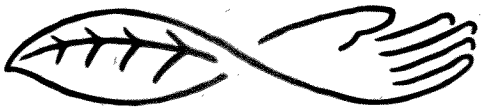

EARTHRIGHTS INTERNATIONAL

December 2, 2010

Ms. Meredith Cross
Director, Division of Corporate Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-4628

Re: Comments of EarthRights International on Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Ms. Cross,

We appreciate the opportunity to participate in the public comment process for the regulations that will be promulgated to implement Section 1504 of the Dodd-Frank Act.

EarthRights International (ERI) is a non-governmental organization based in Washington, DC, and Thailand that works with communities and local groups around the globe to address issues of corporate accountability and liability for human rights and environmental harms. ERI has a significant history working with communities in Burma impacted by extractive issuer projects. A member of Publish What You Pay (PWYP), ERI has a particular interest in government revenue transparency in Burma, where we and our partner organizations work in the context of a repressive and secretive military regime whose revenues stem primarily from the extractive operations of foreign oil, gas, and mining companies.

As an initial matter, we wish to voice our support for the recommendations in the Comment submitted by PWYP-US ("PWYP Comment"). Given PWYP's thorough treatment of the many regulatory issues that the Commission will address in proposing rules to implement Section 1504, ERI's Comment focuses on a few areas of particular concern to our organization and the groups with whom we work. Specifically, this Comment will:

- Expand on the concept of "control" as set forth in the PWYP Comment and provide further illustrative examples;
- Provide insights on the coverage of foreign issuers as envisaged by Congress; and
- Explain the importance of revenue transparency to the civil society groups in Burma, describe how civil society groups in Burma might use Section 1504, and suggest regulatory features that would enable them to make use of Section 1504 disclosures

U.S. Office
1612 K Street NW, Suite 401
Washington, DC 20006
Tel: (202) 466-5188
Fax: (202) 466-5189
email: infousa@earthrights.org

Southeast Asia Office
P.O. Box 123
Chiang Mai University
Chiang Mai 50202 Thailand
Tel/Fax: 66 1 531 1256
email: infoasia@earthrights.org

I. Entities Controlled by the Issuer

We support the suggestions in the PWYP Comment on the definition of "entities under the control" of an issuer. Issuers should be required to report on the payments of all consolidated entities, and to report on a proportionate-share basis on all non-consolidated ventures. In other cases, we agree that the determination of control should be a fact-based inquiry that covers all relationships by which an issuer has the ability to significantly influence an entity making extraction-related payments. We submit that any bright-line definition limiting disclosure to consolidated entities or to operators of joint ventures would allow issuers to structure their business so as to maintain effective control over non-listed entities while evading the intent of Congress to mandate wide-ranging disclosure.

It would be impossible to describe the complete spectrum of arrangements through which U.S. and foreign issuers maintain significant influence over an entity's operations.. At minimum, though, we note that control does not only exist where an issuer owns a majority of a subsidiary, or where it is the operator of a joint venture; by virtue of its financial role, a non-operator might in fact have more influence in a joint venture than an operator, while an issuer might control an entity that makes payments through a contractual relationship or an off-balance-sheet transaction that makes that entity its debtor. A few examples involving the business arrangements of major companies serves to illustrate the need to examine all indicia of control through a fact-based inquiry, rather than relying on rigid rules like percentage ownership or operator status.

Chevron and Total in Burma

Chevron Corp., a U.S. company, and Total S.A., a registered foreign issuer, are joint venture partners in the Yadana gas pipepline project in Burma through wholly-owned subsidiaries, along with the Myanmar Oil and Gas Enterprise (MOGE), a Burmese state-owned oil company, and PTT Exploration and Production (PTTEP), a Thai state-owned energy company. Neither Chevron nor Total holds a majority stake in the joint venture; Total is the designated operator.[1] While MOGE has contributed to the joint venture, it has done so on a preferential basis – it was allowed to exercise its option for a 15% stake after it was clear that the project was commercially viable, and rather than having to contribute assets commensurate to its 15% stake up front, it was allowed to pay them over time, out of its revenue stream from the project.[2]

Until at least 2008, the French bank, BNP Paribas, contracted with the Yadana consortium to receive payments from the Petroleum Authority of Thailand (PTT) (the ultimate buyer of the gas), and to then divide the revenue among the various entities involved.[3] Two of these revenue streams flowed to the Burmese government: one constituting the taxes, royalties, and in-kind

---

[1] *See* Production Sharing Contract for Appraisal, Development and Production of Petroleum in the Moattama Area between Myanmar Oil and Gas Enterprise and Total Myanmar Exploration and Production ("Total PSC"), submitted as Defs.' Ex. 1002 at trial in *Doe v. Unocal Corp.*, BC 237980 (Cal. Super. Ct. 2004), *available at* http://www.earthrights.org/sites/default/files/documents/1002.pdf; Total, *Total in Myanmar: a sustained commitment* at 15 (2010), *available at* http://burma.total.com/en/publications/sustained_commitment.pdf.

[2] Total PSC, *supra* note 1, at 54-56.

[3] Arnaud Valerin, *Total et BNP Paribas accusés de «complicité» avec la junte birmane; AU rapport*, Libération (Paris), Jul. 6, 2010, at 6.

payments to which the Burmese government was entitled pursuant to the joint venture contracts, and the other corresponding to MOGE's equity stake in the pipeline.[4]

As the paying agent for the joint venture partners, BNP Paribas should be considered an entity controlled by Chevron and Total for the purpose of making payments, and Chevron and Total should report the bank's payments to the Burmese government on their behalf on a proportional basis. Furthermore, as MOGE's participation in the Yadana project is on a preferential basis – i.e., on terms not available to private operators – the revenue it receives from the paying agent for its equity stake in the project should also be reported by the issuer as a payment in kind.[5]

Occidental Petroleum in the Persian Gulf

Occidental Petroleum, a California-based petroleum exploration and development company, does business in the Persian Gulf through a number of different structures, all of which should trigger a reporting requirement or, at least, a factual inquiry into whether or not the issuer controls the local entities through which it operates. These arrangements include:

- Through its 24.5% ownership of Dolphin Energy, a 24.5% interest in a natural gas pipeline from Qatar to the United Arab Emirate, and a 24.5% interest in a Development & Production Sharing Agreement (DPSA) with the Government of Qatar to develop a gas field whose results the company *already reports proportionately to its equity interest*,[6] and
- Contractual interests in three producing blocks in Yemen, including a 40.4 percent interest in one field, a significant portion of which is held through a non-consolidated entity.[7]

In addition, Occidental has provided guarantees to refinance the debt of Dolphin energy with a notional value of $300 million.[8] This off-balance-sheet arrangement may give the issuer greater

---

[4] *See* Yadana Gas Project - Union of Myanmar - Paying Agent Agreement, presented as Defs.' Ex. 1017 at trial in *Doe v. Unocal Corp.*, No. BC 237980 (Cal. Super. Ct.); Sept. 22, 2003 Letter from Tek Lin Tan, Fin. Mgr., BNP Jersey Trust Corp., to Total E&P Myanmar, presented as Defs.' Ex. 2537 at trial in *Doe v. Unocal Corp.*, No. BC 237980 (Cal. Super. Ct.).

[5] If an issuer were not required to report on its joint ventures' equity payments to government partners who participate on a preferential basis, a large percentage of the financial benefits host governments receive from foreign-operated resource extraction would fall outside of the ambit of the statute, seriously weakening its ability to promote revenue transparency in many countries. *See, e.g.*, Royal Dutch Shell Plc., 2009 Annual Report: Form 20-F, at 22–23, *available at* http://www.sec.gov/Archives/edgar/data/1306965/000095012310024947/u07660e20vf.htm ("PSCs [production sharing contracts] entered into with a state or state oil company oblige the oil company, as contractor, to provide all the financing generally, and bear the risk of exploration, development and production activities in exchange for a share of the production."). Governments or issuers that wish to evade disclosure could simply structure their agreements such that the government takes an equity share rather than a payment directly from the issuer, even though in practice the government is not participating in the same manner as a private joint venturer or investor but as a state entity.

[6] Occidental Petroleum, 2009 Annual Report: Form 10-K, at 15, 17, *available at* http://www.sec.gov/Archives/edgar/data/797468/000079746810000020/form10k-2009.htm. Furthermore, the fact that Occidental's 24.5 percent stake in Dolphin translates into an equivalent 24.5 percent interest in the assets and liabilities of the DPSA suggests that Dolphin provides all assets and shoulders all liabilities in its joint venture with the Government of Qatar. *Id.* at 15. As described above, where a private operator is involved in a joint venture with a government partner, and the government partner's financial exposure is negligible or, at least, incommensurate with its actual economic benefit, equity payments to the government should be disclosed as payments under Section 1504. *See supra* note 5.

[7] *Id.* at 15.

[8] *Id.* at 25.

control or influence over Dolphin than its ownership stake alone would suggest; in general, such arrangements should be included in the fact-based inquiry that determines control.

Non-arms-length relationships in the CNPC Group

PetroChina, a subsidiary of the state-controlled China National Petroleum Company (CNPC),[9] is a registered foreign issuer. CNPC has a network of affiliates and subsidiaries (of which PetroChina is one), referred to as the CNPC group; the Chinese government has "control, joint control or significant influence" over all these entities.[10] In its filings with the SEC, PetroChina reports that its transactions with other members of the CNPC group may not have the same character as those with unrelated parties[11] – i.e., its relationships with members of the CNPC group are not necessarily arms-length transactions between equal and independent parties.[12]

In its 2009 filing, PetroChina describes a number of arrangements that fall into this category, including a wide range of services, from sales to construction to loans (the latter category totaled in the billions of dollars in 2009).[13] While it is unclear what rights these non-arms-length transactions confer on PetroChina, their existence should trigger a fact-based inquiry to determine whether PetroChina has effective control over any related parties for the purposes of payments to foreign governments, even if they are not PetroChina's subsidiaries.

II. Coverage of Foreign Issuers

The language and requirements of Section 1504 apply to foreign issuers who are registered pursuant to Section 12 of the Exchange Act and every issuer who is required to file reports pursuant to Section 15(d) of the Exchange Act.[14] This includes foreign issuers who have registered with the SEC, make annual reports, and who may make periodic reports.

Level II and Level III ADRs, as registered foreign issuers who provide annual reports and may provide periodic reports, are covered under Section 1504. Any move to limit this coverage – for example, by providing an exception for foreign private issuers to follow home country rules and

---

[9] PetroChina, 2009 Annual Report, at F-42, *available at* http://www.sec.gov/Archives/edgar/data/1108329/000095012310060898/h04189e20vf.htm#111. ("CNPC, the controlling shareholder of the Company, is a state-controlled enterprise directly controlled by the PRC government."

[10] *Id.*

[11] *Id.*

[12] In fact, comments by CNPC's General Manager, who is also PetroChina's Chairman, indicate that PetroChina operates as an arm of CNPC, incorporated to take care of CNPC's overseas business. *PetroChina halts CNPC assets purchase plan*, REUTERS, May 20, 2010, *available at* http://www.reuters.com/article/idUKTOE64J04920100520. In 2007, one investment advisor has concluded that "investors should treat CNPC and PetroChina as if they were a single entity." KLD Research & Analytics, Inc., *Public Companies Operating in 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. The possibility that PetroChina is in fact just an alter ego of CNPC raises complex questions of which entity should be treated as the true issuer for the purposes of Section 1504. The Commission has, in the context of the Investment Advisers Act of 1940, found that a parent company is subject to registration requirements if its U.S. subsidiary is merely an alter ego for the purpose of shielding it from scrutiny or liability. *See* GREEN *ET AL.*, 1 U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKET 11-15 (9th ed. 2006).

[13] PetroChina Annual Report, *supra* note 9, at F-32 – F-36, F-43.

[14] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1504(1)(D)(i).

only disclose what is required under those rules[15] – would disadvantage American companies and would undermine the creation of a uniform disclosure system under Section 1504.

As for Level I ADRs, we recognize that they are exempted from the reporting requirements of registered foreign issuers.[16] However, we reiterate the PWYP Comment's call for the Commission to provide guidance to Level I ADRs on incorporating Section 1504's mandate into their corporate disclosure standards, and to advise Level I ADRs to publish these disclosures online through the compilation created by Section 1504.

In addition to these recommendations, we propose that the Commission monitor the registration and filings of extractive industry issuers to discern whether the exemption for Level I ADRs is having anti-competitive effects on American business. If the Commission ascertains that there has been an anti-competitive effect – for example, if previously registered foreign issuers begin applying for unlisted trading privileges in order to avoid reporting, or if a large number of foreign issuers begin using the Level I ADR exemption instead of listing with the SEC and filing reports – the Commission should consider extending reporting requirements to Level I ADRs. Such requirements could be promulgated under the statutory authority of Section 1504 read together with the Commission's obligations to consider the effects on competition pursuant to Section 23(a)(2) of the Exchange Act,[17] or under the general authority of Section 12(f)(1)(D) of the Exchange Act.[18] If it is necessary to issue regulations requiring reporting by Level I ADRs, such regulations would give effect to the plain language of the Dodd-Frank Act and would help prevent any anti-competitive results of the statute.

In drafting Section 1504, Congress intended the provision to have the broadest coverage possible over foreign issuers; both to address anti-competitive concerns for U.S. extractive issuers, and to give investors and other stakeholders the necessary breadth of information needed to address the underlying intent of the legislation.[19] We note that the submissions of several industry representatives suggest broad exemptions and strained interpretations of key terms, citing the potential anti-competitive effects of Section 1504 on U.S. businesses.[20] We submit that

---

[15] *See, e.g.*, Marten J. ten Brink, Royal Dutch Shell plc Comment, at 5 (Oct. 25, 2010) *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-33.pdf.

[16] 17 C.F.R. § 240.12(f) (2010).

[17] Section 23(a)(2) requires the Commission, in adopting rules under the Exchange Act, to consider the anti-competitive effects of such rules, if any, and to balance any impact against the regulatory benefits gained in terms of furthering the purposes of the Exchange Act.

[18] §12(f)(1)(D) provides the SEC authority to issue additional disclosure requirements and other regulations with respect to exempt foreign issuers.

[19] Senator Cardin's floor statement during a debate on the Restoring American Financial Stability Act argued for the inclusion of Section 1504's provisions and cited a list of covered companies under the provision which includes American Depository Receipts (ADRs). C-SPAN Video Library, *Restoring American Financial Stability Act of 2010 Cont.: Sen. Cardin*, (May 6, 2010) *available at* http://www.c-spanvideo.org/videoLibrary/clip.php?appid=598099821; *see also* Senate Floor Statement of Senator Cardin, July 15, 2010 (Section 1504 requires "all foreign and domestic companies registered with the U.S. Securities & Exchange Commission" to disclose payments to governments), *available at* http://cardin.senate.gov/news/testimonyrecord.cfm?id=326396&&.

[20] *See* Royal Dutch Shell plc Comment, *supra* note 15, at 2; Cravath Swaine & Moore LLP, et al., Rulemaking under Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, at 2 (Nov. 5, 2010) *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-45.pdf; Kyle Isakower & Patrick T. Mulva, American Petroleum Institute Comment, at 5 (Oct. 12, 2010) *available at*

regulations that weaken the disclosure requirements of Section 1504 would be contrary both to the plain language of the law and the clear intent of Congress. Rather, applying Section 1504 to the full range of business entities provided by the law is the way to give effect to congressional intent while avoiding potential harm to our own extractive companies.

III. Section 1504 and Burmese Civil Society

Burma ranks second to last on Transparency International's Corruption Perception Index[21], and with over 70 percent of all foreign exchange reserves gained through sales of natural gas to Thailand,[22] payment transparency can serve a critical good governance function. For civil society groups from Burma, Section 1504 can, if implemented through a strong and common-sense regulatory regime help effectuate this change. For example:

- The IMF has concluded that less than one percent of Burma's gas revenues ever enter the state budget.[23] Confidential sources report that hundreds of millions of dollars from Burma's foreign exchange accounts are held in bank accounts in Singapore in the names of individuals closely associated with the Burmese military junta, but not identified as sanctioned entities by the U.S. or other countries.[24] Robust revenue transparency that requires disclosure of payments by both operators and non-operating partners of gas projects in Burma, including the U.S. issuer Chevron Corporation, the French issuer Total, S.A., and other U.S.-listed issuers operating in Burma, would enable civil society to understand and investigate if, and how much, money is being expatriated. Some issuers may also be facilitating the misappropriation of public resources in violation of international and national laws on money laundering and restrictions on transactions with sanctioned Burmese officials. U.S. investors should be aware of the risks associated with these activities.
- The Burmese government allocates a smaller percentage of its annual budget to social spending – line items like public health and education – than any other government in the region.[25] A more detailed understanding of the state's revenues from resource extraction – the regime's main source of foreign income – would enable civil society groups to advocate for increased expenditures that better promote the public interest.

---

http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf; Nat'l Mining Ass'n, White Paper on SEC Implementation of Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, at 11 (Nov. 16, 2010) *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-52.pdf.

[21] Transparency International, CORRUPTION PERCEPTION INDEX 2010, *available at* http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results

[22] International Monetary Fund (IMF), Staff Report for the 2008 Article IV Consultation, Jan. 7, 2009, at note 4, (confidential report obtained by EarthRights International), *available at* http://www.earthrights.org/sites/default/files/documents/IMF-Leaked-Myanmar-2008-Art-IV-Consultation.pdf.

[23] *Id.* ("Foreign exchange revenues . . . contributed less than 1 percent of total budget revenue in 2007/08, but would have contributed about 57 percent if valued at the market exchange rate").

[24] 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).

[25] IMF Staff Report, *supra* note 22, at 4.

- There is widespread documentation of serious human rights abuses committed by the Burmese military against communities living near extractive projects.[26] In many cases, it is believed that the companies pay security forces to protect their facilities. Civil society groups may use the information disclosed under Section 1504 to reveal connections between issuers and security services to advocate for improved human rights treatment. U.S. investors, for their part, would be more able to assess the material risk to their investment for companies accused of complicity in committing serious human rights abuses.
- Companies operating in Burma often point to their institution of social programs to assist the communities in the areas in which they work, and whose livelihoods are often negatively affected by extractive operations.[27] Civil society could use information about the payments companies make to the government in the form of social programs to assess those efforts and work with companies to improve their impact. U.S. investors would be better able to assess the relationship between communities and the companies in which they invest and the risk of social instability that could disrupt operations.

In order for Burmese groups and investors to effectively use the payment data disclosed under Section 1504, in addition to the points in the previous sections, the disclosure requirements should include:

- Coverage of in-kind payments, including social programs and informal barter payments that may be ad hoc and are not necessarily included in companies' contracts, but which form an important component of the financial relationships between companies, the government, and local communities;
- Project-by-project disclosure as required by the plain language of Section 1504, based on issuers' obligations as set out in project contracts and other agreements;
- Payments related to downstream activities, as required by the plain language of Section 1504;
- No exemptions for confidentiality clauses or conflicting local law, as this would provide incentives to negotiate contracts or enact laws prohibiting disclosure; and
- A *de minimis* standard that takes into account the significance of payments in terms of revenue transparency in the host country, rather than just the financial significance of such payments to the issuer or with respect to total project revenues.

---

[26] *See, e.g.*, ERI & Southeast Asia Information Network, TOTAL DENIAL: A REPORT ON THE YADANA PIPELINE PROJECT IN BURMA (June 1996), *available at* http://www.earthrights.org/files/Reports/TotalDenial96.pdf; ERI, THE HUMAN COST OF ENERGY (April 2008), *available at* http://www.earthrights.org/mwt_journal_admin/HCoE_pages.pdf; Arakan Oil Watch, BLOCKING FREEDOM: A CASE STUDY OF CHINA'S OIL AND GAS INVESTMENT IN BURMA (2008), *available at* http://www.oilwatch.org/doc/paises/birmania/BlockingFreedom.pdf; Shwe Gas Movement, SUPPLY AND COMMAND (July 2006), available at http://www.shwe.org/media-releases/publications/file/SUPPLYANDCOMMAND.pdf; International Human Rights Clinic at Harvard Law School (IHRC), CRIMES IN BURMA (2009), *available at* www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf; U.S. Dep't of State, *2008 Human Rights Report: Burma*, Feb. 25, 2009, *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119035.htm.

[27] *See, e.g.*, Total, *Total in Myanmar*, *supra* note 1.

IV. Conclusion

We thank the Commission for creating an inclusive and transparent process for developing and promulgating regulations under Section 1504 of the Dodd-Frank Act. We would welcome any opportunity to submit further information, or to clarify any of the issues raised in this submission.

Sincerely,

Marco Simons
Legal Director

Jonathan Kaufman
Staff Attorney

Cc:

Ms. Paula Dubberly
Deputy Director Division of Corporation Finance
Securities and Exchange Commission

Mr. Wayne Carnall
Chief Accountant
Division of Corporation Finance
Securities and Exchange Commission

Mr. Paul Dudek
Chief
Office of International Corporate Finance
Division of Corporation Finance
Securities and Exchange Commission

Ms. Tamara M. Brightwell
Senior Special Counsel to the Director
Division of Corporation Finance
Securities and Exchange Commission

Mr. Roger Schwall
Assistant Director
Division of Corporation Finance
Securities and Exchange Commission

Mr. Elliot B. Staffin
Special Counsel
Office of International Corporate Finance
Securities and Exchange Commission