, as well as in more remote villages such as Law Ther.⁹⁸ These abuses have been reported consistently over a

95 Interview #113, in Wa Shu Ko, Burma (2001); Interview #031 in Tavoy, Burma (2002; explaining killing in 2001); Interview #037 in Zinba, Burma (2003); Interview #020 in Law Ther, Burma (2007; explaining killing in 2005); Interview #041 in Eindayaza, Burma (2008; explaining killing in 2005); Interview #011 in Law Ther, Burma (2008; explaining killing in 2005); Interview with Army defector in Ohnbinkwin, Burma (2009); Interview #035, in Law Ther, Burma (2010). All on file with EarthRights International.

96 Interview #011 in Law Ther, Burma (2008); Interview #020 in Law Ther, Burma (2007). On file with EarthRights International. Another villager, captured at the same time as a man killed by the military, managed to escape but fears for his life if he returns. Interview #001 in Eindayaza, Burma (2008). On file with EarthRights International.

97 Interview #YP-s-001 in Alerhsakan, Burma (2010). On file with EarthRights International.

98 EARTHRIGHTS INTERNATIONAL, *THE HUMAN COST OF ENERGY*, *supra* note 90, at 29-40.

number of years.

In the past, the Burmese military forced villagers to build “sentry posts” used to guard the pipeline. According to one villager from Kanbawk: “One person from each household has to go for it. I myself had to go several times. What we had to do was clean the area, build the huts, build the fence and dig the ground for a communication line... We did not get payment. We cannot refuse to do it.”⁹⁹ Another villager from Kanbawk similarly described being forced to build “huts along the pipeline” for sentry work. These huts have subsequently led to other instances of forced labor to maintain the huts.¹⁰⁰

Over the last decade, the military has forced pipeline-area villagers to submit to highly abusive security training programs. From 2001-2010, local army battalions forced villagers in the pipeline corridor to enlist one member of each household to attend these trainings, which involve considerable economic and mental strain on participants and their families.¹⁰¹ Villagers have told EarthRights International that “a lot of children under 18 years old and elders” are forced to attend these trainings.¹⁰² Beatings of “participants” by the Burmese battalions are common during these sessions.¹⁰³ One villager, who subsists by small-scale logging, described how he and his wife sent their 19-year-old son to forced security training.¹⁰⁴ They had to prepare food and water in advance for him to take for the month-long program and had to hire someone to do his work while he was away, causing severe financial hardship.¹⁰⁵ The villagers had no alternative, stating, “We could not leave. If we did, this [the pipeline security] battalion would punish the relatives of our family.”¹⁰⁶ The trainings have become so notorious that, hearing that their village will be next, numerous villagers have sought refuge on the Thai border rather than face forced participation.¹⁰⁷

EarthRights International first exposed the forced militia

99 Interview #037 in Zinba, Burma (2003). On file with EarthRights International.

100 Interview #045 in Kanbawk, Burma (2005). On file with EarthRights International.

101 See, e.g., Interview #037 in Zinba, Burma (2010) and other interviews. On file with EarthRights International; see also Matthew Smith & Naing Htoo, “Energy Security: Security for Whom?” 11 *Yale Human Rights and Development Law Journal*, 217, 231 (2008) (describing the beginning of these trainings in the pipeline corridor). In some villages, these trainings did not begin until 2003. See, e.g., Interview #009 in Zinba, Burma (2003). On file with EarthRights International.

102 Interview #053 (2005, Kanbawk). On file with EarthRights International.

103 Interview #016 in Law Ther, Burma (2007). On file with EarthRights International.

104 Interview #043 in Kanbawk, Burma (2005). On file with EarthRights International.

105 *Id.*

106 *Id.*

107 Interview #054 in Ahlersekan, Burma (2005). On file with EarthRights International.

trainings in 2009.¹⁰⁸ In 2010, the trainings in the pipeline corridor were re-named “fire fighting trainings,” while neither the actual trainings nor their forced nature have changed.¹⁰⁹ Outside the corridor, the trainings are referred to for what they are – forced militia trainings. As explained in the 2010 EarthRights International report *Energy Insecurity*, this re-branding in the pipeline corridor appears to be a crude attempt to suggest there is civic merit to the trainings, when in fact the trainings are feared by villagers and designed to build the local security apparatus.¹¹⁰ One villager told EarthRights International:

Each village in the area had to send representatives depending on the number of households in the village. Our village had to send two people. Our villagers had to pay their expenses during the training. Now that they are done with the training each night they have to patrol the village and check for guests.¹¹¹

This abusive behavior is directly related to soldiers’ mandate in the area: security for the companies and the pipelines.

Reports by EarthRights International also confirm the widespread conscription of villagers to provide other security-related work, such as sentry duty on the pipeline.¹¹² One refugee from Kanbawk told EarthRights International what this work entails:

We were forced to stay at the sentry hut and keep watching any suspicious things and actions. We had to work on this kind of forced labor by rotation and one person from a household had to go for it. . . . We had to prepare everything for possible use in this sentry hut. We all have to bring tools and food from our house. We had to take responsibility about 24 hours in this sentry hut and always had to be alert and keep watching the surroundings all the time. . . . If we were caught sleeping by the patrol soldier, we would surely be beaten. . . . We could not refuse going for this. . . . I had to work for this kind of forced labor many times.¹¹³

In late 2008, a villager from Michauglaung explained how he was forced by the Burmese Army to provide security in his village along the Yadana and Yetagun pipelines:

We also have to do nighttime security – one night

108 EARTHRIGHTS INTERNATIONAL, *THE HUMAN COST OF ENERGY*, *supra* note 90, at 34-37.

109 Interview #035 in Law Ther, Burma (2010). On file with EarthRights International; EARTHRIGHTS INTERNATIONAL, *ENERGY INSECURITY*, *supra* note 9, at 10-11.

110 *Id.*

111 Interview #003 in Michauglaung, Burma (2010). On file with EarthRights International.

112 Interviews #043 in Kanbawk, Burma (2003); #037 in Zinba, Burma (2003); #045 in Kaleinaung, Burma (2005); #50 in Kanbawk, Burma (2005). On file with EarthRights International.

113 Interview #043 in Kanbawk, Burma (2005). On file with EarthRights International.

for three hours, once every two weeks. There are two groups – one in the beginning of the village, the other at the end of the village. If you fall asleep you have to provide [approximately 3 kilograms] of chicken [to the Burmese Army]. Sometimes they beat you up, and [then] you have to do one day of forced labor.¹¹⁴

c. Forced Labor on Pipeline-Related Infrastructure

In 2010, EarthRights International documented ongoing forced labor in the maintenance of Burmese army compounds used by pipeline security battalions.¹¹⁵ This is perhaps the most common trend of forced labor in the pipeline area,¹¹⁶ and villagers who own tools are now the most likely to be conscripted for this labor.¹¹⁷ As of 2003, the militarization in the Yadana pipeline area alone included at least 39 military outposts, camps, barracks, or bases, many of which have been forcibly maintained by local villagers.¹¹⁸ Interviews conducted by ERI from 2003-2010 confirm that at least 14 military battalions have operated at one time or another in the pipeline region and that the Burma Army is still providing pipeline security – the permanent pipeline security battalions are battalions 273, 282, 408, 409, and 410.¹¹⁹ Just months ago, villagers in the pipeline area were forced to cut bamboo and leaves in order to construct a military barrack for pipeline security battalion 282.¹²⁰

The Burmese Army has also used forced labor to maintain and repair local roads necessary for pipeline operations.¹²¹ These roads, ironically, have featured prominently in Total's campaign

to demonstrate the benefits brought by their presence.¹²² The primary benefit of the roads, however, appear to accrue to the pipeline companies and their personnel. Local people are not compensated for their road maintenance labor, and are then restricted from certain roads because of the potential damage caused by their bullock carts – most villagers do not own other means of transport.¹²³ According to previous accounts from Zinba Village published by EarthRights International, it appears that the forced maintenance began after complaints from foreign oil company workers about damage to the roads.¹²⁴

d. Spillover Effect – Transfer of Abuses

A serious and underreported impact of the Yadana and Yetagun projects is a forced labor “spillover effect,” which EarthRights International has documented, but was first observed by a former representative of the ILO.¹²⁵ Essentially, pressure by Total on the Burma Army has led to a decrease in forced labor in the area the companies acknowledge as the pipeline area or “corridor”, but instead of reducing the incidents of forced labor, the demand from the army has instead shifted to neighboring villages.

The Yadana and Yetagun companies have neither acknowledged this grave problem nor accepted responsibility for the impacts of pipeline security abuses outside of the corridor that was agreed upon by the companies and the Burmese military. The pipeline corridor originally included 13 villages and then in 2001 it was expanded to include 25 villages. EarthRights International continues to document abuses committed by pipeline security battalions in villages outside of the designated pipeline corridor.¹²⁶ The battalions exacting forced labor in these outlining areas are the same battalions whose principal mandate is security for the oil companies and the pipeline projects. The Council must assess the “spillover” abuses because they are the result of the militarization of the pipeline region brought on by the Yadana and Yetagun project, and by the ongoing demand of pipeline-related security.

e. Forced Portering for Pipeline-Security Battalions

Forced portering is a signature abuse of the Burmese military, involving forcing civilians to carry heavy loads of arms, ammunition, and supplies, or to “guide” battalions on extended trips through the jungle surrounding the pipeline area. Since

114 Interview #044 in Michaunglaung, Burma (2008). On file with EarthRights International.

115 Yadana Field Report (Oct. 2010). On file with EarthRights International.

116 This abuse has been documented in EARTHRIGHTS INTERNATIONAL & SOUTHEAST ASIA INFORMATION NETWORK, TOTAL DENIAL, *supra* note 74; EARTHRIGHTS INTERNATIONAL, MORE OF THE SAME, *supra* note 85; EARTHRIGHTS INTERNATIONAL, SUPPLEMENTAL REPORT, *supra* note 84; EARTHRIGHTS INTERNATIONAL, TOTAL DENIAL CONTINUES, *supra* note 82; EARTHRIGHTS INTERNATIONAL, THE HUMAN COST OF ENERGY, *supra* note 90; EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT, *supra* note 10; EARTHRIGHTS INTERNATIONAL, GETTING IT WRONG, *supra* note 61; and EARTHRIGHTS INTERNATIONAL, ENERGY INSECURITY, *supra* note 9.

117 EarthRights International interviews and field reports from the Yadana pipeline area, Burma (2008-2010). On file with EarthRights International.

118 EARTHRIGHTS INTERNATIONAL, TOTAL DENIAL CONTINUES, *supra* note 83, at 20-21; Smith & Htoo, *supra* note 101, at 228-229.

119 *E.g.*, Interview #037 in Zinba, Burma (2003); Interview #043 in Kanbauk, Burma (2005); Interview #010 in Ya Pu, Burma (2007); Interview #050 in Kanbauk, Burma (2005); Interview #035 in Law Ther, Burma (2010); Interview # yp-s-003 in Michaunglaung, Burma (2010). All on file with EarthRights International.

120 Interview #035 in Law Ther, Burma (2010). On file with EarthRights International.

121 Interview #002 in Zinba, Burma (2008); Interview #009 in Zinba, Burma (2003); Interview #031 in Law Ther, Burma (2003). All on file with EarthRights International.

122 EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT, *supra* note 10, 21-23; Total, *Infrastructure*, at http://burma.total.com/en/engagement/p_3_3_4.htm.

123 Interview #002 in Zinba, Burma (2008). On file with EarthRights International.

124 Interview #009 in Zinba, Burma (2003). On file with EarthRights International.

125 EarthRights International communication with former ILO Liaison Officer (March 16, 2009).

126 See EARTHRIGHTS INTERNATIONAL, ENERGY INSECURITY, *supra* note 9; EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT, *supra* note 10; EARTHRIGHTS INTERNATIONAL, GETTING IT WRONG, *supra* note 60; EARTHRIGHTS INTERNATIONAL, THE HUMAN COST OF ENERGY, *supra* note 90.

the mid-1990s and continuing to the present day, EarthRights International has documented forced portering and forced “guiding” in connection to the pipelines. It is exacted by the Burmese Army to support the presence of security soldiers necessitated by the pipelines.

Typically, local infantry battalions require village heads to arrange a semi-regular rotation of porters, creating considerable physical and economic hardship for local farmers.¹²⁷ Burmese soldiers also arbitrarily seize villagers and force them to serve as porters.¹²⁸ Portering or guide trips often take several days or longer and, according to accounts from defected soldiers and forced laborers, these trips involve brutal mistreatment of the forced laborers.¹²⁹

Portering and guiding is not optional. “We cannot refuse to go with them,” one villager told EarthRights International, which is a common refrain from people from the pipeline area that are forced to do this type of work for the military.¹³⁰ In addition to forcing porters to carry heavy loads or “guide” soldiers, the military has also commanded that porters procure food and other supplies from villages.¹³¹

The continued use of forced labor in the pipeline area speaks to the ongoing demand for local labor that is both directly linked to the operation of the Yadana and Yetagun pipelines and that facilitates conditions for the companies operating the pipelines. The purpose of the forced labor is “to protect the company’s property or investment.”¹³² Maintenance of pipeline roads, building infrastructure, providing pipeline security, and portering for soldiers guarding the pipeline all directly facilitate the maintenance and security of the Yadana and Yetagun operations. These abuses are ongoing and, arising an unanticipated change in Burma’s political situation or in the management of the Burmese Army, the demand for project-related forced labor will continue throughout the pipelines’ operational lifetime.¹³³

3. Company Efforts to Mislead Investors

Following the revelations in the *Doe v. Unocal* case, Total acknowledged the use of forced labor by the Burmese Army, but claimed that while a few “incidents may have escaped

Total’s attention in the very early stages of the project,”¹³⁴ it had since categorically resolved the matter of forced labor in the pipeline corridor. Total stated, “there is no forced labour in the area around our pipeline”¹³⁵ and that “the Yadana Project has brought about improvements in the quality of life of over 50,000 villagers that include...eradication of forced labor.”¹³⁶ Additionally, in a letter signed by its then Vice President of Public Affairs Jean-Francois Lassalle, Total claimed that local “people say they are grateful for the fact that all forms of forced labour in the area where Total operates have been eradicated.”¹³⁷ The company went so far as to claim that the International Labour Organization (ILO) had certified that it had eradicated forced labor in its project area. From 2003 to 2009, on its website, Total claimed that “according to the ILO, the only region in the country in which forced labor has ceased is the area in which the Yadana gas pipeline was built.”¹³⁸

In fact, forced labor continues in the Yadana pipeline area, as described in detail in the sections above and in numerous EarthRights International reports.¹³⁹ Moreover, the ILO has confirmed that it never stated that forced labor had ceased in the pipeline area and that this claim by Total is untrue. As exposed in the 2009 report *Getting It Wrong*, a senior and former ILO representative in Burma disavowed Total’s claims and noted that the statement that was attributed to the ILO was false and is “not right to say.” He added that “we’ve never had information that suggested [forced labor is] eradicated in the pipeline corridor.”¹⁴⁰ The representative later reiterated that the ILO “never certified or declared the corridor to be free of forced labour - we don’t do such certification, and even if we did, it would have taken a lot more research to draw such a definitive conclusion.”¹⁴¹ Likewise, a current representative

134 Total, *The Allegations and Total’s Response*, at http://burma.total.com/en/controversy/p_4_1.htm (last visited Oct. 28, 2010).

135 Total, Total in Burma – A Long-Term Commitment, at http://burma.total.com/en/news/p_5_3.htm (last visited Oct. 28, 2010).

136 TOTAL, TOTAL IN MYANMAR: A SUSTAINED COMMITMENT, at 46 (2010) available at http://burma.total.com/en/publications/sustained_commitment.pdf

137 Letter from Jean-François Lassalle, Total E&P Vice-President of Public Affairs to Burma Campaign UK, available at http://birmanie.total.com/en/publications/burma_campaign.pdf.

138 See Total, *Human Rights in Myanmar*, (archived copy) at http://web.archive.org/web/20080113131822/http://burma.total.com/en/contexte/p_1_1.htm (preserving a copy of Total’s website as archived on Jan. 13, 2008).

139 In September 2009, EarthRights International published two reports on the Yadana project, TOTAL IMPACT, *supra* note 10 and GETTING IT WRONG, *supra* note 61. In 2010, EarthRights International released EARTHRIGHTS INTERNATIONAL, ENERGY INSECURITY, *supra* note 9. These reports exposed frequent human rights abuses, including forced labor, that benefit the Yadana and Yetagun projects, committed by Burmese Army security forces tasked with providing protection for the projects.

140 EARTHRIGHTS INTERNATIONAL, GETTING IT WRONG, *supra* note 61, at 38.

141 Communication with former ILO Officer (July 10, 2009). On file with EarthRights International.

127 Interview #038 in Ya Pu, Burma (2010); Interview #045 in Kaleinaung, Burma (2005). On file with EarthRights International.

128 Interview #054 in Ahlersekan, Burma (2005). On file with EarthRights International.

129 Interview #006 with defector from battalion 273(2008). On file with EarthRights International.

130 Interview #043 in Kanbauk, Burma (2005). On file with EarthRights International.

131 Interview #038 in Ya Pu, Burma (2010); Interview #025 in Michaunglaung, Burma (2007); Interview #037 in Zinba, Burma (2007); Interview #015 in Zinba, Burma (2008). All on file with EarthRights International.

132 Graver Report, *supra* note 23, at § 5.3.2.3.

133 See Council on Ethics, Total Assessment, *supra* note 6, at 12 (listing the criteria the Council on Ethics considers to determine if there is an unacceptable risk of the Fund contributing to human rights violations).

of the ILO in Burma, responding directly to the statement, told EarthRights International that “no area of the country can claim to be completely forced labour-free.”¹⁴² Only in 2009, after EarthRights International exposed the untruth of Total’s statements, did Total quietly withdraw this misleading claim from their website. In 2010, the current ILO Liaison Officer in Rangoon Steve Marshall confirmed in writing to EarthRights International that forced labor has continued in the Yadana pipeline area.¹⁴³

4. The Companies’ Knowledge of and Failure to Take Reasonable Measures to Prevent Abuses

In determining whether a company is complicit in abuses, the Council must find that the company either contributed actively to the abuses, or had knowledge of the abuses, but failed to take reasonable measures to prevent them.¹⁴⁴ The Yadana and Yetagun companies are clearly aware of reported abuses connected to their projects. In addition to numerous reports from the area over the past 15 years, lawsuits against them and their partners, and consistent news media reports, the companies themselves have taken actions that indicate awareness of human rights abuses associated with their projects.

For example, Total has undertaken some efforts around forced labor in the Yadana area. The company claims that its staff has communicated to its partner, the Myanmar Oil and Gas Enterprise, its opposition to instances of forced labor in the project area.¹⁴⁵ Total also installed anonymous, forced-labor complaint boxes in some but not all pipeline villages¹⁴⁶ and claims to have established lines of communication with villages through what they refer to as “village communication committees.”¹⁴⁷ Additionally, Total sent two staff members to the ILO’s “facilitation training” to learn how to facilitate complaints of forced labor to the ILO.¹⁴⁸ All of these efforts are evidence that Total is aware that forced labor is an ongoing concern in the pipeline area.

However, these efforts have done little to prevent forced

labor in connection to the Yadana and Yetagun companies’ presence. As of June 2010, Total had yet to facilitate any complaints of forced labor to the ILO.¹⁴⁹ Moreover, the forced labor complaint boxes – substitutes for reporting abuses to the ILO, where the reports would be formally processed – no longer exist (“In the past, there was a complaint box, but now I do not see it anymore,” said one villager, for example).¹⁵⁰ When they did exist, villagers regarded them as ineffective.¹⁵¹ Villagers explained further that the complaint boxes put complainants in jeopardy with the local authorities, who routinely punish villagers who dissent from the Army’s demands on them. According to one villager from the pipeline village of Eindayaza:

People put complaints in the complaint box but nothing changed so people grew tired of it. The people who check it are from the socio-economic program. The complaints are about forced labor... There is one box in each village. There is no answer from the company. They’ve been there for six or seven years. They check them only when they come to the village, so about once a month. Once, the complaint somehow did reach the top – it was in the news – so the military came and [told the villagers not to complain] anymore. I’m not sure what the subject was but I think it was about forced labor. They called a meeting with the villagers and also went through the village head. It was Battalion 273. The village head was afraid. The village head said that if complaints are filed, we will suffer, so you decide.¹⁵²

The local village communication committees have proved equally ineffective. Most villagers that EarthRights International has interviewed have never had any contact with the committees and continue to complain about ongoing abuses and livelihood problems.¹⁵³

To EarthRights International’s knowledge, although Total maintains a working relationship with the ILO, it has yet to facilitate a complaint of forced labor to the ILO. Moreover, the ILO in Burma is minimally staffed and overburdened by a sizable mandate, unreasonable staffing restrictions imposed by the Burmese regime, and ongoing use of forced labor and child soldiers throughout the country.

The companies’ knowledge of ongoing abuses and meager efforts to combat forced labor and other abuses demonstrates that Total and its partners, despite their assurances and actions,

142 Communication with ILO Officer (May 25, 2009). On file with EarthRights International.

143 Email communication with Steve Marshall, ILO Officer (June 9, 2010). On file with EarthRights International.

144 Council on Ethics, Total Assessment, *supra* note 6, at 12.

145 *Id.* at 16; *see also* Total, *Protection of Human Rights*, at http://burma.total.com/en/engagement/p_3_2.htm (claiming “From the outset [of the project in Burma] Total has taken all the precautions that seemed necessary [to protect human rights], including:... Taking a very firm stance, relayed by it’s local partner MOGE, against forced labor in the pipeline region.”).

146 EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT, *supra* note 10, at 28-29.

147 Total, *Total’s Careful Monitoring*, at http://burma.total.com/en/gazier/p_2_4_2.htm (last visited Nov. 18, 2010).

148 Email communication and meetings between EarthRights International and Mr. Steve Marshall of the ILO (2009-2010). On file with EarthRights International.

149 This was verified by the ILO as of June 9, 2010. Email communication between EarthRights International and the ILO Liaison Officer in Burma (June 9, 2010). On file with EarthRights International.

150 Interview #038-2008 in Michaunglaung, Burma (2008). On file with EarthRights International.

151 EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT, *supra* note 10, at 28-29.

152 Interview #042-2008 in Yebone, Burma (2008). On file with EarthRights International.

153 EarthRights International interviews, Burma (2005-2010). On file with EarthRights International.

have failed to take reasonable measures to address abuses.

Importantly, the Council's standard does not rest on a company's motives or intent, but on the objective reasonableness of its efforts. As the Council has recognized, "[c]ompanies' motives for acts or omissions are, as a general point of departure, not relevant to the Council's deliberations."¹⁵⁴ In other words, the Council must measure the ethics of investing in Total and the other pipeline operators by the likelihood that the companies' projects will continue to be linked to ongoing negative human rights impacts.

In similar situations, in which companies have either attempted to whitewash ethical violations or made minimal or ineffective attempts to address them, the Council has taken it as evidence that there is an unacceptable risk such abuses will continue. In its recommendation to exclude a timber company from the Fund on the basis of severe environmental damage, the Council noted that the company's "belief that its forestry operations are sustainable and carried out in a lawful manner" was evidence that its abusive practices were unlikely to change.¹⁵⁵ Additionally, the Council found that the company's efforts to improve water supply and communications in local communities were irrelevant to its violations of environmental laws.¹⁵⁶ Similarly, in its assessment of Monsanto for use of child labor, the Council noted that, although the company adopted a human rights policy, it had applied prevention measures in only part of its operations.¹⁵⁷ The Council concluded: "Without focused and comprehensive measures undertaken by the company itself there is little reason to believe that the incidence or the severity of the violations will recede in the future."¹⁵⁸ Likewise, despite the efforts Total has undertaken, there is little evidence to suggest that serious human rights violations in the Yadana area will decrease in the future.

5. Complicity of the Yadana and Yetagun Partners and Purchasers

The Council has so far failed to address whether the Fund's investments in Total's partners in the Yadana project –

154 Council on Ethics, Letter dated April 18, 2008, on the Council's assessment of investments in Israel Electric Corp., (unofficial English translation) available at www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Other-documents/letter-dated-april-18-2008-on-the-council.html?id=524431.

155 Council on Ethics, Recommendation of 22 February 2010, on the Exclusion of the Company Samling Global Ltd., at 42, (unofficial English translation) available at www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/recommendations-on-environmental-damage/Recommendation—of-February-22nd-2010-on-the-exclusion-of-the-company-Samling-Global-Ltd.html?id=612794.

156 *Id.* at 40.

157 Council on Ethics, Recommendation of 20 November 20, 2006 on Exclusion of the Company Monsanto Co., at 22, (unofficial English translation) available at www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/recommendations-on-human-rights/recommendation-of-november-20-2006-on-ex.html?id=526104.

158 *Id.*

Chevron and PTTEP – are in line with the Ethical Guidelines. In the Council's 2005 assessment of Total, the Council only analyzed Total. The Council, however, recognized that Total had only a 31 percent share in the Yadana project and that Unocal (now Chevron), with a 28 percent share, and PTTEP, with a 25 percent share, also had large shares.¹⁵⁹ In addition, the Council found, based on evidence submitted in the *Doe v. Unocal* litigation in the United States, that Total and Unocal (Chevron) shared responsibility for the abuses because they "collaborated closely on the gas project in the period in question."¹⁶⁰ According to this understanding, the Council should assess the entire Yadana consortium.

The Council should also assess JX Nippon Oil & Gas Exploration, a partner in the Yetagun pipeline in conjunction with PTTEP.¹⁶¹ (Petronas Carigali of Malaysia is the operator of the Yetagun pipeline but, to EarthRights International's knowledge, the Fund does not have holdings in the company.) As the above sections demonstrate, the abuses carried out by the Burmese military relate to both the Yadana and Yetagun pipelines. Moreover, the companies are well aware of the abuses. The Yetagun partners' own impact assessment for the project stated, "the pipeline will create a major security role for the army,"¹⁶² and EarthRights International has published reports on the abuses associated with the Yetagun project.¹⁶³ Thus, the Council should not ignore the Yetagun companies' complicity in the pipeline-related abuses.

Finally, the Council should also assess the role played by PTT, the purchaser of the gas from the Yadana and Yetagun pipelines. The preparatory work for the Ethical Guidelines recognized that a company in a customer relationship may be complicit in the abuses of its suppliers "if the customer relationship is long-term or repeated after the unethical practices have been identified."¹⁶⁴ Moreover, evidence shows that PTT has considerable influence over the Yetagun project. In 2009, PTT reportedly joined forces with Nippon Oil to successfully

159 Council on Ethics, Total Assessment, *supra* note 6, at 4.

160 *Id.* at 17.

161 JX Nippon Oil & Gas Exploration Corporation owns a 50.0% share of Nippon Oil Exploration (Myanmar), the subsidiary that directly owns the Yetagun pipeline share. The Government of Japan owns the other 50.0% stake in Nippon Oil Exploration (Myanmar). JX Nippon Oil & Gas Corporation, *Business Activities: Myanmar*, at www.nex.jx-group.co.jp/english/activity/southeast_asia/myanmar.html (last visited Nov. 24, 2010). JX Nippon Oil & Gas Exploration is a wholly-owned subsidiary of JX Holdings, Inc. See JX Holdings, Inc., *Consolidated Financial Results for the First Half of Fiscal 2010* (Nov. 5, 2010), available at www.hd.jx-group.co.jp/english/ir/library/statement/2010/pdf/jx_en_ts_fy2010_2q.pdf.

162 EARTHRIGHTS INTERNATIONAL & SOUTHEAST ASIA INFORMATION NETWORK, TOTAL DENIAL, *supra* note 74, at 65 (citing LeProvost Dames & Moore, Yetagun Development Project (Phase I): Environmental and Cultural Impact Assessment for Onshore Zone 1, (August 1996) (draft)).

163 EarthRights International reports that specifically discussed the Yetagun project, TOTAL DENIAL CONTINUES, *supra* note 83, SUPPLEMENTAL REPORT, *supra* note 84, and MORE OF THE SAME, *supra* note 85.

164 Graver Report, *supra* note 23 at § 5.3.2.3.

pressure Petronas to select Thai Nippon as a subcontractor for the construction of a new offshore platform for the project.¹⁶⁵ Thus, although PTT is not involved in the project from an equity perspective, as the buyer, it is nonetheless complicit in the violations to the extent that it is aware of the continued abuses and has not sought to exercise its influence to prevent them.

The evidence of abuse associated with the Yadana and Yetagun companies meets the Council's threshold for an unacceptable risk of the Fund contributing to human rights violations through its holdings: 1) There is a visible link between the abuses and the pipeline companies' operations; 2) The breaches facilitate conditions for the companies; and 3) The breaches are ongoing. Total, Chevron, PTTEP, Petronas, and JX Holdings (formerly Nippon Oil) know of these breaches but have yet to take effective measures to prevent them.

165 *Power Politics in Burma's Yetagun Gas Field*, ASIA SENTINEL, Oct. 21, 2009, *available at* www.asiasentinel.com/index.php?option=com_content&task=view&id=2110&Itemid=417.

IV. The Shwe Gas Pipeline and Oil Transport Pipeline Projects: Documented Abuses and Construction

There are two new, major trans-Burma energy projects that have moved from planning to construction stages. The first project involves a consortium of energy companies from South Korea and India that is developing offshore natural gas deposits in the Bay of Bengal in waters off Arakan state. The project involves construction of offshore natural gas platforms and wells, an offshore-to-onshore transport pipeline, and a massive overland transport pipeline from western Burma to Yunnan Province, China. The project, known as Shwe (gold), commenced in the early part of this decade with three producing wells – Shwe, Shwe Phyu, and Mya – that collectively contain one of Southeast Asia’s largest proven natural gas reserves.¹⁶⁶ Like the resources extracted by the Yadana and Yetagan projects, the Shwe gas is destined primarily for foreign markets.

The second project involves a consortium led by a Chinese state-owned company in partnership with the Shwe consortium, and is moving forward with construction of a parallel crude oil transport pipeline to China’s western provinces. The oil transport pipeline will transport oil acquired by China in Africa and the Middle East. The pipeline will transport oil overland from Maday Island in Arakan State across Burma to the China Border in Shan State. The oil transport project also includes ongoing construction of port and processing facilities on Maday Island.

The gas and oil pipeline projects are the primary focus of the Shwe Gas Movement (SGM), a Burmese-led civil society network committed to human rights, democracy, and development in Burma.¹⁶⁷ The SGM advocates for the companies involved in the projects to suspend the projects; for investors to divest their holdings in the companies; and for banks to refrain from financing the projects unless the following four conditions are met: 1) free prior and informed consent of affected populations; 2) environmental, social and human rights impact assessments according to best practice; 3) basic human rights and environmental protections and safe complaint mechanisms in place for villagers; and 4) adequate compensation provided directly to villagers who have been displaced or who have suffered lost or damaged personal property or land.¹⁶⁸ Importantly, the leaders of the Shwe Gas Movement hail from areas directly affected by the projects, but due to violent persecutions by the Burmese military regime against human rights activists and individuals harboring dissent against these projects, they are forced to work clandestinely.

166 *Our Friends in the North*, THE ECONOMIST, Feb. 9, 2008, available at www.economist.com/world/asia/displaystory.cfm?story_id=10653874 (last visited Oct. 30, 2010).

167 See The Shwe Gas Movement, *Campaign Goals*, at www.shwe.org/about-sgm/campaign-goals (last visited Nov. 27, 2010).

168 THE SHWE GAS MOVEMENT, CORRIDOR OF POWER: CHINA’S TRANS-BURMA OIL AND GAS PIPELINES, at 30 (Sept. 2009) available at www.shwe.org/Attachments/CorridorofPower.pdf (hereinafter CORRIDOR OF POWER).

1. The Shwe Gas Project and Oil Transport Pipeline Components

The sections that follow explain the roles of the key companies involved in the Shwe gas and oil transport projects and assesses whether their activities are in line with the Ethical Guidelines.

a. Natural Gas Ownership and Offshore Pipeline Construction

The Shwe consortium owns offshore gas fields in western Burma’s Bay of Bengal. The project involves drilling in 25 wells in offshore blocks A-1 and A-3, as well as the installation of extensive offshore production and processing facilities. The project also entails construction of a 110 km-long offshore-to-onshore pipeline from the offshore platform to Ramree Island, which is the gas sales point, from where it will be purchased by the Chinese National Petroleum Corporation (CNPC) and the Shwe consortium and transported to the China border.

The Shwe consortium has five members. Daewoo International, a public company incorporated in Seoul, South Korea holds a 51% percent stake in the consortium.¹⁶⁹ The South Korean company POSCO recently acquired a 68% percent majority share of Daewoo International.¹⁷⁰ Korea Gas Corp., a publicly listed, state-controlled South Korean company, holds an 8.5% per stake in the Shwe consortium.¹⁷¹ The remaining stakes are held by the GAIL of India Ltd. (8.5%), the Oil and Natural Gas Corp. Videsh (ONGC Videsh) (17%), and the Myanmar Oil and Gas Enterprise (MOGE) (15%).¹⁷²

Hyundai Heavy Industries (South Korea) and Transocean (Switzerland) are also involved in offshore and some onshore development portions of the Shwe project. The Shwe consortium awarded Hyundai Heavy a USD \$1.4 billion contract for construction of a “40,000-ton class offshore gas platform, a subsea production system, subsea pipelines, an onshore gas terminal, a jetty and a supply base.”¹⁷³ Hyundai Heavy Industries expects to complete construction by March 2013.¹⁷⁴ Hyundai Heavy Industries also performed the “front

169 *GAIL exploring option to buy stake in China’s CNPC*, FINANCIAL EXPRESS, Sept. 9, 2009, available at www.financialexpress.com/news/gail-exploring-option-to-buy-stake-in-chinas-cnpc/514610/ (hereinafter Financial Express).

170 Sungwoo Park & Shinye Kang, *Posco Buys Daewoo International Stake for \$2.8 Billion*, BLOOMBERG, Aug. 30, 2010, available at www.bloomberg.com/news/2010-08-30/posco-buys-daewoo-international-stake-for-2-8-billion-to-expand-resources.html.

171 Financial Express, *supra* note 169.

172 *Id.*

173 Hyundai Heavy Industries Co. Ltd., *Hyundai Heavy Signs US\$1.4 Billion Myanmar Gas Plant Deal*, Feb. 23, 2010, at http://english.hhi.co.kr/press/news_view.asp?idx=531&page=1 (last visited Oct. 30, 2010).

174 *Id.*

end engineering design” study for the Shwe project, which determined in large part the way in which the entire project will proceed from 2009 to 2028.¹⁷⁵ Transocean, for its part, has conducted major drilling operations related to the project.¹⁷⁶ The overall cost of development of the offshore gas fields is approximately USD \$3.2 billion and the project has an estimated lifespan of 30 years.¹⁷⁷

b. Onshore Natural Gas Pipeline Construction and Distribution

The Shwe consortium members and CNPC will construct and operate a cross-country, onshore natural gas pipeline from the gas sale point at Ramree Island to the China border.¹⁷⁸ In 2008, the Shwe consortium entered into an Export Gas Sales and Purchase Agreement with CNPC for the sale and transport of Shwe natural gas.¹⁷⁹ The Shwe consortium has a 49.1 percent stake in the cross-country onshore pipeline operation – Daewoo International (25.04%), ONGC Videsh (8.347%), MOGE (7.365%), GAIL of India Ltd. (4.174%) and Korea Gas Corp. (4.174%) – and CNPC has a 50.9 percent share.¹⁸⁰

Under this agreement, CNPC serves as the “controlling party of the joint venture to be in charge of the design, construction, operation, expansion and maintenance of the [Burma] oil and gas pipeline.”¹⁸¹ According to a public statement confirmed by a Daewoo press official, however, Daewoo will participate with CNPC in pipeline construction and gas transport.¹⁸² This information was also confirmed in publicly-available information based on required filings in India by the Indian companies involved in the project.¹⁸³

175 “Development of A-1 and A-3 gas fields in Myanmar-I: Indian investment at \$1 billion but gas goes to China,” Indian-Petro, Nov. 02, 2009, available at www.indianpetro.com. (hereafter Indian-Petro).

176 Mac McClelland, *Feds Investigate Transocean’s Possible Ties to Burmese Drug Clan*, MOTHER JONES, Aug. 19, 2010, available at <http://motherjones.com/rights-stuff?page=2>.

177 *Daewoo pegs Shwe spend at \$3.2bn*, UPSTREAM ONLINE, (Sept. 2, 2009), available at www.upstreamonline.com/live/article187072.ece.

178 ONGC Videsh Ltd., *Assets*, at www.ongcvidesh.com/Assets.aspx (last visited Oct. 30, 2010) (“The Onshore Pipeline Company was formed and registered in Hong Kong... The Company will lay an onland [sic] pipeline of 870 Km X 40 from land fall point at Ramree Island to Myanmar China border.”).

179 *Daewoo Seals Myanmar-China Gas Export Deal – Xinhua*, REUTERS, Dec. 25, 2008, available at <http://in.reuters.com/article/idINPEK27223120081225>; Indian-Petro, *supra* note 175.

180 ONGC Videsh Ltd., *Assets*, *supra* note 178.

181 CNPC, *Myanmar-China Oil and Gas Pipeline Project Commenced*, June 4, 2010, at www.cnpc.com.cn/en/press/newsreleases/MyanmarChinaOilandGasPipelineprojectcommenced_.htm (last visited Oct. 25, 2010) (hereinafter Pipeline Project Commenced).

182 *Daewoo Signs MoU to Sell Gas to China*, BURMA NEWS INTERNATIONAL, June 19, 2009, available at www.bnionline.net/news/mizzima/6506-daewoo-signs-mou-to-sell-gas-to-china.html.

183 ONGC Videsh Ltd., *Assets*, *supra* note 178; Indian-Petro, *supra*

PetroChina, a subsidiary and closely-related entity of CNPC, will distribute the Shwe gas in China.¹⁸⁴ PetroChina’s subsidiary, PetroChina Kunlun Gas Company Ltd. (Kunlun Gas), along with three local companies, will provide urban natural gas distribution services to Kunming City in China.¹⁸⁵ Kunlun Gas holds a 51 percent stake in the distribution venture.¹⁸⁶ Kunlun Energy Company, Ltd., another PetroChina subsidiary, recently announced plans to take over Kunlun Gas.¹⁸⁷

c. Crude Oil Pipeline Construction and Operation

In addition and parallel to the natural gas pipeline, construction is underway for a 1,100 km crude oil pipeline to transport oil from the Middle East and Africa through Burma to China.¹⁸⁸ The pipeline will extend from Madaya Island, in Arakan State in western Burma, to the China Border in Shan State and into the southwestern Chinese province of Yunnan.¹⁸⁹ In addition to the pipeline itself, the project includes construction of a large crude oil wharf and crude oil storage tanks at the port of Kyauk Phyu, off the western coast of Burma.¹⁹⁰

CNPC signed an agreement with the regime in Burma over the development, operation, and management of the oil transport pipeline in 2009 and began construction of the port facilities later that year.¹⁹¹ The agreement stipulates that Burma’s government shall guarantee the safety of the pipeline, meaning that the Burmese Army and other state security forces will occupy and patrol the area where the pipelines will be constructed, maintained, and operated.¹⁹²

note 175.

184 *PetroChina Inks 1st Natural Gas Distribution Agreement*, CHINA KNOWLEDGE, Oct. 3, 2008, available at www.chinaknowledge.com/News/news-detail.aspx?type=1&id=17891.

185 *Myanmar-China Pipeline to Start Construction in 2009*, CHINA STAKES, Nov. 21, 2008, available at www.chinastakes.com/2008/11/myanmar-china-pipeline-to-start-construction-in-2009.html.

186 *Id.*

187 *CNPC (HongKong) to Rename, Acquire PetroChina Kunlun Gas*, C1 ENERGY, Feb. 22, 2010, available at www.c1energy.com/common/2626861,0,0,0,2.htm.

188 Xinhua Economic News, *Sino-Myanmar Crude Pipeline Memo Signed*, DOWNSTREAM TODAY, June 19, 2009, available at www.downstreamtoday.com/%28X%281%29S%28jcgmovup1ts42foqvafny55%29%29/news/article.aspx?a_id=16796&AspxAutoDetectCookieSupport=1 (hereinafter Pipeline Memo Signed). Estimates on the actual length of the pipeline vary. Another report indicates that it will be 771 km long. *CNPC to Build, Run China-Myanmar Oil Pipeline*, CHINA DAILY, Dec. 21, 2009, available at www.chinadaily.com.cn/china/2009-12/21/content_9209811.htm (hereinafter CNPC to Build).

189 Xinhua Economic News, *Pipeline Memo Signed*, *supra* note 188.

190 *Id.*

191 *CNPC to Build*, *supra* note 188.

192 *Id.*

d. Summary of the Norwegian Pension Fund-Global's Investments Related to the Shwe Project

Companies involved in the Shwe gas project:

| Companies involved in the Shwe project | Natural Gas Ownership, Offshore and Onshore Construction up to the gas sale point on Ramree Island | Onshore Natural Gas Pipeline Construction and Operation from the gas sale point on Ramree Island to the China border | Onshore Crude Oil Pipeline Construction and Operation from Burma to the China border |
|--|--|--|--|
| Daewoo International/POSCO | 51% | 25.04% | |
| ONGC Videsh | 17% | 8.3% | |
| MOGE | 15% | 7.3% | 49.1% |
| Korea Gas Corp. | 8.5% | 4.17% | |
| GAIL of India | 8.5% | 4.17% | |
| CNPC | | 50.9% | 50.9% |
| Hyundai Heavy Industries | Construction sub-contractor | | |
| PetroChina/Kunlun Gas | | Distributor | |
| Transocean | Offshore drilling company | | |

The Norwegian Pension Fund-Global holds investments in most of the major companies in the Shwe gas project. As of December 31, 2009, the Fund held investments in Shwe consortium members Daewoo International, GAIL of India Ltd., and Korea Gas Corp., worth a collective USD \$51 million.¹⁹³ In addition, the Fund had USD \$244 million invested in POSCO, which owns a majority stake in Daewoo, and approximately USD \$12 million invested in Hyundai Heavy Industries.¹⁹⁴ The Fund had USD \$90 million invested in PetroChina and USD \$58 million invested in Kunlun Energy Co Ltd.¹⁹⁵ Finally, the Fund had \$168 million invested in Transocean.¹⁹⁶

2. Abuses Linked to the Shwe Gas and Oil Transport Pipeline Projects

In October 2008, EarthRights International, the Shwe Gas Movement, and nine co-complainants filed a complaint with the OECD Korean National Contact point alleging Daewoo International and the Korea Gas Corporation were in violation of the *OECD Guidelines for Multinational Enterprises* through their involvement in the Shwe gas project.¹⁹⁷ The 43-page complaint detailed allegations that Daewoo International and Korea Gas Corp. were in breach of at least six OECD Guidelines through their activities as members of the Shwe project: failing to respect human rights, contributing to forced labour, failing to promote sustainable development, failing to disclose information about the project, failing to consult with local populations, and by failing to conduct an Environmental

193 Norges Bank Investment Management, Fund Holdings, *supra* note 16 (listing fund holdings in Daewoo(USD \$2.6 million), Korea Gas Corp (USD \$1.3 million), and GAIL of India, Ltd. (USD \$47.2 million).

194 *Id.*

195 *Id.*

196 *Id.*

197 EARTHRIGHTS INTERNATIONAL ET. AL, REPORT TO THE SOUTH KOREA NATIONAL CONTACT POINT REGARDING DAEWOO INTERNATIONAL AND KOREA GAS CORPORATION (Oct. 2009), available at www.earthrights.org/sites/default/files/publications/OECD-Complaint10.29-ENGLISH.pdf (hereinafter REPORT TO THE SOUTH KOREA NATIONAL CONTACT POINT).

Impact Assessment (EIA) according to international standards.¹⁹⁸

According to research and investigations conducted by EarthRights International and others, the Shwe companies' ongoing actions and omissions have led to abuses and will contribute to future abuses as the Shwe project moves into the construction phase. As the following sections describe, the Shwe project and oil transport pipeline have led to human rights abuses in Arakan State and Magwe Division, and have exacerbated ethnic tensions in Shan State, where there is currently a risk of renewed civil war. EarthRights International continues to monitor the situation and document abuses along the route.

a. Violations of Civil and Political Rights

Burmese authorities have arrested and interrogated local people who have expressed dissent regarding the Shwe gas project as well as others who were simply suspected of supporting the activists.¹⁹⁹ Since April 2008, students in Arakan State have been detained, interrogated, and forced into hiding based on the suspicion they are opposed to the Shwe project and for allegedly hanging posters in public places expressing opposition to the Daewoo-led project.²⁰⁰ Authorities have also detained and arrested villagers involved in grassroots community-level trainings and meetings regarding the potential implications of the project.²⁰¹

In 2009, one ethnic Arakan man was tortured and sentenced to six months in Insein Prison for participating in such a meeting. He told EarthRights International:

[Military intelligence] blindfolded me for four days.
For four days I couldn't see anything. I was beaten

198 *Id.*

199 KALADAN PRESS, *Arakan State Under Military Control*, BURMA NEWS INTERNATIONAL, June 8, 2007, available at www.bnionline.net/index.php?Itemid=6&id=1805&option=com_content&task=view.

200 Interview #032-2008 in Sittwe, Burma (2008). On file with EarthRights International; Shwe Gas Movement interviews. On file with Shwe Gas Movement.

201 Interview #053 in Sittwe, Burma (2010). On file with EarthRights International.

nonstop, always being questioned, nonstop for four days. They asked me many things. . . They beat me very hard. Sometimes they'd come in and just slap me or punch. They wouldn't say anything, they'd just hit me. Sometimes I'd be so tired because I didn't sleep, and the intelligence would tell me I could sleep for five minutes. Then they'd wake me up and keep asking me questions, or beating me.²⁰²

This man stood trial on fabricated charges, was provided no lawyer in his defense, and went into hiding after serving out his sentence in Insein Prison.²⁰³

b. Forced Displacement and Land Confiscation

EarthRights International and others have documented forced displacement and land confiscation in relation to the Shwe gas and oil transport pipeline projects. In 2010, hundreds of households in Arakan State and Magwe Division have been adversely affected by the companies' activities, particularly on Maday and Ramree Islands, and in other parts of Kyauk Phyu township in Arakan State.

In these areas, villagers report that Daewoo International, CNPC, and the Burmese authorities are working in collaboration with Asia World Company Ltd. to forcibly acquire their land for the Shwe gas and oil transport pipeline projects.²⁰⁴ Asia World confiscated land for the pipeline construction routes and other infrastructure development. Although the company promised some villagers compensation for their land based on local prices, no one with whom EarthRights International has spoken claims to have received compensation.²⁰⁵ Villagers report the presence of both Chinese and Korean company representatives on Maday Island, in Kyauk Phyu township, and Ramree Island, including representatives of both Daewoo International and CNPC.²⁰⁶ Villagers claim that Burmese men from Asia World and Arakanese men interpret for both Koreans and Chinese representatives from Daewoo

International and CNPC, respectively.²⁰⁷

Villagers in Arakan State were told by Asia World that their homes will be destroyed to make way for the pipeline route, while other villagers were informed they would lose several acres or all of their rice paddy fields. The villagers with whom EarthRights International has spoken have not received compensation, they were not consulted about the impacts of the projects in any significant way, nor do they have any other way to dissent to the development plans.²⁰⁸ According to one villager, "We have no rights to speak out. Anytime they can do anything to us."²⁰⁹ Another affected villager in Kyauk Phyu told EarthRights International:

If the company men order our villagers to move to another place, we must follow their orders, because they are also the government's men. They are working for the government. Even though we don't want to move to another place, we can't deny their orders. I love my village very much, because it is our native land and my parents and grandparents also lived in this village.²¹⁰

In 2010, an Asia World representative told one villager that his "three acres of paddy fields were in the area of the gas pipeline route, and that they have to use my paddy fields for the gas pipeline, and that they will pay compensation for my paddy fields' value later." The villager, however, said that, "Until today, I have not received any compensation from [the companies or authorities]. I don't know if they will pay compensation. . . . If [they] don't pay any compensation for the paddy fields, I can do nothing. I am helpless."²¹¹

"Our family depends on our paddy fields for our survival," added another uncompensated villager in Maday Kyun Rwama village.²¹² He lost two out of four acres of rice paddy to the pipeline project.²¹³ "We cannot survive without our paddy fields," he said.²¹⁴ Another villager explained to EarthRights International that the companies confiscated three out of four acres of his family's paddy fields for the gas pipeline project: "Now I have about one acre of paddy field to plough. How can my family members survive with one acre of paddy field? We are facing a lot of difficulties right now because of the Asia World Company."²¹⁵

202 *Id.*

203 *Id.*

204 Asia World Co. Ltd. is a well-known Burmese company closely associated with the ruling military regime. Tun Myint Naing, aka Steven Law, is the managing director of Asia World and the son of infamous drug lord Lo Hsing Han. The company is involved in construction, management of ports, import-export, and retail businesses. Asia World Co. Ltd. is listed on the European Union and American sanctions lists, while Tun Myint Naing and his Singaporean wife are included in the US and EU travel bans, and are both on the US Treasury Department Office of Foreign Asset Control Specifically Designated Nationals (SDN) list, also referred to as the black list.

205 EarthRights International has conducted over 30 interviews with local people from Arakan State in 2010 alone, explaining a variety of negative impacts of the Shwe gas and oil transport pipeline projects. *See, e.g.*, Interview #004 in Maday Kyun Rwama, Burma (2010); Interview #014 in Kyauk Phyu, Burma (2010); Interview #021 in Maday Kyun Rwama, Burma (2010); Interview #005 in Kyauk Phyu, Burma (2010). All on file with EarthRights International.

206 *Id.*

207 *Id. supra* note 205; Interview #009 in Maday Kyun Rwama, Burma (2010). On file with EarthRights International.

208 *Id.*

209 Interview #028 in Maday Kyun Rwama, Burma (2010). On file with EarthRights International.

210 Interview #005 in Kyauk Phyu, Burma (2010). On file with EarthRights International.

211 Interview #004 in Maday Kyun Rwama, Burma (2010). On file with EarthRights International.

212 Interview #021 in Maday Kyun Rwama, Burma (2010). On file with EarthRights International.

213 *Id.*

214 *Id.*

215 Interview #022 in Maday Kyun Rwama, Burma (2010). On file with EarthRights International.

In Magwe Division, in the path of the pipelines, the Burmese authorities confiscated local people's lands for the project but told villagers they would only need their land for the pipelines for three years, at which point their land would be returned. In these "good faith" cases, villagers received no compensation and had no option but to submit their land to the control of the companies and the state. Additionally, they are uncertain regarding their legal rights to their land now that the authorities have confiscated it.²¹⁶

One resident in Magwe Division told EarthRights International that Chinese oil company employees are working in cooperation with the Burmese Army. He said that the Chinese workers travel in the pipeline path in Magwe Division accompanied by the Burmese Army.²¹⁷ He also said that when the proposed pipeline path crosses local villagers' farmlands, an Army representative confiscates the land but gives the villagers some compensation. "Now [the Chinese workers] are working on farmlands that are owned by the villagers. The villagers had to give their farmland to the Chinese men."²¹⁸

c. Exacerbating Ethnic Tensions in Shan State

"The pipeline will be a tool and an opportunity for the [Burmese regime] to eliminate the armed groups."

- General Gam Shawng Gunhtang of the Kachin Independence Army, 2009²¹⁹

There are no ceasefire groups or non-state armies in Arakan State or Magwe Division, Burma. However, on the northeast side of the pipeline projects, in Shan State, there are over 40 militias, numerous ethnic nationalities, and several non-state ethnic armies that administer their own territories, called *atu deitha*, or "special regions."²²⁰ Several of these armies, and ethnic political organizations overseeing the armies, are currently under ceasefire agreements with the Burmese authorities,²²¹ while others remain at war.²²² The ceasefire areas in Shan State are currently on the verge of collapse.

At the time of writing, the United Wa State Army and the Kachin Independence Army, with an estimated 40,000 soldiers between them, are bracing for potential war with the

Burmese regime in Shan and Kachin States.²²³ Such renewed fighting would put an end to the ceasefire agreements that each organization has maintained with the Burmese regime for approximately two decades. The UWSA signed its ceasefire agreement in the first wave of such agreements in Burma, in 1989, and the KIA signed a similar agreement in 1994. The KIA's 4th Brigade, also known as the Kachin Defense Army (KDA), operates in Shan State and signed a separate agreement in 1991.²²⁴

The precise route of the Shwe gas and oil pipelines in northern Shan State is unconfirmed, as neither the companies nor the military regime have publicly released definitive details, contrary to international standards for disclosure of this vital information.²²⁵ Nevertheless, EarthRights International sources indicate the pipeline route in northern Shan State will travel from Namtu to Mongtat, to Mongwi, to Namhkan, north of Thibaw.²²⁶ The route appears to be in the direct path of the politically contested territory of the KIA's 4th Brigade (the Kachin Defense Army, or KDA) and the Shan State Army-North.²²⁷

The pipelines will necessarily bring infrastructure construction to this and possibly other politically contested areas in Shan State, as well as an influx of Burmese Army troops tasked with providing security for the companies and the projects. The existing roads and infrastructure in the area between Hsipaw and Namhkan are in very bad condition, and there is little or no central government authority in the area.²²⁸ This has led to a concern that the projects will be used by the Burmese regime to penetrate and occupy the area. In 2009, General Gam Shawng Gunhtang of the Kachin Independence Army said, "The pipeline will be a tool and an opportunity for the [Burmese Authorities] to eliminate the armed groups."²²⁹

In the unfortunate event of renewed conflict between the

216 EarthRights International interviews in Magwe Division, Burma (2010). On file with EarthRights International.

217 Interview #040 in Magwe, Burma (2010). On file with EarthRights International.

218 *Id.*

219 Thomas Fuller, *Ethnic Groups in Myanmar Want Peace but Gird for a Fight*, NEW YORK TIMES (May 10, 2009) (quoting a Kachin Independence Army general discussing the way in which the military regime conceptualizes development vis-à-vis the Shwe pipeline).

220 TRANSNATIONAL INSTITUTE, NEITHER WAR NOR PEACE: THE FUTURE OF THE CEASE-FIRE AGREEMENTS IN BURMA, at 15 (July 2009) available at www.tni.org/report/neither-war-nor-peace.

221 These include the United Wa State Army, the Shan State Army-North, the Palaung State Liberation Party, and the Kachin Defense Army, or the 4th Brigade of the Kachin Independence Army.

222 The largest army at war with the Burmese regime in Shan State at present is the Shan State Army-South.

223 See, e.g., Lawi Weng, *Ethnic Armed Groups Prepare for War*, THE IRRAWADDY, Oct. 18, 2010, available at www.irrawaddy.org/article.php?art_id=19756; Dennis Gray, *Myanmar's Ethnic Minorities Prepare for War*, WASHINGTON POST, Nov. 2, 2010, available at www.washingtonpost.com/wp-dyn/content/article/2010/11/02/AR2010110201037.html. The Wa have an estimated 30,000 soldiers, making the UWSA Burma's largest non-state army, and the Kachin have an estimated 10,000 soldiers. In addition, it is widely thought that aggression from the Burmese Army against the ceasefire groups could lead to a surge in enlistments in the non-state ethnic armies.

224 Zaw Oo & Win Min, *Assessing Burma's Ceasefire Accords* 39 Policy Studies 12, 85-86 (2007).

225 EARTHRIGHTS INTERNATIONAL, REPORT TO THE SOUTH KOREA NATIONAL CONTACT POINT, *supra* note 197, at 24-31.

226 EarthRights International communication with confidential sources (2009-2010). On file with EarthRights International.

227 *Id.*; Oo & Min, *Assessing Burma's Ceasefire Accords* *supra* note 224, at 85-86.

228 EarthRights International internal memo regarding communication with confidential source (2010). On file with EarthRights International.

229 Fuller, *Ethnic Groups in Myanmar Want Peace but Gird for a Fight*, *supra* note 219.

ceasefire groups and the Burmese Army, the gas and oil pipelines will lead to grave human rights abuses. In the worst case scenario, the conflict will take the form of flashes of high-intensity conflict and protracted guerrilla warfare.²³⁰ In such a scenario, the pipelines will present a simple, strategic, and ready target for an armed opposition force. In response to that risk, there is a high likelihood that the Burmese Army's efforts to protect and secure the pipeline area for the companies will lead to violent human rights abuses, as was the case in the Yadana and Yetagun pipeline construction, which was opposed by the Mon National Liberation Army (MNLA) and Karen National Liberation Army (KNLA).²³¹

In 1995-1996, there were at least three attacks in the Yadana pipeline area by the KNLA.²³² Two of the attacks specifically targeted the pipeline.²³³ After the attacks, Burmese Army Brigadier General Zaw Htun promised Total, "You will never hear gunfire again"; this was followed by systematic abuses by the Burmese Army against local villagers thought to sympathize with the ethnic armed opposition.²³⁴ In 1996, in direct response to attacks on the Yadana pipeline by the KNLA, the Burmese Army battalions that were providing security for the companies and their pipeline tortured a village headman, Saw Kyi Lwin, who was accused of collaborating with the KNLA in the pipeline corridor.²³⁵ He was then summarily executed.²³⁶ The pipeline security soldiers then apprehended 12 villagers in Eindayaza village and summarily executed ten of them, imprisoning the other two.²³⁷

This type of suspicion by the Burmese Army remains in the Yadana and Yetagun pipeline corridor and continues to result in violent abuses committed in the name of pipeline security. These abuses include forced militia trainings²³⁸ and extrajudicial killings.²³⁹ As noted above, in February 2010, two villagers in the Yadana pipeline area were killed by pipeline security battalions for being suspected of sympathizing with an ethnic armed group.²⁴⁰

Within the last two years, fighting has broken out in northern Shan State between the Burmese Army and ceasefire groups. In September 2010, the Burmese Army instigated a violent skirmish outside Hsipaw with the Shan State Army-North, a ceasefire group, near where pipeline construction is taking

place.²⁴¹ EarthRights International has not yet confirmed a direct connection between the pipeline projects and any attempt to secure the areas surrounding the skirmish, although it would be unlikely that the regional Burmese commander did not consider the importance of "securing" the pipeline path in his military movements.

Moreover, in 2009, the Burmese Army unexpectedly attacked the Myanmar National Democratic Alliance Army, an ethnic Kokang ceasefire group based near the China border. At the time, the group was under the country's longest-running ceasefire agreement, which was signed in 1989.²⁴² The attacks caused an estimated outflow of 30,000 ethnic Kokang refugees to China.²⁴³ It is plausible the attacks were part of a broader strategy to "secure" an area of strategic importance to the military regime and its transnational pipelines and border trade. According to Wong Aung, Coordinator of the Shwe Gas Movement, the attacks on the Kokang "show how volatile the area is... This is yet another example of how the regime is destabilizing the region."²⁴⁴

If the ceasefire agreements between the military regime and the ethnic armed groups fall apart and the Burmese authorities demonstrate aggression, EarthRights International is concerned that several groups in Shan State – not only the KDA/KIA – will have reason to regard the Shwe gas and oil transport pipelines as an unwelcome encroachment on ethnic territory, whether or not it directly crosses their territory.²⁴⁵

d. Livelihood and Social Impacts

Most of the residents of Arakan State in western Burma are fishermen and/or farmers. Interviews conducted by EarthRights International in 2010 reveal that, since 2006-2007, the companies involved in the Shwe gas and oil pipeline projects have engaged in onshore exploration and infrastructure construction that has had serious negative impacts on local livelihoods and food security in the area.

Several villagers in Kyauk Phyu township and Maday Island in Arakan State claim that companies activities have destroyed or damaged their rice paddies – in most cases, the villagers' principal means of subsistence.²⁴⁶ Villagers reported that their

230 Indian-Petro *supra* note 175 (reporting that, as a result of the political risk of doing business in Burma, a consulting firm hired by GAIL of India to assess the offshore component of the project concluded that the Shwe project companies should acquire political risk insurance).

231 EARTHRIGHTS INTERNATIONAL & SOUTHEAST ASIA INFORMATION NETWORK, TOTAL DENIAL, *supra* note 74, at 15-20.

232 *Id.*

233 *Id.*

234 *Id.* at 16.

235 *Id.* at 17.

236 *Id.*

237 *Id.*

238 *Id.*; *supra* notes 101-110.

239 *Supra* notes 96-97.

240 *Id.*

241 *Third Clash Between Junta, Ex Ceasefire Shans*, SHAN HERALD AGENCY FOR NEWS, Sept. 30, 2010, available at www.shanland.org/index.php?option=com_content&view=article&id=3225:third-clash-between-junta-ex-ceasefire-shans&catid=86:war&Itemid=284; see also *Myanmar Neighbors Advance Pipeline Project*, WALL STREET JOURNAL, Nov. 3, 2009, available at http://online.wsj.com/article/SB125712409500421827.html?mod=WSJ_hpp_sections_business (reporting from Hsipaw).

242 Oo & Min, *Assessing Burma's Ceasefire Accords*, *supra* note 224, at 12.

243 *Kokang fighters flee to China*, RADIO FREE ASIA, Aug. 31, 2009, available at <http://www.unhcr.org/refworld/docid/4a9fcd58c.html>.

244 Shwe Gas Movement, *New Report: China Ignoring Grave Risks of New Energy Corridor Through Burma*, Sept. 7, 2009.

245 Fuller, *Ethnic Groups in Myanmar Want Peace but Gird for a Fight*, *supra* note 219.

246 EarthRights International interviews in Arakan State, Burma

paddy production has decreased considerably since the oil companies arrived on the island in 2006-2007.²⁴⁷

The Shwe gas exploration also led to fishing restrictions that have impacted villagers' economic livelihoods. In providing security and clearing the maritime area for the offshore portion of the Shwe project, the Burmese military turned the much-traversed waters around the Shwe project drilling rigs into military-patrolled exclusion zones. According to interviews with local people, the military gave no advance warning before they declared these waters off-limits.²⁴⁸ Villagers received no compensation, despite the waters previously active fishing activities.²⁴⁹ Moreover, the military has beaten unsuspecting "trespassers." In 2004, four men, unaware that they were in a restricted zone because they had frequently fished in the area, were arrested, beaten, and imprisoned.²⁵⁰ In 2005, authorities arrested and beat a local boat owner and his crew for being within an exclusion zone, and seized his boat and the catch.²⁵¹

As described above, since project activities began, many local people are now attempting to survive without their primary means of subsistence, either agriculture or fishing. In 2010, one villager told EarthRights International:

Of the paddy fields being occupied, my family has lost about two acres. So, I now have to plough on the remaining two acres of paddy field for my family's survival. We have not received compensation from [the companies or the authorities]. They have promised us full compensation at the local selling price but they have not paid us yet.²⁵²

The presence of the companies in western Burma is also reportedly eroding social and cultural norms, harming the local economy, and creating heightened public health risks in the project areas. According to local villagers, there has been a dramatic increase in prostitution, or sex work, in project areas, particularly around Kyauk Phyu. A local educator told EarthRights International:

The education, social and economic sectors are not developing in our town, but prostitution is increasing dramatically. The prostitution is rising day by day because of foreigners. The Chinese and Koreans have good relations with the Burmese officials, including the chairman of the District Peace and Development Council. Now, there are about 10 brothels in our town...The Burmese officials own these brothels, and they are the heads

(2009-2010); see e.g. Interview #004 in Maday Kyun Rwama, Burma (2010). On file with ERI.

247 *Id.*

248 SHWE GAS MOVEMENT, SUPPLY AND COMMAND: NATURAL GAS IN BURMA SET TO ENTRENCH MILITARY RULE, at 22, (July 2006) available at www.shwe.org/media-releases/publications/file/SUPPLYANDCOMMAND.pdf (hereinafter SUPPLY AND COMMAND).

249 *Id.*

250 *Id.* at 31.

251 *Id.*

252 Interview #028 in Kyauk Phyu, Burma (2010). On file with EarthRights International.

of the prostitution. The foreigners and the Burmese officials themselves have hired the prostitutes in the hotels. Our town's pretty image is being affected by both Burmese officials and foreigners from CNPC and Daewoo companies. They are systematically destroying our town.²⁵³

Other villagers spoke at length about how their village used to enjoy a positive social reputation that has deteriorated considerably since the oil companies arrived and sex work increased. Villagers told EarthRights International that close associates of the Burmese authorities and the oil companies brought sex workers from Mandalay and Rangoon for the Daewoo and CNPC staff. Villagers blame the oil companies and the Burmese authorities. One villager commented that:

CNPC has been creating the [demand for] prostitution in the May Phone Maw Hotel in our town since last year, 2009. And the Asia World and Daewoo companies are partners in the prostitution...In the past, our town's image was really good and had a pleasant reputation. But since they came to our town to search for gas and oil, our town's image has been seriously impacted.²⁵⁴

Confidential sources have also documented that ethnic Shan and Arakan villagers are concerned with the influx of ethnic Burman, Korean, and Chinese project workers connected to the gas and oil pipelines.²⁵⁵ They have noted that pipeline-related construction of road links through the Arakan-Yoma mountain range will facilitate assimilation of indigenous Arakan cultures into the nationally-dominant Burman culture.²⁵⁶ The Arakan-Yoma mountain range provides a natural boundary between Arakan State and Magwe Division, long separating Burman and Arakan civilizations.

Wong Aung, the Coordinator of the Shwe Gas Movement, concurred that road links through the mountain range may increase Burman cultural, linguistic, and economic domination by people loyal to the regime. All ethnic communities living along the pipeline route will face similar situations, he said, adding: "This is a big concern for local people. Arakan access to opportunity is already limited. Burman businessmen already monopolize local businesses in partnership with the local military commander, and this will most likely increase as more regime cronies settle in Arakan State." He added, "What is needed is more emphasis on the provision of education, electricity, and other social services for and by local Arakan people in participatory manner, but we're unlikely to see that."²⁵⁷

253 Interview #015 in Kyauk Phyu, Burma (2010). On file with EarthRights International.

254 Interview #018 in Kyauk Phyu, Burma (2010). On file with EarthRights International.

255 *Id.*, *supra* notes 226, 228; See also EarthRights International Interviews in Arakan State, Burma (2010). On file with EarthRights International.

256 *Id.*

257 Telephone communication with Wong Aung (Nov. 26, 2010). On file with EarthRights International.

e. *Free Prior and Informed Consent*

Despite the Shwe and oil transport projects' adverse documented and likely adverse human rights impacts on local people, to EarthRights International's knowledge, the companies involved have not engaged in any meaningful consultation with affected communities, nor have affected communities provided Free, Prior, and Informed Consent (FPIC) for the project or regarding any resettlements required for the project. This failure violates the right to FPIC set forth in the Declaration on the Rights of Indigenous Peoples and the principle of Meaningful Consultation, a best practice found in World Bank and other multi-party voluntary industry standards.²⁵⁸

As the preparatory work for the Guidelines recognized, the exclusion mechanism should apply to "companies that contribute to violations of international standards in general and other grossly unethical corporate practices."²⁵⁹

The World Bank standard requires operators of projects involving World Bank financing to undertake "a process of free, prior, and informed consultation with the affected Indigenous Peoples' communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project."²⁶⁰ The Declaration of the Rights of Indigenous People provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources."²⁶¹ It notes that informed consent is necessary "particularly in connection with the development, utilization or exploitation of mineral, water or other resources."²⁶² Likewise, FPIC standards have gained recognition in industry-specific certifications, international financial institutions' policies, and other guidelines that apply directly to corporations.²⁶³

The United Nations and the World Bank define indigenous peoples as cohesive groups of people who have historically inhabited a territory long before it was invaded or colonized by others, and maintain languages and cultural practices distinct from the governing society that they wish to keep and pass on

258 Amy K. Lehr & Gare A. Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges*, at 11-22 (May 2010), available at www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing_Informed_Consent_Policy.aspx?ref=1.

259 Graver Report, *supra* note 23, at § 5.3.2.

260 The World Bank, Operational Manual, OP 4.10 - Indigenous Peoples available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html#F3>.

261 U.N. Declaration on the Rights of Indigenous Peoples, art. 32, U.N. Doc. A/RES/61/29 (13 Sept. 2007), available at www.un.org/esa/socdev/unpfii/en/drip.html.

262 *Id.*

263 Lehr & Smith, *supra* note 258, at 11-22.

to future generations.²⁶⁴ There are over 100 such groups in Burma, including the Arakan and Shan people who live in the path and vicinity of the Shwe gas and oil transport pipelines.

The Burmese authorities and the companies involved in the projects have so far failed to meaningfully consult with ethnic Arakan and Shan villagers along the pipeline route. Villagers recognize that there is no room for dissent from the development plans involving the gas and oil pipelines. "We have no chance to stop their actions," one affected villager told EarthRights International. "If the companies and the Burmese authorities order us to move, we have to move. We can't deny their orders. We must follow any order from their mouth. They are very powerful."²⁶⁵

Several villagers from Arakan State have recently expressed that their community does not want the companies in their lives and that the community was left out of any decision-making processes with respect to the pipeline projects. A local farmer told EarthRights International, "I really don't want them to be on our island. We would like to live peacefully on our island with our traditional work. Since they came to our island, our lives are not in peace. They destroyed our paddy fields and our lives."²⁶⁶

Another villager from Kyauk Phu in Arakan State said:

The foreigners came to our town for business a decade ago but they are not such good people for our town and our Arakanese people. They came to our town to take our gas and oil for their countries. They came to our area to get a lot of profits but they are one-eye-blinded people so that they see only one side. They know their business and profits only, and they don't care and they don't see the suffering of our people who lack everything.²⁶⁷

f. *Environmental Impact Assessments*

To EarthRights International's knowledge, no company associated with the Shwe project has released an Environmental Impact Assessment (EIA) or conducted one according to international standards. The EIA is not merely an optional courtesy or a matter of internal corporate information gathering, but rather is enshrined as an obligatory principle under customary international law, designed to enable transparent and public decision-making by the range of affected actors and communities.²⁶⁸ Multilateral treaties, including the

264 See *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (Supplementary Part)* E/CN.4/Sub.2/1982/2/Add.6 (20 Jun. 1982) (submitted by the Special Rapporteur Mr. Jose R. Martinez Cobo).

265 Interview #004 in Maday Kyun Rwama, Burma (2010). On file with EarthRights International.

266 Interview #028 in Kyauk Phyu, Burma (2010). On file with EarthRights International.

267 Interview #018 in Kyauk Phyu, Burma (2010) on file with EarthRights International.

268 EARTHRIGHTS INTERNATIONAL, REPORT TO THE SOUTH KOREA NATIONAL CONTACT POINT, *supra* note 197, at 38 (citing multiple international legal instruments related to EIAs).

Declaration of Environmental Policy of the Organization for Economic Cooperation and Development (OECD)²⁶⁹ and the Rio Declaration on Environment and Development,²⁷⁰ require public EIAs for activities likely to have a significant adverse effect on the environment. Moreover, Burma has ratified three such international treaties – the Convention on Biological Diversity,²⁷¹ the Agreement of the Association of South-East Asian Nations (ASEAN) on Conservation of Nature and Natural Resources,²⁷² and the U.N. Convention on the Law of the Sea²⁷³ – that legally require Burma to ensure that an EIA is carried out for a project like the Shwe gas project.²⁷⁴

Although obligations of international customary law and treaties fall on the state, the Council has recognized that “[c]ompanies can . . . contribute to human rights violations committed by states.”²⁷⁵ The Shwe participants are sophisticated multinational corporations with extractive operations across the world, and thus are aware of the broad customary obligation of conducting EIAs. In the absence of any evidence to the contrary, it appears that the companies took advantage of the weak regulatory and governance environment in Burma to skirt the full breadth of their responsibilities.

Moreover, for Shwe companies headquartered in OECD-member South Korea – Daewoo, POSCO, and Hyundai Heavy Industries – the OECD Guidelines place obligations *directly on the company* to carry out EIAs for projects like Shwe.²⁷⁶

In November 2006, ERI and the Korean Federation for Environmental Movement (KFEM) sent letters to both Daewoo International and Korean Gas Corp. expressing concern that the Shwe Project would lead to human rights and environmental abuses, similar to those that occurred in conjunction with the Yadana and Yetagun natural gas pipeline projects in Burma.²⁷⁷ The letter requested that,

269 Article 9, OECD Declaration of Environmental Policy, available at <http://sedac.ciesin.columbia.edu/entri/texts/oecd/OECD-4.04.html>.

270 United Nations Conference on the Environment and Development: The Rio Declaration on Environment and Development, June 13, 1992, Principle 17, 31 I.L.M. 874, 879.

271 *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, available at www.cbd.int/doc/legal/cbd-un-en.pdf.

272 ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, 09 July 1985, Art. 14, available at www.ecolex.org/ecolex/ledge/view/RecordDetails.jsessionid=3698C2F040F509435F9D391B684FDAA9?id=TRE-000820&index=treaties.

273 Third United Nations Conference on the Law of the Sea: Final Act, Oct. 21, 1982, art. 206, 21 I.L.M. 1245, 1309, 11th Sess., at 86, U.N. Doc. A/Conf. 62/122 (1982).

274 *Supra* notes 268-273.

275 Council on Ethics, Total Assessment, *supra* note 6, at 9.

276 *OECD Guidelines for Multinational Enterprises*, Section V.3, available at www.oecd.org/dataoecd/56/36/1922428.pdf.

277 EarthRights International & Korean Federation for Environmental Movement, *Letters to Daewoo International and KOGAS detailing the international law and Korean law requirements for conducting an environmental impact assessment (EIA) for the Shwe Project*,

pursuant to international standards, the companies prepare an Environmental Impact Assessment (EIA), a Social Impact Assessment (SIA), and a Human Rights Impact Assessment (HRIA) for the Shwe Project.²⁷⁸ To date, neither company has publicly acknowledged nor responded to these letters.

Moreover, although Daewoo has since stated that it has conducted an EIA in Burma, it has yet to produce it. In a private meeting in Seoul in 2008, Senior Executives from Daewoo International informed representatives of EarthRights International and the Shwe Gas Movement that the company had conducted EIAs in Burma. Daewoo Senior Executive Vice President Chae-Moon Rim said he would provide each organization with the conclusions of the EIAs. Daewoo, however, has yet to provide the conclusions and has refused to acknowledge EarthRights International’s attempts to communicate and engage with the company since the 2008 meeting. In response to the complaint filed with the Korean National Contact Point (NCP) over alleged violations of the OECD Guidelines, Daewoo again claimed that it had carried out an EIA but continued to refuse to disclose the assessment or a summary of its findings.²⁷⁹

3. Unacceptable Risk: Large-Scale Construction and Imminent Abuses

As noted above, the Council on Ethics has found that there is a “considerable” risk of grave human rights violations in connection with construction of infrastructure in Burma and “this is particularly the case in the first stages of large construction projects.”²⁸⁰ Thus, the Council’s own statement would require it to assess the Fund’s investments in the Shwe project consortium and Hyundai Heavy Industries, which commenced construction of the Shwe onshore gas terminal, jetty, and supply base on Ramree Island in 2009. Abuses have

Nov. 16, 2006, available at : www.earthrights.org/campaigns/burma-project/eri-demands-daewoo-and-kogas-conduct-impact-assessments.

278 *Id.* (The letters describe the requirement of an Environmental Impact Assessment (EIA) for projects that will have a significant impact on the environment, and how it is widely regarded by legal experts to be part of customary international law. It is required under the Stockholm Convention (1972), Principles 15 and 17 of the Rio Declaration (1992), and in addition, many international lenders have adopted EIA procedures, requiring compliance as a precondition before providing project or development funding. All multilateral development banks have adopted environmental assessment policies, which apply to proposed project activities. The Asian Development Bank established EIA procedures in the early 1980’s. The World Bank’s Environmental Assessment Directive was first issued in 1989. Likewise, South Korean law requires EIAs for projects that will have significant impact on the environment in South Korea (The Environmental Preservation Act (1977); the Basic Environmental Act (1990)).

279 Energy and Climate Policy Institute for Just Transition (ECPI), *Problems of Korean Extractive Industry’s Overseas Projects and Suggestions for Alternative Policies (Audit Policy Report)*, Assembly Person Cho Seung Soo’s Year 2009 National Audit Report, at 68-69 (2009).

280 Council on Ethics, Burma Assessment, *supra* note 7, at 2.

already occurred near the construction area and there is an unreasonably high risk that abuses will continue as the project progresses, at least until construction is completed in May 2013.²⁸¹

Moreover, the Council has stated that the construction of onshore oil and gas pipelines in Burma pose such a high risk of contributing to human rights violations, that any future agreement by a company to participate in the construction of such a pipeline would suffice to recommend exclusion from the Fund.²⁸² The Council specifically stated, “**it is not considered necessary to wait until the violations actually take place.**”²⁸³

The proposed overland Shwe natural gas and oil transport pipelines from Burma to China will extend for an estimated 870 km long in Burma.²⁸⁴ In Burmese territory, the pipelines are nearly fifteen times the length of the 60 kilometer length of the Yadana and Yetagun pipelines.²⁸⁵ The Shwe gas and oil pipelines will traverse 24 townships in Burma, and through or near several large population centers in Arakan State, Bago Division, Magwe Division, Mandalay Division, and Shan State.²⁸⁶ The route also traverses several contested zones,²⁸⁷ and construction will inevitably lead to increased militarization in politically contested areas, as explained above.²⁸⁸ Construction of the natural gas pipeline officially started on June 3, 2010.²⁸⁹

Thus, even apart from the abuses documented to date, the evidence of infrastructure construction agreements alone satisfies the Council’s criteria of an unacceptable risk of the Fund contributing to human rights violations. Moreover, as the sections that follow demonstrate, other companies in the Fund’s portfolio, in addition to Hyundai Heavy Industries – which has directly engaged in project construction – share

responsibility for that risk.

4. The Complicity of the Shwe Partners, Parent Companies, and Other Participants

The preparatory work for the Ethical Guidelines recognized that, in some situations, it is unethical to invest in companies that have “controlling interests or ownership interests or other links” to companies involved in unethical practices.²⁹⁰ Thus, in the case of a large-scale project like Shwe, the Council must assess the relationships between the major players to determine which companies bear responsibility for the ethical violations. The following sections consider how the Shwe consortium members, as well as POSCO as the majority owner of Daewoo, Petrochina as the subsidiary of CNPC, Transocean as the drilling company, and Kunlun Energy as the distributor, share responsibility for the ongoing and likely future abuses associated with the project.

The Council has concluded that it may find a company responsible for ethical violations when it has control over the company directly engaged in committing those violations.²⁹¹ It has further recognized that “a majority shareholder exercises considerable influence over its subsidiaries.”²⁹² The Council has also recognized that even when a company has a minority share in a joint venture agreement, it may nonetheless be held responsible for its partners’ violations where it has “exerted considerable influence on decisions” and has played “an active role in operation and development.”²⁹³

Based on these principles, the Council should assess each of the members of the Shwe gas consortium, as well as POSCO. Daewoo International, the majority shareholder in the consortium, plays a large role in the offshore portion of the project. In addition, the Daewoo-led consortium is actively participating in the construction of the onshore gas pipeline in conjunction with CNPC. POSCO, as a majority shareholder in Daewoo, has the authority to control Daewoo’s activities.²⁹⁴ Moreover, while Korea Gas Corp. and GAIL of India are smaller stakeholders in the offshore gas development, they are parties to the onshore pipeline construction agreement, which alone may serve as grounds for exclusion from the Fund. To the extent that the Council deems that more than the agreement itself is necessary, it should inquire into the roles that the two companies will play as the Shwe project moves forward, and their degree of influence over abuses

281 *Hyundai Wins Shwe Race*, UPSTREAM ONLINE, Nov. 2, 2009, available at www.upstreamonline.com/live/article197341.ece.

282 Council on Ethics, Burma Assessment, *supra* note 7, at 3.

283 *Id.*

284 Zhang Jin & Qin Jize *Oil, Gas Projects Energize Relations with Myanmar*, CHINA DAILY, June 4, 2010, available at www.chinadaily.com.cn/world/2010-06/04/content_9932066.htm?

285 The Yadana and Yetagun pipelines are approximately 40 miles (60 km) long onshore in Burma. The pipelines converge to one pipeline at the border with Thailand. The 40 mile (60 km) length does not account for the pipeline laid offshore in Burma or onshore in Thailand. Public estimates of the length of the Shwe gas and oil transport pipelines vary and it is unclear if estimates account for variations in topography along the route and the existence of geographical obstructions to a more direct route.

286 This includes 3 townships in Arakan State, 2 townships in Bago division, 5 townships in Magwe division, 8 townships in Mandalay division, and 6 townships in Shan state. See Smith & Htoo, *supra* note 101, at 239.

287 *Myanmar’s Neighbors Advance Pipeline Project*, WALL STREET JOURNAL, Nov. 3, 2009, available at <http://online.wsj.com/article/SB125712409500421827.html>.

288 *Id.*, *supra* notes 219-245.

289 CNPC, Pipeline Project Commenced, *supra* note 181.

290 Graver Report, *supra* note 23, at § 5.3.2.3.

291 Council on Ethics, Rio Tinto Assessment, *supra* note 32, at 9.

292 Council on Ethics, Recommendation of 15 May, 2007 on exclusion of Vedanta Resources Plc, at 7, (unofficial English translation) available at www.regjeringen.no/en/sub/styrrer-radutvalg/ethics_council/Recommendations/Recommendations/recommendations-on-environmental-damage/Recommendation-of-May-15-2007-on-exclusi.html?id=488519.

293 Council on Ethics, Rio Tinto Assessment, *supra* note 32, at 11-12.

294 *Daewoo Signs MoU to Sell Gas to China*, BURMA NEWS INTERNATIONAL, June 19, 2009, at www.bnionline.net/news/mizzima/6506-daewoo-signs-mou-to-sell-gas-to-china.html.

associated with the project.

While the Shwe consortium members should be a primary concern for the Council, other companies involved in the Shwe gas project merit the Council's further inquiry. The Council should assess the Fund's investment in PetroChina and its closely associated CNPC, operators of the onshore pipeline project and port project in Sittwe. The Council should also address Norway's holdings in Transocean Inc., the Swiss-based drilling and exploration company responsible for offshore exploration and drilling services for the Shwe gas project.

a. *PetroChina's Ties to CNPC and Kunlun Energy*

According to the preparatory work for the Guidelines, "if the links are so close between a company in the . . . Fund's portfolio and a company where there is an ethical risk that the two can be identified with each other, the company's legal structure cannot be decisive in the ethical assessment of complicity."²⁹⁵ The unique relationship between PetroChina and CNPC fits this situation because, although PetroChina and CNPC are legally separate entities, CNPC's repeated asset transfers and shared leadership with PetroChina blurs the line between the two companies.

CNPC is the majority shareholder of PetroChina, with an 86.2% share as of December 2009.²⁹⁶ PetroChina must acquire foreign assets through CNPC because Chinese law prohibits PetroChina from entering into production sharing contracts with foreign companies.²⁹⁷ After signing a production sharing contract, CNPC will, subject to approval of China's Ministry of Commerce, assign to PetroChina most of its commercial and operational rights and obligations under the production sharing contract as required by a non-competition agreement between the two companies.²⁹⁸

Most importantly, there is substantial overlap between PetroChina and CNPC.²⁹⁹ For example, CNPC Exploration and Development Co. is a 50-50 percent venture between PetroChina and CNPC.³⁰⁰ PetroChina's chairman, who also serves as CNPC's general manager, has stated, "The job of our overseas businesses will be mostly done via PetroChina."³⁰¹ The ties between the two companies are such that a socially responsible investment advisor has concluded that "investors should treat CNPC and PetroChina as if they were a single entity."³⁰²

295 Graver Report, *supra* note 23, at § 5.3.2.3.

296 PetroChina, Annual Report 2009, at 12, available at [www.petrochina.com.cn/Resource/pdf/xwygg/2009ANNUALREPORT\(e\).pdf](http://www.petrochina.com.cn/Resource/pdf/xwygg/2009ANNUALREPORT(e).pdf).

297 *Id.* at 54,

298 PetroChina filing 2010-6-25 SEC 20-F, at 54, available at www.sec.gov/Archives/edgar/data/1108329/000095012310060898/h04189e20vf.htm.

299 *PetroChina Halts CNPC Assets Purchase Plan*, REUTERS, May 20, 2010, available at www.reuters.com/article/idUKTOE64J04920100520?type=companyNews.

300 *Id.*

301 *Id.*

302 KLD Research & Analytics, Inc., *Public Companies Operating in*

Finally, in addition to its ties to construction of the onshore oil pipeline via CNPC, PetroChina is also connected to the project through its subsidiaries, Kunlun Gas Company and Kunlun Energy Co., Ltd. Kunlun Gas Company has a 51 percent stake in the Shwe gas distribution contract and Kunlun Energy has announced plans to take over Kunlun Gas.³⁰³

b. *Kunlun Energy's Role as Major Distributor*

As noted above, the preparatory work for the Ethical Guidelines recognized that a company in a customer relationship may be complicit in the abuses of its suppliers "if the customer relationship is long-term or repeated after the unethical practices have been identified."³⁰⁴

As the preceding section explains, Kunlun Energy, a PetroChina subsidiary, has plans to take over Kunlun Gas, the company that holds a majority stake in the Shwe natural gas distribution agreement. The Council should therefore inquire whether Kunlun Energy has completed that takeover. If it has, Kunlun Energy's role as the major distributor over the lifetime of the Shwe project merits the Council's attention. As the distributor, Kunlun Energy will play a substantial part in the project and may have influence over the abuses likely to occur as a result of pipeline construction and operation.

c. *Transocean's Role as Drilling Company*

Major gas discoveries in the Bay of Bengal by the Shwe consortium involved the world's largest drilling company, Transocean Ltd., which is included in the Fund's portfolio. Daewoo conducted several drilling campaigns using Transocean and its 3,500-foot water depth semi-submersible, making the company an integral component of Daewoo's activities in Burma. This included a drilling effort that nearly resulted in armed conflict with Bangladesh, as the companies were drilling in waters that are the subject of a maritime border dispute between Burma and Bangladesh.³⁰⁵ At least one contract between the consortium and TransOcean lasted from September 2008 to January 2009 at a day rate of \$411,000. There appears to be a second contract between the Shwe consortium and Transocean that commenced in January 2009 and ran until March of 2009 at the same day rate.³⁰⁶

The Shwe gas project will involve drilling activity through at least 2027. It is unclear if this will involve Transocean. Transocean's future operations in Burma's territorial waters are unknown at this time. As described above, offshore exploration has led to substantial livelihood impacts and other negative impacts on villagers. Transocean's role in the Shwe project therefore merits the Council's attention.

Sudan: The Relationship of PetroChina Company Ltd. to China National Petroleum Corporation, at 5, May 2007, available at www.kld.com/newsletter/archive/press/pdf/KLD_Analysis_of_PetroChina_Company.pdf.

303 See C1 ENERGY, *CNPC (HongKong) to Rename, Acquire PetroChina Kunlun Gas*, *supra* note 187.

304 Graver Report, *supra* note 23 at § 5.3.2.3.

305 Matthew Smith, *Daewoo Aggravating Bay of Bengal Tensions*, THE IRRAWADDY, Nov. 25, 2008.

306 Transocean Inc · 8-K · For 7/9/08 · EX-99.1

V. Other Companies in Burma's Oil and Gas Sector That Warrant the Council's Assessment

Although the Yadana, Yetagun, and Shwe pipeline projects are the largest projects in terms of foreign investment, gas production, and social and environmental impacts, they are by no means the only oil and gas projects in Burma. The following sections describe additional projects underway in Burma, operated by companies included in the Fund's portfolio, and the current and potential abuses associated with those projects.

1. PTTEP: A New Pipeline to Thailand

PTT Exploration & Production (PTTEP) is a Thailand-based company listed on the Thai stock exchange. The company is a minority partner in both the Yadana and Yetagun projects. Beyond its role in the human rights abuse associated with those projects, PTTEP has extensive ties to Burma's oil and natural gas sector as the operator of onshore and offshore natural gas blocks. In addition, it is involved in the construction of a new pipeline from the Andaman Sea to Thailand from Burma's offshore M9 Block, also called Zawtika, raising serious human rights concerns.³⁰⁷

The new pipeline will transport natural gas from the Andaman Sea to Thailand, following an overland route similar to the Yadana and Yetagun pipelines. Field reports collected by EarthRights International indicate this pipeline is in the construction phase.³⁰⁸

EarthRights International has obtained a letter from PTTEP, on PTTEP letterhead, sent to village heads in Burma in the area of the new pipeline, explaining that villagers will be expected to work as needed.³⁰⁹ Villagers interpret this as a notification that they will have to perform forced labor on infrastructure related to the new project.³¹⁰ Villagers were not involved or consulted on decisions about the project in any meaningful way.³¹¹

2. China National Offshore Oil Corporation Ltd.: Onshore Oil Development in Arakan State

Both directly and through its many subsidiaries, China National Offshore Oil Corporation Ltd. (CNOOC) has been active in the exploration, development, and production of oil

and natural gas in Burma, including projects involving onshore and offshore blocks.³¹² In one such project, CNOOC is the managing partner in an agreement with MOGE and two other companies for oil and gas exploration in Block M in Arakan state, a project that has already reportedly led to human rights abuses in the area.

A report by Arakan Oil Watch³¹³ provides credible evidence that CNOOC's development of Block M has had negative human rights impacts. CNOOC has failed to consult with the affected communities, nor did they seek the communities' Free Prior and Informed Consent.³¹⁴ In addition, villagers suffered damage to their crops and loss of income from their traditional, small-scale oil drilling operations as a result of the company's surveying and exploratory drilling in their villages.³¹⁵ Authorities also confiscated land and local refinery operations and provided little or no compensation.³¹⁶ In one village, frustration over the impacts of the project led villagers to break in and ransack a CNOOC drilling site.³¹⁷ In response, the Burmese army arrested and interrogated all of the men in the village.³¹⁸ Seventy people have since fled the village.³¹⁹ CNOOC's Chief Financial Officer, however, dismissed human rights concerns, stating that the company's presence in Burma is "making people's lives better" by developing resources that would otherwise go untapped.³²⁰

As CNOOC's activities related to Block M demonstrate, oil and gas exploration projects in Burma lead to human rights violations even when they do not entail onshore pipeline construction. The human rights violations relate directly to and helped facilitate CNOOC's oil exploration activities. In addition, there is a risk of future violations as CNOOC has plans to continue its oil and gas exploration in Burma.³²¹

312 ARAKAN OIL WATCH, BLOCKING FREEDOM: A CASE STUDY OF CHINA'S OIL AND GAS INVESTMENT IN BURMA, at 7 (Oct. 2008) available at www.arakanoilwatch.org/ (hereinafter *Blocking Freedom*).

313 Arakan Oil Watch is an independent non-governmental organization that aims to protect human rights and the environment from extractive industries in Arakan and Burma. Arakan Oil Watch, *About Us*, at www.arakanoilwatch.org/index.php?option=com_content&view=article&id=77&Itemid=27 (last visited Nov. 27, 2010).

314 ARAKAN OIL WATCH, BLOCKING FREEDOM, *supra* note 312, at 32.

315 *Id.* at 9, 16-17.

316 *Id.* at 15, 21-23.

317 *Id.* at 5.

318 *Id.*

319 *Id.*

320 CNOOC Firm on Myanmar Prospects, THE MYANMAR TIMES, Oct. 22-28, 2007, available at www.mmtimes.com/no389/b001.htm.

321 CNOOC Ltd., Annual Report 2009, at 12, available at www.cnooltd.com/encnooltd/tzzgx/dqbd/nianbao/images/201049660.pdf.

307 Myanmar-PTTEP - Offshore Block M9 & M11, ENERGY WORLD, at www.cceec.com.cn/English/Project/2010/0906/8021.html (last updated Sept. 6, 2010).

308 EarthRights International field reports from Tenneserim Division, Burma (2009-2010). On file with EarthRights International.

309 PTTEP, Letter to Village Heads (Dec. 9, 2009). On file with EarthRights International.

310 EarthRights International field reports from Tenneserim Division, Burma (2009-2010). On file with EarthRights International.

311 *Id.*

3. Essar Oil's Exploration and Pipeline Discussions

Essar Oil Ltd. is an Indian company listed on both the Bombay stock exchange and the National Stock Exchange of India. The company is a subsidiary of the Essar Group.³²² Essar Oil's subsidiary, Essar Exploration & Production Limited (Essar), owns two natural gas blocks in Burma: onshore Block L and shallow water Block A-2.³²³

Essar signed a production sharing contract with the government of Burma in May 2005 and is reportedly still at the exploratory stage.³²⁴

Essar's activities in Burma have reportedly led to human rights abuses. Villagers have reported that the company confiscated their rice plantations without compensation. According to Arakan Oil Watch, "The former farmland is being used for Essar's drilling camp, and is protected by a fence."³²⁵ Local villagers also report that their means of subsistence – rice farming, shrimp farming, and plantations – were negatively affected by the company's seismic surveys in 2008. Local communities were not compensated for their losses.³²⁶ To EarthRights International's knowledge, Essar has not conducted social, environmental, or human rights impact assessments in Burma, and the company has not consulted with nor obtained Free, Prior, and Informed Consent from local people.

Essar has discussed plans for a proposed 950-kilometer, USD \$1 billion pipeline from Burma's Arakan State to India, passing

through Bangladesh.³²⁷ Estimates suggest the pipeline project could happen within two or three years.³²⁸ A source in Burma indicates that the project is advancing at a faster pace.³²⁹ Very little is known about this project. The Council, however, should monitor the situation in light of its pronouncement that entering a contract for onshore pipeline construction may suffice to recommend exclusion from the Fund.

322 Another Essar Group subsidiary, Essar Projects, Ltd., has a contract to construct a port at Sittwe and a jetty at Paletwa in Burma, along with plans for a separate contract for construction of 120 km of roads. See *Essar Signs Contract For 'Kaladan Multi Modal Transit Transport Project*, MIZZMA NEWS, May 10, 2010, available at www.mizzima.com/business/3956-essar-signs-contract-for-kaladan-multi-modal-transit-transport-project.html. The construction is part of the "India-financed Kaladan multi-modal transit transport project," which aims to boost links between ports on India's eastern seaboard and Sittwe in Arakan State, Burma. *Id.* The project recently started and is expected to last three years. *Id.* According to the Arakan Rivers Network, the project has already led to a vastly increased military presence in the project area and will likely lead to land confiscation, forced labor, and other human rights abuses. See Arakan Rivers Network, *Kaladan Multi-Modal Transit Transport Project*, at www.arakanrivers.net/?page_id=135 (last visited Nov. 1, 2010).

323 Essar Oil, Annual Report 2009, at 37, 58, available at www.essar.com/upload/pdf/Essar_oil_annual_report_26_8_10_1_am.pdf.

324 *Indian Oil, Oil India in Talks to Buy into Essar's Myanmar Gas Block*, ECONOMIC TIMES, Aug. 24, 2010, available at www.economictimes.indiatimes.com/news/news-by-industry/energy/oil—gas/Indian-Oil-Oil-India-in-talks-to-buy-into-Essars-Myanmar-gas-block/articleshow/6423763.cms.

325 *India's Essar Oil Abuses Human Rights in Burma*, SHWE GAS BULLETIN, at 8, Mar. - Apr. 2009, available at www.burmalibrary.org/docs07/SGB03-06.pdf.

326 *Id.*

327 Siddharth Srivastava, *India, Bangladesh Look to Turn a Corner*, ASIA TIMES, Jan. 16, 2010, available at www.atimes.com/atimes/South_Asia/LA16Df01.html.

328 *Id.*

329 EarthRights International sources indicate the pipeline project is likely to proceed on an advanced timeline. EarthRights International has not been able to independently confirm this.

VI. Burma's Gas Revenue and the Ethics of Investing in Companies Financing Repression

In the 2007 letter from the Council regarding the Fund's investments in companies with operations in Burma, the Council stated that the fact that a company has operations in a state that is controlled by a repressive regime would not in and of itself constitute sufficient grounds for excluding a company from the Fund.³³⁰ The Council elaborated that even if "the presence of a company generates revenues for the repressive regime and thereby contributes to uphold it, such a connection between a company and the state's unethical actions would not, in itself, be sufficient to exclude a company from the Fund. This applies regardless of where companies operate, including in Burma."³³¹ While the Council found that generating revenues was not sufficient "in itself" to recommend exclusion, it did not claim that generating revenues is irrelevant to its assessments.

Based on EarthRights International's most current estimate, from 1998 through the end of 2009, the Yadana gas pipeline project alone generated upwards of USD \$9 billion, of which approximately USD \$4.599 billion was income for the military regime.³³² Combined with the Yetagun payments, which are estimated to be around the same as Yadana revenues, these two projects alone account for nearly 70 percent of all foreign exchange reserves in Burma. This revenue is registered in the national accounts at the grossly inaccurate exchange rate of 6 Kyat to USD \$1, as opposed to the unofficial market exchange rate of 1,000 Kyat to USD \$1. The effect is that most of the gas revenue is never registered in the national budget or national accounts, and never makes it into the country.³³³

EarthRights International has exposed how some of these public monies have been misappropriated into private bank accounts in offshore Singaporean banks.³³⁴ A senior military regime official acknowledged that some of the revenue has been used for "war purposes"³³⁵ and EarthRights International has explained how the revenues could plausibly be financing illegal weapons programs.³³⁶ EarthRights International and other organizations, such as Human Rights Watch and the

Shwe Gas Movement, have expressed concern that gas revenues have not been used to the benefit of the ailing national economy, the under-funded health and education systems, or any number of dire humanitarian crises in the country.³³⁷

Indeed, gas revenues have emboldened the military regime. In the late 1990s, when the junta faced financial collapse, Total and the junta began construction of the Yadana pipeline and the prospect of enormous gas revenues came into focus.³³⁸ This pipeline was officially constructed from 1996-1999, resulting in what the Council on Ethics has recognized as corporate complicity in wide-scale human rights abuses by the Burmese military.³³⁹ In addition, the project provided financial solvency for the military regime.³⁴⁰

Natural gas sales generate approximately 40 percent of Burma's GDP, but this percentage will increase with new gas sales to China when the Shwe gas pipeline becomes operational in 2013, as the companies claim.

In November 2010, Jane's Defense Weekly reported that the military regime "intensified its procurement of military hardware in recent months," adding that "the total value of [military] purchases made during the last two years could exceed USD \$2 billion."³⁴¹ This includes military equipment intended to be used domestically for "counter insurgency" against non-state ethnic armies.³⁴² This type of conflict currently and traditionally has involved the Burmese Army's widespread, deliberate, and indiscriminate killing of non-Burman civilians in ethnic areas.³⁴³ The political and military

330 Council on Ethics, Burma Assessment, *supra* note 7, at 1.

331 *Id.*

332 EARTHRIGHTS INTERNATIONAL, ENERGY INSECURITY, *supra* note 9, at 20.

333 Turnell, "Dissecting the Data: Burma's Macroeconomy at the Cusp of the 2010 'Elections.'" *supra* note 11, at 10; *see also* EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT, *supra* note 10, at 43; International Monetary Fund (IMF), Article IV Consultation, *supra* note 9, at 10.

334 EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT, *supra* note 10, at 43.

335 Luc Zandvliet & Doug Fraser, Field Visit Report: Yadana Gas Transportation Project (Second Visit), Corporate Engagement Project (CDA), Apr.-May 2003, at 16, *available at* www.cdainc.com/cdawww/pdf/casestudy/cep_myanmar_second_visit_field_visit_report_Pdf.pdf.

336 EARTHRIGHTS INTERNATIONAL, ENERGY INSECURITY, *supra* note 9, at 19.

337 In a 2010 open letter to Chinese Premier Wen, Human Rights Watch states its concern "that little, if any, of these [natural gas] funds have been used for desperately needed health and education programs, or the reconstruction of the Irrawaddy Delta after Cyclone Nargis." Human Rights Watch, *Letter to Chinese Premier Wen Ahead of Trip to Burma*, May 30, 2010, *available at* www.hrw.org/en/news/2010/05/28/letter-chinese-premier-wen-ahead-trip-burma-0; *see also*, THE SHWE GAS MOVEMENT, CORRIDOR OF POWER, *supra* note 168, at 11-12.

338 Bertil Lintner, *Paper Tiger*, FAR EASTERN ECONOMIC REVIEW (Aug. 7, 1997) (noting that the junta "was short of cash," and its foreign exchange reserves "shrank to less than the foreign-currency deposits they are supposed to cover") Total acknowledges that official pipeline construction was from 1996-1997, and that gas production began in 1998. Total, *The Pipeline Project*, at http://burma.total.com/en/gazier/p_2_3.htm (last visited Nov. 10, 2010).

339 *See* Council on Ethics, Total Assessment, *supra* note 6, at 12.

340 *See* EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT, *supra* note 10, at 42-46; EARTHRIGHTS INTERNATIONAL, ENERGY INSECURITY, *supra* note 9, at 19-24.

341 Blythe, *Troubling Times*, *supra* note 13.

342 *Id.*

343 For accurate front line reports and dispatches from ethnic areas undergoing ongoing attacks by the Burmese Army, *see* the Free Burma Rangers, Reports, at www.freeburmarangers.org/Reports/ (last visited Nov. 27, 2010).

significance of revenue generated by the oil and natural gas sector in Burma can not be underestimated.

The revenues a company generates for a repressive regime are particularly relevant in situations like the one in Burma, where a single industry or project, by itself, sustains an exceptionally repressive and brutal regime. The Council should therefore factor revenue generation and payments into its Guideline violation analysis.

VII. Necessary Reforms to the Council on Ethics' Approach to Investment in Burma

The guiding principles of Norway's Ethical Guidelines affirm that the Government Pension Fund-Global's investments must be "contingent on sustainable development in the economic, environmental and social sense" – specifically, they must not contribute to "gross violations of human rights."³⁴⁴ As this report has demonstrated, investment in companies engaged in the oil and gas sector in Burma puts Norway in violation of these principles. The Council should therefore take this report as an indication that it should reform and build upon its approach to the ethics of investment in Burma.

First, the Council was correct in adopting a strict standard of immediate exclusion for companies involved in new onshore pipeline construction in Burma, as it is still clear that such infrastructure development cannot advance without inevitable and serious human rights impacts. However, as this report demonstrates, offshore exploration and extraction and post-construction operation of pipelines pose the same unacceptable risk of abuses. EarthRights International therefore recommends that the Council apply its strict standard for pipeline construction to a broader range of gas development activities.

Second, the ongoing human rights record in the Shwe and Yadana project zones reinforces how, although companies may articulate best efforts to ameliorate violations, widespread abuses continue to be the norm as a result of gas development in Burma. The Council should recall that the Guidelines speak objectively of "serious human rights violations" and conditions by which companies are complicit. Importantly, while the Guidelines say the Ministry "may among other things consider... whether the company is doing what can reasonably be expected to reduce the risk of future norm violations," the Guidelines say nothing about good faith efforts by companies being sufficient to undo complicity in ongoing human rights abuses.³⁴⁵

The Council should continue to vigilantly monitor the situation on the ground in Burma. The Council should not rely in part, as it did in its 2005 assessment of Total, on speculative assumptions (e.g. that a company in the future may be "hardly likely to put itself in a situation" associated with abuse). The Council should also avoid uncritical acceptance of corporate public relations campaigns, as in the case of Total, and discredited reports, such as those produced for Total by CDA.

The Council has stated that, while the principal purpose of excluding a company from the Fund is to "prevent the Fund's complicity in grave violations," there may be other positive impacts of exclusion.³⁴⁶ The Fund acknowledges that the

outcome of exclusion may be "that the company in question, other companies and other stakeholders are affected," and that exclusion of one company could in effect deter future unethical investments by other companies.³⁴⁷ EarthRights International agrees with the Council on this point, and urges it to expediently assess all of the companies detailed in this report.

344 Graver Report, *supra* note 23, at § 6.

345 Norwegian Ministry of Finance, Ethical Guidelines, *supra* note 3, at § 2(4).

346 Gro Nystuen, "Consultation Statement from the Council on Ethics Concerning the Evaluation of the Ethical Guidelines for the Government Pension Fund-Global," Sept. 29, 2008 in Council on Ethics, Annual Report 2008, at 118, *available at* www.regjeringen.no

[no/pages/1957930/etikkradet_engelsk08.pdf](http://www.regjeringen.no/pages/1957930/etikkradet_engelsk08.pdf).

347 *Id.*

VIII. Conclusion

Although this report suggests reforms in the Council's approach to evaluating companies in Burma, it has not called on the Council to create new standards and apply new interpretations of the Ethical Guidelines. Rather, this report highlights the Council's previous interpretations of the Ethical Guidelines and its public statements regarding conditions in Burma that would trigger a recommendation of observation or exclusion from the Norwegian Government Pension Fund-Global. Under these standards, measured against the field data of EarthRights International and other organizations, **there is a high likelihood that the Fund is contributing to grave unethical actions in Burma through its holdings in the Fund.** Thus, by its own standards, the Council is obligated to recommend exclusion or observation of the companies named in this report. In turn, the Ministry of Finance will decide to exclude, observe, or engage the companies.

While the Council's mandate does not extend to conducting assessments of additional effects of excluding companies from the Fund, it is important to note that a recommendation by the Council on Ethics to exclude from the Fund the companies named in this report would not directly result in the companies' divestment from Burma. The Council's recommendation for exclusion from the Norwegian Fund will also not necessarily result in exclusion from the Fund, or other funds. The Ministry of Finance may decide to exclude the companies from the Fund or to become an active owner in these companies. The decision ultimately lies with the Ministry of Finance and Norges Bank, Norway's elected officials, and the people of Norway.

Recommendations

To the Council on Ethics

- Continue to take an active interest in the ethics of the Fund's holdings in companies operating in Burma; uphold the integrity of the Ethical Guidelines and abide by established procedures regarding the Fund's holdings in the 15 companies named in this report.
- Apply the strict standard of exclusion for companies involved in onshore pipeline construction in Burma.
- Expand the strict standard of exclusion for companies involved in onshore pipeline construction in Burma to a wider range of extractive industry activities, including offshore oil and gas project development, large-scale minerals mining, and hydroelectric dam construction.
- Appropriately weigh the unethical nature of the Fund's holdings in companies that provide unusually large financial support to particularly repressive regimes such as that in Burma.

To the Ministry of Finance

- Continue to take an active interest in the ethics of the Fund's holdings in companies operating in Burma, and continue to press the Council on Ethics for definitive recommendations to exclude or observe the companies with natural resource operations in Burma that are included in the Fund's portfolio.

To Investors with Holdings in Oil, Gas, Mining, and Hydropower Companies in Burma

- Actively engage companies operating in Burma regarding their investments, effects, and activities in the country, with clear and time-oriented benchmarks for improving corporate behavior.
- Discourage new investment in Burma's oil, gas, mining, and hydropower sectors. For companies already invested in Burma, advocate for publicly available environmental and human rights impact assessments, human rights monitoring, voluntary revenue transparency, and comprehensive civil society engagement – all as minimum standards for corporate responsibility.
- Support shareholder resolutions that promote policies and practices designed to improve the promotion and protection of human rights, environmental protection, and the rule of law; revenue transparency and other forms of transparency; and the rights of indigenous peoples and affected communities, including the right to Free, Prior, and Informed Consent.
- Promote the goals and objectives of the Publish What You Pay campaign and the Extractive Industries Transparency Initiative.

To Oil and Gas Companies in Burma

- Cease new investments or project construction in Burma until negative human rights and environmental impacts can be adequately mitigated and prevented, and until local communities provide Free, Prior, and Informed Consent to projects. In particular, companies involved in the development of the Shwe gas and oil transport pipeline projects, including Daewoo International, Korea Gas Corp., Gas Authority of India Ltd. (GAIL), ONGC Videsh, China National Petroleum Company (CNPC), PetroChina, and others should immediately cease all project related work until the elements of these recommendations are met.
- Conduct independent, objective, and verifiable third-party environmental and human rights impact assessments before the initiation of any oil and gas projects in Burma; include the full and free participation of local people and make the entire assessments publicly available in English and local languages.
- Facilitate and cooperate with independent, verifiable, third-party human rights monitoring of existing projects.
- Recognize Free, Prior, and Informed Consent as an indigenous human right and consult objective and independent third parties to ensure the right is respected in relation to the company's proposed operations.
- Publish disaggregated data about all payments made to the Burmese authorities.
- Actively engage with all stakeholders, including civil society inside and outside of the country.

To Governments with Public Investments in Companies in Burma's Oil, Gas, Mining, and Hydropower Sectors

- Investigate state holdings in companies in the aforementioned sectors in Burma to determine if such holdings conform to the state authorities' ethical, legal, or other principles of investment.

To the Burmese Authorities

- Require by law environmental, social, and human rights impact assessments in relation to any natural resource exploitation project that stands to have significant environmental, social, or human rights impacts.
- Require by law payment transparency from oil, gas, mining, and hydropower companies conducting business within Burma's borders.
- Take steps toward membership in the Extractive Industries Transparency Initiative, including the promotion, protection, and inclusion of a free and genuine civil society in government oversight.
- Enact a moratorium on the oil, gas, mining, and hydropower sectors until human rights and environmental protections are enshrined in law and practice, and the people of Burma can participate in decision-making and the management of the country's natural resources and natural resource wealth.
- Release all political prisoners and engage in serious dialogue with the democratic opposition and ethnic nationalities.



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EarthRights International is a participant in the True Cost of Chevron Network, one of the largest and most unique activist coalitions organizing to reform Chevron and the entire oil industry. The Network is composed of Chevron affected communities and organizations from around the globe concerned with the human right and environmental impacts of Chevron's operations.

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