

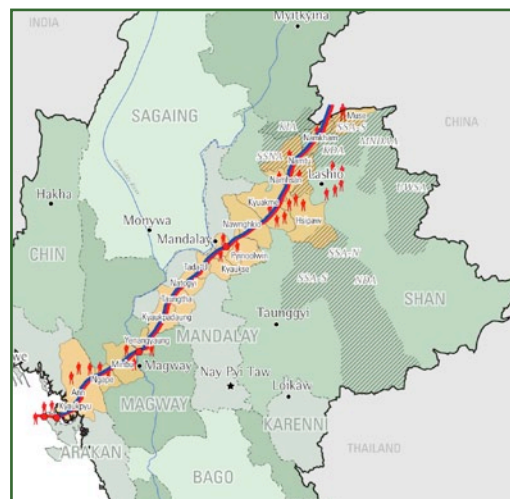
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This brief is the first in a series from EarthRights International focusing on environmental, human rights and financial aspects of natural resource development projects in Burma.

The Burma-China Pipelines: *Human Rights Violations, Applicable Law, and Revenue Secrecy*

This brief provides up-to-date information on the Burma-China gas and oil pipelines. Through firsthand accounts, leaked documents, and publicly available information, EarthRights International analyzes corporate responsibility and accountability with respect to the pipelines, according to international laws and standards, and Burmese law. It discusses how to mitigate harmful impacts and improve the benefits for the people of Burma, and concludes with practical recommendations for key stakeholders.



See page 5 for full map

I. Introduction

Burma (Myanmar) is undergoing complex social and political changes. Controversial national elections were held in November 2010 followed by pro-democracy opposition leader Daw Aung San Suu Kyi's release from political imprisonment. The first legislature in 22 years was formed in January 2011, followed by high-level military shake-ups. There remains widespread agreement that the military will rule the new political system, and the authorities have privatized key sectors to the benefit of a select few. There has been a noteworthy increase in foreign direct investment in the country's energy

sector, led by publicly-listed and state-owned companies from Asia, while the international debate about the efficacy of western-imposed economic sanctions continues. A violent conflict endures in eastern Burma and a number of ceasefire agreements between the Burmese military regime and several ethnic armies hang in the balance. Nationally, the human rights situation has not improved.

This brief focuses on the impacts of two of Burma's largest energy projects, led by Chinese, South Korean, and Indian multinational corporations in partnership with the state-owned Myanmar Oil and Gas Enterprise (MOGE), Burmese companies, and Burmese state security forces. The projects are the Shwe Natural Gas Project and the Burma-China oil transport project, collectively referred to here as the "Burma-China pipelines." The pipelines will transport gas from Burma and oil from the Middle East and Africa across Burma to China. The massive pipelines will pass through two states, Arakan (Rakhine) and Shan, and two divisions in Burma, Magway and Mandalay, over dense mountain ranges and arid plains, rivers, jungle, and villages and towns populated by ethnic Burmans and several ethnic nationalities. The pipelines are currently under construction and will feed industry and consumers primarily in Yunnan and other western provinces in China, while

FURTHER READING

Broken Ethics, The Norwegian Government's Investments in Oil and Gas Companies Operating in Burma (Myanmar), EarthRights International (2010)

Corridor of Power, China's Trans-Burma Oil and Gas Pipelines, The Shwe Gas Movement (2009)

A Governance Gap, The Failure of the Korean Government to hold Korean Corporations Accountable to the OECD Guidelines for Multinational Enterprises Regarding Violations in Burma, EarthRights International (2009)

Report to the South Korean National Contact Point Regarding Daewoo International and Korean Gas Corporation, EarthRights International (2008)

Supply and Command, Natural Gas Development in Western Burma Set to Entrench Military Rule, The Shwe Gas Movement (2006)

The Shwe Gas Bulletin, Arakan Oil Watch

Dodgy Deals, Shwe Gas and Pipeline Projects - Myanmar, BankTrack

producing multi-billion dollar revenues for the Burmese regime.

This brief provides original research documenting adverse human rights impacts of the pipelines, drawing on investigations inside Burma and leaked documents obtained by EarthRights and its partners. EarthRights has found extensive land confiscation related to the projects, and a pervasive lack of meaningful consultation and consent among affected communities, along with cases of forced labor and other serious human rights abuses in violation of international and national law. EarthRights has uncovered evidence to support claims of corporate complicity in those abuses. In addition, companies involved have breached key international standards and research shows they have failed to gain a social license to operate in the country.

New evidence suggests communities in the project area are overwhelmingly opposed to the pipeline projects. While EarthRights has not found evidence directly linking the projects to armed conflict, the pipelines may increase tensions as construction reaches Shan State, where there is a possibility of renewed armed conflict between the Burmese Army and specific ethnic armed groups. The Army is currently forcibly recruiting and training villagers in project areas to fight.

EarthRights has obtained confidential Production Sharing Contracts detailing the structure of multi-million dollar signing and production bonuses that China National Petroleum Corporation (CNPC) is required to pay to MOGE officials regarding its involvement in two offshore oil and gas development projects that, at present, are unrelated to the Burma-China pipelines. EarthRights believes the amount and structure of these payments are in-line with previously disclosed resource development contracts in Burma, and are likely representative of contracts signed for the Burma-China pipelines; contracts that remain guarded from public scrutiny. Accordingly, the operators of the Burma-China pipeline projects would have already made several tranche cash payments to MOGE, totaling in the tens of millions of dollars.¹

If past practice serves as an indicator, the ruling military establishment is not managing the massive revenues generated by the Burma-China pipelines in a responsible or transparent manner. EarthRights has previously documented how natural gas revenues have found their way into private bank accounts in Singapore and it is reasonable to assume the Burma-China pipelines will likewise contribute to similar corruption.² There continues to be a lack of institutional capacity, political space, and freedom among technocrats and civil society inside Burma to effectively advocate for transparent and responsible resource revenue management. Nonetheless, new foreign investment by Asian companies in the country's extractive sectors is likely to continue at an increased pace.

This brief recommends constructive and targeted measures to prevent and mitigate adverse impacts of the Burma-China Pipelines and to encourage positive change in the energy sector. Given the serious problems with energy projects in Burma, political forces in the country should consider advocating for an immediate moratorium on development in the oil and gas sector until the people of Burma can meaningfully participate in development decisions, until the natural resource wealth can be managed responsibly, and until adequate safeguards are put in place to mitigate serious adverse impacts of development projects under military rule.

II. The Pipeline Route, Companies Involved and Operations to Date

The Burma-China pipelines comprise multiple separate projects, each with distinct contracts and ownership structures. The major components are a deep-water natural gas development project and onshore gas terminal; an onshore natural gas transport pipeline from western Burma to China; and an onshore oil transport pipeline from western Burma to China.

¹ Confidential production sharing contracts obtained by EarthRights International. Unless otherwise noted, all confidential documents, field reports, interviews, and letters are on file with EarthRights International.

² See EARTHRIGHTS INTERNATIONAL, TOTAL IMPACT: THE HUMAN RIGHTS, ENVIRONMENTAL, AND FINANCIAL IMPACTS OF TOTAL AND CHEVRON'S YADANA PROJECT IN MILITARY-RULED BURMA (MYANMAR), at 43 (Sep. 2009), available at <http://www.earthrights.org/node/1456>; see also Matthew Smith, *Stop the Looting of Burma*, THE WALL STREET JOURNAL, at 13, Feb. 28, 2011 (print edition).

Shwe Natural Gas Fields

The Shwe Natural Gas fields consist of three independent gas discoveries, the Shwe, Shwe Phyu, and Mya fields (referred to collectively here as the “Shwe fields”). The Shwe fields are in blocks A-1 and A-3 off of Burma’s Arakan coast. Daewoo is the majority owner and operator of both of these blocks, and is itself owned by POSCO, a South Korean conglomerate. Daewoo has brought in a number of minority partners for the gas fields, while MOGE has also exercised its right to take a 15% stake in the project. The current ownership structure is shown in Fig. 1.

The consortium will also operate an offshore pipeline through the Shwe Offshore Pipeline Joint Venture Company. The consortium signed a \$1.4 billion contract with South Korea’s Hyundai Heavy Industries for the construction of the 80km/110km subsea pipeline, as well as much of the offshore natural gas production facilities.³ The pipeline is scheduled for completion by March 2013.⁴ The Burmese military government received numerous offers to purchase gas from the Shwe fields, but finally awarded purchasing rights to China in June 2008 in an agreement to export 6.5tcf of natural gas to China over 30 years.

Onshore Shwe Gas Pipeline

The overland Shwe gas pipeline begins at the offshore pipeline natural gas terminal and will extend 793km to the border with China’s Yunnan province.⁵ The onshore gas pipeline is scheduled for completion in March 2013 at a cost of approximately \$1.04 billion. South-East Asia Pipeline Company Limited (SEAP), a Hong Kong-registered entity created by CNPC, and the Shwe Consortium members, will construct and operate the onshore pipeline⁶ (Fig. 2).

Shwe Natural Gas Fields Ownership (Shwe Consortium)

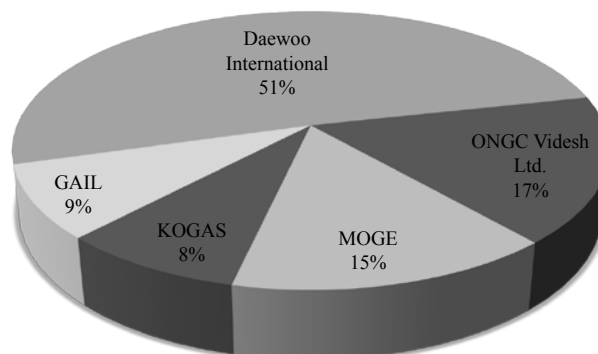


Fig. 1

Onshore Natural Gas Pipeline Ownership

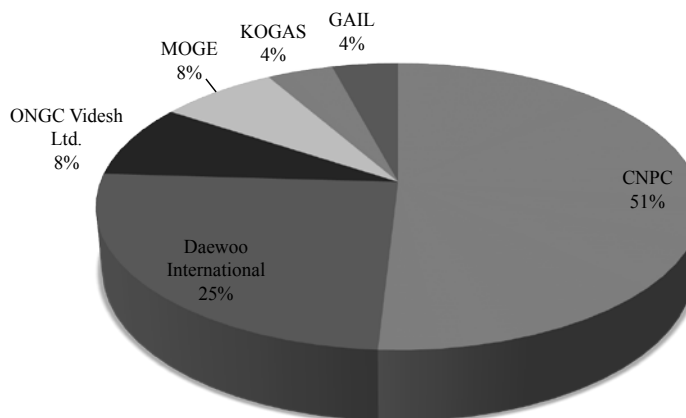


Fig. 2

Onshore Crude Oil Pipeline

For almost the entire distance across Burma, a crude oil pipeline will run parallel to the natural gas pipeline, along with road and rail projects connecting Kyaukphyu to Ruili in Yunnan Province. China’s CNPC is building the pipeline, which will transport oil from the Middle East and Africa to southwestern China.⁷ The project also involves construction of a new deep-water crude unloading port and oil storage facilities on Burma’s Madaya Island.⁸

China National Petroleum Corporation

25.04%, MOGE, Myanmar 7.365 %, GAIL and KOGAS 4.1735% each”).

⁷ Myanmar, Thailand work for building major deep seaport, CAEXPO, Dec. 2, 2010, available at http://eng.caexpo.org/news/t20101202_91503.html.

⁸ Xinhua Economic News, Sino-Myanmar Crude Pipeline Memo Signed, DOWNSTREAM TODAY, June 19, 2009, available at www.DownstreamToday.com/News/article.aspx?a_id=16796.

³ Hyundai Heavy Industries Co., Ltd., *Hyundai Heavy Signs US\$1.4 Billion Myanmar Gas Plant Deal*, Feb. 23, 2010, available at http://english.hhi.co.kr/press/news_view.asp?idx=531.

⁴ ONGC Videsh, *Assets*, available at <http://www.ongcvidesh.com/Assets.aspx> (last visited March 10, 2011).

⁵ CNPC, *Myanmar-China Oil and Gas Pipeline project commenced*, June 4, 2010, available at <http://www.cnpc.com.cn/en/press/newsreleases/>.

⁶ *Id*; ONGC Videsh, *Assets*, available at <http://www.ongcvidesh.com/Assets.aspx> (last visited March 10, 2011) (“The Onshore Pipeline Company was formed and registered in Hong Kong. The shareholding of other partners is CNPC-South-East Asia Pipeline Company Limited (SEAP), China- 50.9%, Daewoo-

(CNPC) controls a 50.9% stake in the oil pipeline through its wholly owned subsidiary South-East Asia Crude Oil Pipeline Ltd. (SEACOP). Burma's state-owned MOGE controls the remaining 49.1%.⁹ According to a December 2009 agreement between CNPC and the Burmese authorities, SEACOP will be responsible for the construction and operation of the pipeline, while Burma's government will provide security for the pipeline.¹⁰ This information about the security arrangement is consistent with confidential contracts between CNPC and MOGE obtained by EarthRights, explained more fully below.

involved in the international drug trade.¹³ The company is listed on the European Union and American sanctions lists,¹⁴ and Steven Law and his Singaporean wife Cecilia Ng are listed on the U.S. Treasury Department Office of Foreign Asset Control Specifically Designated Nationals (SDN) list, also referred to as the black list.¹⁵

The Pipeline Route

Project construction is well underway in Arakan State. In Kyaukpyu, workers have already built housing barracks as well as cleared the land and laid the foundation for the gas terminal.¹⁶ The terminal area alone will require numerous acres of land.¹⁷ In addition, work has commenced on two roads, on either side of Malakyun village, from the coast to the inland gas facility. Paid workers have also started to lay the foundation for the port in Kyaukpyu. The villagers in the area have heard rumors that construction of the port will displace 300 households, but there have been no official announcements yet.¹⁸ The port construction area is officially sealed off and villagers no longer have access to the dock they traditionally used in the dry season. On Maday Island, paid workers are building a pier and the foundation for the oil storage facility. Construction of two new police stations on the island is already complete. Additionally, villagers have heard that 30-40 houses will be destroyed to make way for the projects, but at the time of writing no one among the community has received official notice.¹⁹

Onshore Crude Oil Pipeline Ownership

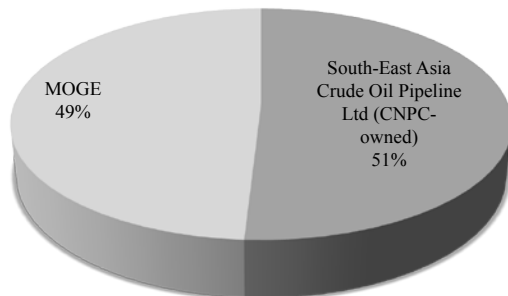


Fig. 3

EarthRights' research indicates the central role of Asia World Co. Ltd (Asia World) in land acquisition related to the Burma-China pipelines, and in facilitating visits to project areas by Korean and Chinese oil executives and staff.¹¹ Asia World is a well-known Burmese company closely associated with the ruling military regime.¹² The managing director is Tun Myint Naing, a.k.a. Steven Law, the son of the infamous drug lord Lo Hsing Han. The company is reportedly involved in the construction business, the management of ports, import-export, and retail businesses in Burma. According to the U.S. Government, Steven Law and his associates are money launderers for the Burmese regime and are

⁹ CNPC, *Rights and obligation agreement signed of Myanmar-China Crude Pipeline*, Dec. 21, 2009, available at <http://www.cnpc.com.cn/en/press/newsreleases/>

¹⁰ *Id.*

¹¹ See e.g. Interviews #004-2010, #005-2010 #009-2010, #014-2010, #021-2010 in Kyaukpyu, Burma.

¹² See U.S. Department of the Treasury, *Burma Sanctions*, "Steven Law Financial Network" (2008), available at <http://www.treasury.gov/resource-center/sanctions/Programs/pages/burma.aspx>.

¹³ *Id.*; see also Barry Meier, *Owner of Exploded Rig is Known for Testing Rules*, THE NEW YORK TIMES, July 7, 2010 available at <http://www.nytimes.com/2010/07/08/business/global/08ocean.html?pagewanted=all>; Thomas Maung Shwe, *Swiss Deny TransOcean's Work for Drug Lord's Violated Sanctions*, MIZZIMA NEWS, July 19, 2010, available at <http://www.mizzima.com/news/world/4126-swiss-deny-transoceans-work-for-drug-lords-violated-sanctions.html>.

¹⁴ See U.S. Department of the Treasury, *supra* note 12; European Commission External Relations, *Consolidated list of persons, groups, and entities subject to EU financial sanctions*, available at http://ec.europa.eu/external_relations/cfsp/sanctions/consol-list_en.htm (last visited March 10, 2011).

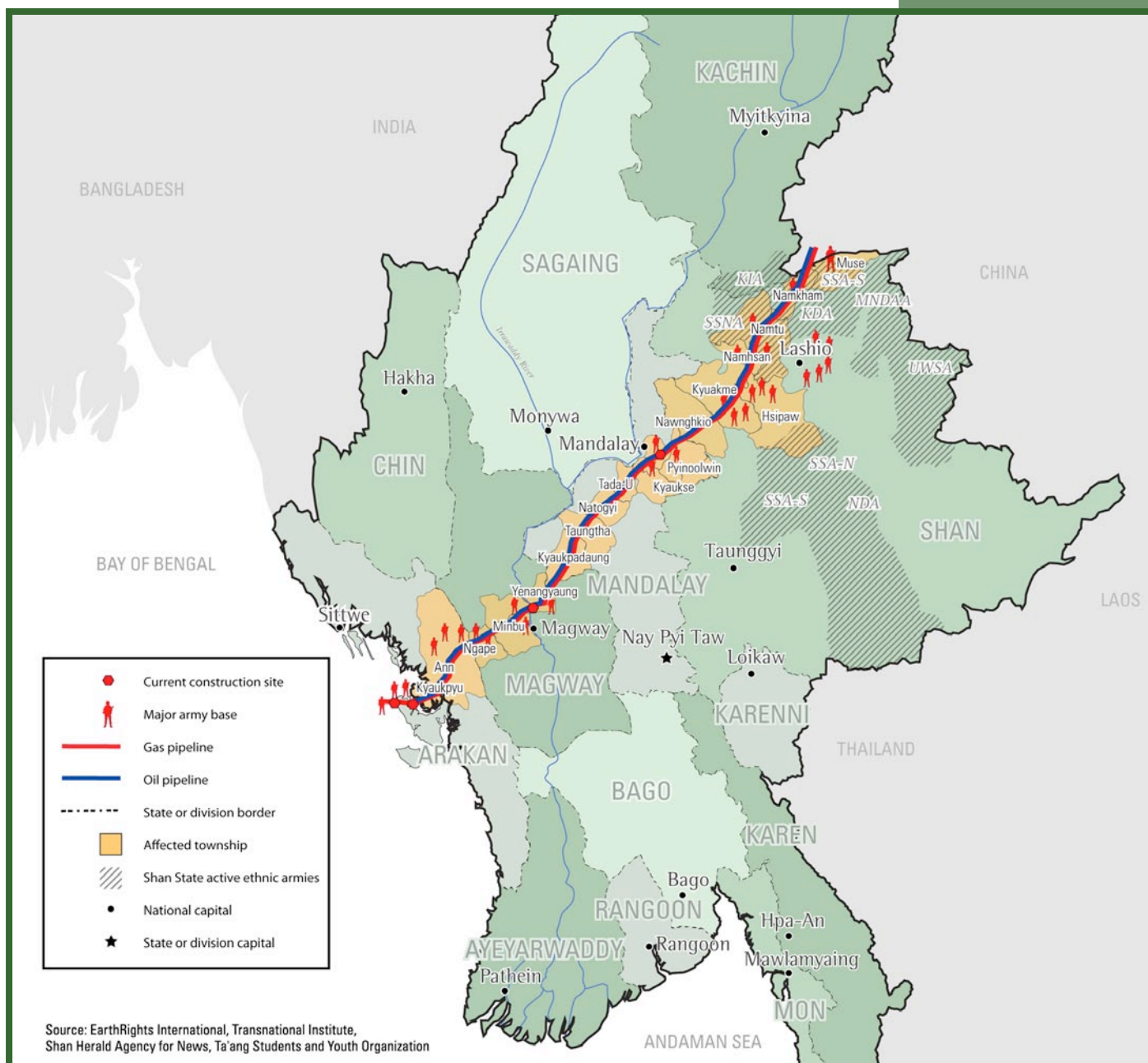
¹⁵ U.S. Department of Treasury, *Specially Designated Nationals and Blocked Persons*, Feb. 25, 2011, available at <http://www.treasury.gov/ofac/downloads/t11sdn.pdf>.

¹⁶ Field Report, Feb. 2011, Kyaukpyu, Burma.

¹⁷ *Id.*

¹⁸ Interview #014-2011 in Kyaukpyu, Burma.

¹⁹ Interviews #004-2010, #007-2010, #008-2010, #009-2010 in Kyaukpyu, Burma.



Work on other construction centers is also underway farther east along the pipeline route, in Yenangyaung Township in Magway Division and Patheingyi Township in Mandalay Division. In Yenangyaung Township, according to local sources, the company aims to complete the Irrawaddy River crossing to Wetmasut village before that area is flooded during the rainy season.²⁰ The construction has focused on the western bank of the Irrawaddy, near Mone Creek. In addition, villagers in Wetmasut report that workers have started construction on a pipeline facility in their area.²¹ EarthRights has also received reports of pipeline-related constructed in Patheingyi Township.²²

III. Project Security

The China-Burma pipeline projects have led to increased Army, Navy, and police presence in certain project construction areas.²³ According to EarthRights' research, there are at least 28 Burmese Army battalions stationed in the area of the Burma-China pipelines, from Arakan State to the China border, some of which were introduced since pipeline project construction began.²⁴ Three battalions are stationed in Kyaukpyu Township in Arakan State alone, and two of the battalions, LIB 542 and LIB 543, are close to the onshore gas terminal.²⁵ In

²⁰ Field Report, Feb. 2011, Magway, Burma.

²¹ *Id.*

²² Field Report, Nov.-Dec. 2010, Mandalay, Burma.

²³ Interviews #017-2010, #049-2010, #054-2010 in Kyaukpyu, Burma; #051-2010 in Minbu, Burma.

²⁴ Multiple interviews conducted by EarthRights in Burma since 2008.

²⁵ Interviews #010-2009, #011-2009 in Kyaukpyu, Burma.

addition, the Navy has increased its presence in Kyaukpyu, including more frequent patrol activities around the exploration area as well as across Maday Island.²⁶ There are two new police stations on Maday Island where in the past there was no permanent police presence.²⁷ In addition, Burmese naval vessels have provided escort to Daewoo International's exploration vessels in the area of Kyaukphyu.²⁸

In Shan State, there has not been a documented military influx specifically related to the pipeline projects, as the Burmese Army presence in the state is complex and longstanding. However, a senior official in the Kachin Independence Army (KIA) recently confirmed that

EarthRights has obtained confidential, official contracts between CNPC and MOGE that show CNPC has contracted with the Burmese regime to provide project security for oil and gas projects in Burma that are, at present, unrelated to the Burma-China pipelines.³⁰ However, it is believed the security clauses in the contracts are a standard provision in the contracts that MOGE enters into with foreign oil companies. The contracts state that MOGE, which is owned by the Burmese authorities, will "[provide] at cost facilities supplies and personnel including, but not limited to... security protection and rights of way and easements."³¹ The contracts further provide that expenses incurred by the Burmese authorities for such services "shall be reimbursed" in U.S. dollars computed at the rate set by the Union of Myanmar Foreign Trade Bank.³²

The Burmese Army's security operations around development projects have historically led to widespread human rights violations against local communities and the Burma-China pipelines appear to be no exception. EarthRights has received unconfirmed reports that villagers in Shan State, near the pipeline route, are being conscripted into an Army-associated militia and trained to fight as part of the security apparatus in the area.³³ EarthRights has received a report of similar civilian-militia trainings in Arakan State.³⁴ The 2010 report of the U.N. Special Rapporteur on Human Rights in Burma also documents reports of forced labor in the area of the pipeline projects.³⁵

CNPC appears to have acknowledged the security arrangement with MOGE when it announced in 2009 that it had signed a Rights and Obligations Agreement with MOGE stipulating, "the Myanmar government shall...guarantee the safety of the pipeline."³⁶



PHOTO: Light Infantry Division #88, near pipeline route, Magway Division, Burma (Oct. 2009)

the Burmese Army is building up its presence in northern Shan State, which is consistent with news reports.²⁹ EarthRights is following the situation closely to learn details of the mandates of battalions near the route.

²⁶ Interviews #017-2010, #054-2010 in Kyaukpyu, Burma; Interview #051-2010 in Minbu, Burma.

²⁷ Interviews #017-2010, #049-2010, #054-2010 in Kyaukpyu, Burma.

²⁸ *Myanmar brings warships to explore Bangladesh waters*, THE DAILY STAR (Nov. 3, 2008) available at <http://www.thedailystar.net/story.php?nid=61625>; Matthew Smith, *Daewoo Aggravating Bay of Bengal Tensions*, THE IRRAWADDY, Nov. 25, 2008.

²⁹ Interview #080-2010 in Bangkok, Thailand; Sai Zom Hseng, *Cease-fire Groups Wary as Burmese Army Buildup Continues*, THE IRRAWADDY, Mar. 2, 2011, available at http://www.irrawaddy.org/article.php?art_id=20862.

³⁰ Confidential production sharing contracts, *supra* note 1.

³¹ *Id.* at 43.

³² *Id.* at 43-44.

³³ Interview # 081-2010 in Bangkok, Thailand.

³⁴ Interview #049 in Kyaukpyu, Burma.

³⁵ U.N. Human Rights Council, *Human Rights Situations that Require the Council's Attention*, at 27, U.N. Doc. A/HRC/13/48 (March 2010) (prepared by Tomas Ojea Quintana, Special Rapporteur), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-48.pdf>.

³⁶ CNPC, *Rights and Obligations Agreement Signed*

IV. Documented Human Rights Impacts and Applicable International and Domestic Legal Standards

The Burmese regime has a well-documented history of violence and disregard for the rights of local communities in areas of natural resource development, including oil and gas exploitation.³⁷ The Shwe gas and oil pipeline projects have already contributed to serious violations of international and Burmese law. Tensions are likely to rise as the Shwe construction progresses and local people are denied access to their land and livelihoods, and as the pipelines reach areas long affected by ethnic-related violence and conflict.

The firsthand documentation in this brief represents a snapshot of conditions and trends along the pipeline route. This documentation is not exhaustive and readers should assume additional instances of abuse are occurring. To date, land confiscation, inadequate compensation, and a lack of free, prior, and informed consent of local people are the most common violations connected to the project. Other serious abuses have also been recorded, including harassment and intimidation by state agents, arbitrary detention and torture, and forced labor associated with the projects.

Arbitrary Detention and Torture

State-sanctioned torture³⁸ and prolonged arbitrary detention³⁹ violate customary international law and all states, including Burma, are obligated to refrain from these actions. Burma's domestic law also outlaws torture⁴⁰ and provides protections against arbitrary detention.⁴¹ Despite these provisions, EarthRights has documented multiple instances of arbitrary detention and torture connected to the Burma-China pipelines.

In Sitwe, in Arakan State, authorities detained and interrogated students and others for suspected opposition to the gas project.⁴² In addition, on Maday Island, a local youth was arrested three times for shouting in the village about his opposition to confiscation of his family's land.⁴³ In another instance in 2009, authorities tortured and imprisoned an Arakan man for participating in community-level meetings discussing the project. He told EarthRights:

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

of Myanmar-China Crude Pipeline, Dec. 1, 2009, available at <http://www.cnpc.com.cn/en/press/newsreleases/>.

³⁷ EarthRights International's publications on this issue are available at <http://www.earthrights.org/publications>; see also ARAKAN OIL WATCH, BLOCKING FREEDOM: A CASE STUDY OF CHINA'S OIL AND GAS INVESTMENT IN BURMA, at 7 (Oct. 2008) available at http://www.arakanoilwatch.org/index.php?option=com_content&view=article&id=27&catid=43&Itemid=55; Human Rights Foundation of Monland-Burma, LAID WASTE: HUMAN RIGHTS ALONG THE KANBAUK TO MYAING KALAY GAS PIPELINE (May 2009) available at: <http://www.rehmonnya.org/data/Laid-Waste.pdf>; 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.

³⁸ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980); see also Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, Harvard Human Rights L.J. (2001) available at <http://www.law.harvard.edu/students/orgs/hrj/iss14/nagan.shtml>.

³⁹ E.g., Restatement 3d of the Foreign Relations Law of the U.S. § 702 (1987).

⁴⁰ Burma Penal Code, Ch. XVI, § 330 (providing that torture is a crime punishable by up to seven years imprisonment). English translation by the Burma Lawyers Council, available at <http://www.blc-burma.org/html/Myanmar%20Penal%20Code/mpc.html>.

⁴¹ Burma Code of Criminal Procedure, Ch. V, § 61 (providing that an arrest without a warrant requires an appearance before a judge within 24 hours). English translation by the Burma Lawyers Council available at http://www.blc-burma.org/html/Criminal%20Procedure%20Code/cpc_01-15.html#061.

⁴² Interview #032-2008 in Sittwe, Burma; Shwe Gas Movement interviews on file with Shwe Gas Movement.

⁴³ Interview #051-2010 in Kyaukpyu, Burma.

“No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”

- UN Declaration on the Rights of Indigenous Peoples

they’d wake me up and keep asking me questions, or beating me.”⁴⁴

This man stood trial on fabricated charges, had no lawyer for his defense, and went into hiding after serving out a six-month sentence in Insein Prison.

Land Confiscation and the Right to Adequate Compensation

Both of the Burma-China pipelines have led to widespread abusive land confiscation practices in violation of international human rights norms as well as potential violation of Burma’s domestic legal obligations. Under Burma’s domestic law, certain land types are protected and cannot be confiscated by authorities without following procedures for fair compensation.⁴⁵ In addition, the Guiding Principles on Internal Displacement, an internationally recognized normative framework for treatment of internally displaced people, prohibits arbitrary displacement, which includes displacement “in cases of large-scale development projects that are not justified by compelling and overriding public interests.”⁴⁶ It further provides that states are under a particular obligation to protect against the displacement of indigenous peoples . . . and other groups with a special dependency on and attachment to the land.”

Burma recognized that additional land confiscation protections apply to indigenous ethnic minorities when it endorsed the U.N. Declaration on the Rights of Indigenous Peoples.⁴⁷ The Declaration provides that, “No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after

agreement on just and fair compensation and, where possible, with the option of return.” Given that indigenous Arakan and Shan communities are located on the projected path and in the vicinity of the Shwe pipelines, Burma and the pipeline companies should seek their free, prior, and informed consent (FPIC) before undertaking operations that will likely lead to their resettlement and relocation.⁴⁸ Indigenous rights are discussed more fully below.

Despite the protections enshrined in Burma’s domestic law and international norms, the Shwe project has led to numerous instances of land confiscation without adequate compensation. On Maday Island, 56 villagers lost approximately 60 acres of farmland to make way for the natural gas storage facility.⁴⁹ The villagers have yet to receive compensation, although construction of the facility has commenced. In addition, villagers on Maday Island received no compensation when construction work flooded their paddy fields, rendering them permanently unsuitable for farming.⁵⁰ Another 20 villagers in Kyaukpyu await compensation for land the government has already seized because it lies in the path of the pipeline route.⁵¹ Villagers in Magway Division also await compensation despite pipeline-related construction that has begun on their property; some of the villagers received partial payment, while others have received nothing.⁵²

EarthRights obtained a letter MOGE sent to local villagers in Arakan State, dated March 16, 2010, informing villagers they must vacate their land in just five days.⁵³ The letter cites a contract with Daewoo International for the Shwe gas pipeline and tells villagers they must hand over their land and abandon any remaining crops. The letter says nothing about compensation.

⁴⁴ Interview #053-2010 in Sittwe, Burma.

⁴⁵ See, e.g., The Land Acquisition Act (1894), The Requisitioning Act (1947) cited in Scott Leckie & Ezekiel Simperingham, HOUSING, LAND AND PROPERTY RIGHTS IN BURMA: THE CURRENT LEGAL FRAMEWORK, at 30-32, 43, 190-209, 502-505 (2009). The law in Burma is “uncertain and vague,” however, and the extent and duration of the military government’s abuse of housing, land and property rights “speaks volumes about both the legal framework and the status of the rule of law in Burma.” *Id.* at 16.

⁴⁶ Francis Deng & et al., *Guiding Principles on Internal Displacement presented to the United Nations Office for the Coordination of Humanitarian Affairs*, Principle 6, (Aug. 2, 1998), available at http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html.

⁴⁷ U.N. Declaration on the Rights of Indigenous Peoples, art. 32, available at www.un.org/esa/socdev/unpfii/en/drip.html.

⁴⁸ Bonney Hartley, *MDG Reports and Indigenous Peoples: A Desk Review*, at 10 (Feb. 2008), available at http://www.un.org/esa/socdev/unpfii/documents/MDG_Reports_and_IPs_2008.pdf (stating that the Arakanese and Shan, and numerous other ethnic minorities in Burma, are considered indigenous people).

⁴⁹ Interview #001-2011, Kyaukpyu, Burma.

⁵⁰ Interviews #004-2011, #005-2011, Kyaukpyu, Burma.

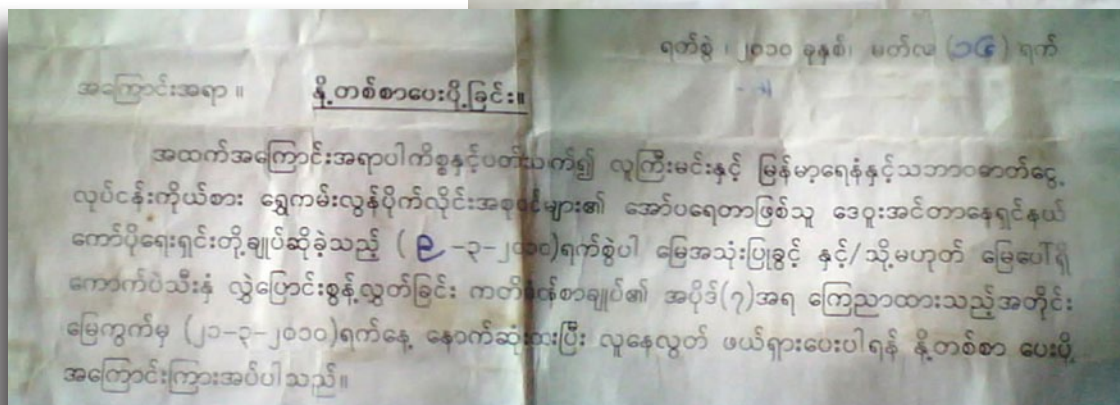
⁵¹ Interview #005-2011, Kyaukpyu, Burma.

⁵² Field Report, Feb. 2011, Magway, Burma.

⁵³ Letter from the Myanmar Oil and Gas Enterprise to villagers, dated March 16, 2010.

Letter from MOGE to villagers in Arakan State

- Original Burmese -



- English Translation -

To: [Redacted]
Id No. [Redacted]
[Redacted] Village

2010 March 16

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Subject: Sending Notification Letter

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Related to the above-mentioned issue, the contract between you and Daewoo International, the offshore pipeline consortium operator, who is the MOGE representative, made on March 9, 2010; Section 7 of the agreement allows [Daewoo International] to use the land and/or you must delivery your land and whatever grows on the land. The deadline is March 21, 2010, and on March 21, 2010, no one should remain on that land and this letter is notice.

U Myint Shwe
Representative of MOGE
Acting Engineer
MOGE
Energy Department

Cc:
V.S.P.D (Village Peace and Development Council)
Township Peace and Development Council (Kyakpyu Township)
District Peace and Development Council (Kyakpyu District)

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The government has also failed to explain the land compensation process to affected communities and individuals. The process has fostered corruption and profiteering and has consistently involved long delays, during which villagers wait with no information regarding their land or compensation. Several villagers have stated that they have received conflicting messages from the Shwe companies about how long their land would remain confiscated,⁵⁴ while a confidential assessment prepared for CNPC and obtained by EarthRights says explicitly that due to the 30-year life span of the project, “the displacement of farmers is likely to be permanent.”⁵⁵ Villagers have reported that well-connected individuals have seized land or changed land titles prior to compensation payouts, depriving the actual landowner of any compensation.⁵⁶ Additionally, a villager told EarthRights that people who knew in advance which land would be confiscated bought the land and then sold it to the authorities for the

up to a year.⁵⁸

Even when villagers have received compensation, it has been inadequate. Villagers report that they received less than the real value for their land because the measurement did not account for all of their acres or for the value of improvements to the land.⁵⁹ In addition, Daewoo International and the Burmese subcontractor Asia World Corporation’s early onshore exploration work on Maday Island in Arakan State led to crop damage and decreased yields for which villagers received no compensation.⁶⁰ No farmers who have received compensation have been able to secure new farmland due to the scarcity and expense of farmland in the vicinity.⁶¹ These villagers have lived in the area their entire lives and report that they have no place to relocate.⁶²

Villagers on Maday Island who were forced to sell their farms to the authorities told EarthRights they believed the residents of the entire island will eventually have to leave the island or will be forcibly evicted. One villager believed the Chinese companies will “confiscate the whole island,”⁶³ while others explained their families will be forced to leave because the companies will make life impossible in the project area: “Later we will lose our house because we cannot live here,” said one farmer who was already forced to sell his family’s farm. “It will be very dangerous on this island. They will store the gas here. And they will destroy our village by building the roads for the gas pipeline.”⁶⁴ Another villager claimed the companies and authorities “are trying systematically to get us to flee from this island by destroying our livelihood.”⁶⁵



PHOTO: Construction materials on uncompensated land in Magway Division, Burma (Dec. 2010)

Shwe project for a higher price.⁵⁷ Finally, among the individuals interviewed by EarthRights who did receive some measure of compensation, no one had received compensation for their lands in under four months time, and most villagers waited for

⁵⁴ E.g., Interviews #070-2010, #071-2010 in Kyaukpyu, Burma.

⁵⁵ Confidential assessment obtained by EarthRights International, 2010.

⁵⁶ Interviews #069-2010, #073-2010, #003-2011, 006-2011 in Kyaukpyu, Burma.

⁵⁷ Interview #071-2010 in Kyaukpyu, Burma.

⁵⁸ E.g., Interviews #024-2010, #025-2010, #27-2010 in Kyaukpyu, Burma ; Interview #021-2010 on the Bangladesh-Burma border.

⁵⁹ E.g., Interviews #050-2010, #069-2010, #074-2010 in Kyaukpyu, Burma.

⁶⁰ Interviews #004-2010, #005-2010, #007-2010, #028-2010 in Kyaukpyu, Burma.

⁶¹ E.g., Interviews #050-2010, #072-2010 in Kyaukpyu, Burma.

⁶² E.g., Interview #005-2010 in Kyaukpyu, Burma (“I love my village very much, because it is our native land and my parents and grandparents were also living in this village.”); Interview #007-2010 in Kyaukpyu, Burma (“We do love this place and this island. Our grandparents, parents and a lot of our relatives were born and passed away in this place.”).

⁶³ Interview #049-2010 in Kyaukpyu, Burma.

⁶⁴ Interview #047-2010 in Kyaukpyu, Burma.

⁶⁵ Interview #52-2010 in Kyaukpyu, Burma.

Livelihood Impacts and Children's and Women's Rights

Because many local people impacted by pipeline construction have lost land upon which they rely for their livelihood, abusive land confiscation practices also implicate rights protected under the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Discrimination of Women (CEDAW). Burma has ratified both conventions. The CRC requires state parties to take appropriate measures to assist families with providing children a standard of living adequate for the child's physical, mental, spiritual, moral and social development, especially with regard to nutrition, clothing and housing.⁶⁶ The CEDAW requires that state parties "take into account the particular problems faced by rural women" and that they ensure rural women the right "[t]o enjoy adequate living conditions."⁶⁷ In the absence of adequate alternative means of subsistence, the pipeline projects are directly impinging on these important rights and protections.

In numerous interviews by EarthRights, villagers have expressed their desperation in the face of land confiscation because they lack the skills or opportunity to engage in work other than farming.⁶⁸ One interviewee lamented, "We will lose our livelihood. I am now old. We cannot work in the Shwe company. I do not want my daughters to work there. They also do not need women workers in the working site. How can we survive?"⁶⁹ Another farmer said, "I don't have enough rice for my family. I worry for my family. I have four children, three are studying for their education. The eldest daughter could not continue her education because we need her help."⁷⁰ None of these villagers are receiving any job training assistance from the Shwe companies or the Burmese authorities.

Forced Labor

The Burmese Army's reliance on forced labor is widespread and well documented, despite international and domestic prohibitions against the practice.⁷¹ Burma has ratified the Convention Concerning Forced or Compulsory Labour, which provides that "[t]he competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations."⁷² Moreover, Burmese law, Order No. 1/99 directs "responsible persons not to exercise powers...relating to requisition of forced labour."⁷³ The Supplementing Order No. 1/99 makes the use of forced labour a criminal offense in Burma.⁷⁴

Despite these prohibitions, the Burmese Army has used forced labor in connection with the Shwe project. EarthRights received a report that soldiers in the Shwe project construction area on Maday Island forced villagers to join the local fire brigade and a local militia.⁷⁵ One villager explained, "A man from every house has to attend the militia training. We don't want to attend the training because we cannot do our work for our family. But they will punish us if we don't attend the training."⁷⁶

A senior representative of the Kachin Independence Army (KIA) reported that the Burmese Army has begun conscripting villagers in the area of the KIA's 4th Brigade in Shan State and training them as an armed militia:

The Burmese are training 40 Kachin, 20 Shan, and 10 Chinese, and that is in only one village . . . They are going to train

"It will be very dangerous on this island. They will store the gas here. And they will destroy our village by building the roads for the gas pipeline."

- Arakan villager forced to sell his farm, 2010, Kyaukpyu

⁶⁶ *Convention on the Rights of the Child*, art. 27, available at <http://www2.ohchr.org/english/law/crc.htm>.

⁶⁷ *Convention on the Elimination of Discrimination Against Women*, art. 14, available at <http://www2.ohchr.org/english/law/cedaw.htm>.

⁶⁸ E.g., Interviews #021-2010 on the Bangladesh-Burma border; Interview #027-2010 in Kyaukpyu, Burma; Interview #079-2010 in Yenangyaung, Burma.

⁶⁹ Interview #074-2010 in Kyaukpyu, Burma.

⁷⁰ Interview #072-2010 in Kyaukpyu, Burma.

⁷¹ E.g., EarthRights International, SUPPLEMENTAL REPORT: FORCED LABOR ALONG THE YADANA AND YETAGUN PIPELINES (Feb. 2002) available at www.earthrights.org/sites/default/files/publications/supp-to-more-of-the-same.pdf; *Complaint concerning the non-observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)* available at <http://www.ilo.org/public/libdoc/ilo/P/09604/09604%281998-81-serie-B-special-suppl%29.pdf>.

⁷² *Convention Concerning Forced or Compulsory Labour*, (ILO No. 29), art. 4, available at <http://www2.ohchr.org/english/law/forcedlabour.htm>.

⁷³ The Union of Myanmar, The State Peace and Development Council, Letter No. 04/Na Ya Ka (U)/Ma Nya, Nov. 1, 2000, available at [www.mol.gov.mm/8.Home/Home_link/spdc\(Eng\).pdf](http://www.mol.gov.mm/8.Home/Home_link/spdc(Eng).pdf).

⁷⁴ *Id.*

⁷⁵ Interview #049-2010 in Kyaukpyu, Burma.

⁷⁶ *Id.*

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“They control everything. I feel that we lost our freedom.”

- Arakan villager, Kyaukpyu, Burma, 2010

“They ordered our 25 farmers from this village to sign that we were in agreement with them. . . . At last, I had to sell to them.”

- Arakan villager, Kyaukpyu, Burma, 2010

villagers as soldiers all along the area [of the pipeline through northern Shan State]. Thousands of people they are going to train at this kind of thing, a militia training. [The Burmese Army] are going to distribute arms and ammunitions.⁷⁷

Lastly, in 2009, EarthRights learned that the Burmese Army used forced labor directly connected to a Daewoo International corporate social responsibility (CSR) project in the Dry Zone of Central Burma. In this case, the Burmese Army forced local villagers to work on the construction of a health clinic that is part of Daewoo’s socio-economic program. The villagers who were forced to work were not consulted about the project.⁷⁸ EarthRights has confirmed through a third party that Daewoo was subsequently informed of the forced labor.⁷⁹ EarthRights further confirmed that the affected villagers sought remedies through the forced labor complaint mechanism of the International Labour Organization (ILO).⁸⁰

Other Economic, Cultural, and Social Impacts

The increased military presence on Maday Island connected to the Shwe project has led to restrictions on villagers’ movements, confiscation of personal property, and constant scrutiny of villagers’ activities. Local people have reported that the navy command on Maday Island has restricted villagers’ travel and their access to traditional fishing grounds.⁸¹ Villagers also report that the military forces confiscate goods, such as fish and livestock, without providing any payment.⁸² The Navy also demands payment from fishermen to put their boats to sea.⁸³ One villager said, “The fishing is our traditional work for survival. I can’t deny paying. If I do not pay the money they asked, they will beat me a lot and will send me to Kyaukpyu jail.”⁸⁴ Another said,

“They control everything. I feel that we lost our freedom.”⁸⁵

There has also been an influx of sex workers in Kyaukpyu, attendant to the oil companies’ arrival. Local villagers find this morally reprehensible, against their cultural norms, and blame the oil company staff for creating the demand for the sex work.⁸⁶ “They are systematically destroying our town,” said one farmer, referring specifically to the companies’ responsibility for the influx of sex workers.⁸⁷

Free Prior and Informed Consent and Indigenous Communities

Burma has over 100 indigenous peoples, most speaking unique languages and dialects. The pipeline projects will cross through and near the territories of several of these groups, including the Arakan and Shan. In numerous interviews of Arakan people by EarthRights, they have expressed their inability to refuse or object to any aspects of the project, including orders to leave their land and homes. “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.”⁸⁸

Villagers report that they were told their land would be confiscated for the pipeline projects, they were not given an opportunity to refuse, and they were not informed when they would receive payment for their land. On Maday Island, Asia World representatives held a meeting to inform villagers that their land would be confiscated and that they would be paid, but then the company representatives left town without providing payment or any further explanation.⁸⁹ Similar meetings took place in Kyaukpyu and Magway.⁹⁰ One villager

border.

⁷⁷ Interview #080-2010 in Bangkok, Thailand.

⁷⁸ Field Report, May 2009.

⁷⁹ *Id.*

⁸⁰ *Id.*; EarthRights communications with the ILO, 2009-2010.

⁸¹ Interviews #009-2010, 011-2010, #013-2010, #054-2010 in Kyaukpyu, Burma.

⁸² Interview #014-2009 in Kyaukpyu, Burma (2009).

⁸³ *E.g.*, Interviews #048-2010, #049-2010 in Kyaukpyu, Burma (2010).

⁸⁴ Interview #054-2010 on the Bangladesh-Burma

⁸⁵ Interview #051-2010 in Kyaukpyu, Burma.

⁸⁶ *E.g.*, Interview #018 in Kyaukpyu, Burma; *see also* EarthRights International, *BROKEN ETHICS: THE NORWEGIAN GOVERNMENT’S INVESTMENTS IN OIL AND GAS COMPANIES OPERATING IN BURMA (MYANMAR)*, at 28 (Dec. 2010), available at <http://www.earthrights.org/publication/broken-ethics>.

⁸⁷ Interview #015-2010 in Kyaukpyu, Burma.

⁸⁸ Interview #004-2010 in Kyaukpyu, Burma (2010).

⁸⁹ Interviews #007-2010, #009-2010, #024-2010, #025-2010, #026-2010, #047-2010 in Kyaukpyu, Burma.

⁹⁰ Interview #071-2010 in Kyaukpyu, Burma; Interview #078-2010 in Magway, Burma.

explained, “They ordered our 25 farmers from this village to sign that we were in agreement with them. . . . At last, I had to sell to them.”⁹¹

Involuntary resettlement appears imminent in Kyaukpyu and on Maday Island in Arakan State (Rakhine). The villagers have heard that construction of the Kyaukpyu port will displace 300 households, and that 30-40 houses will be destroyed on Maday, but there has been no official announcements yet.⁹² Further resettlement is likely to occur along the route in Shan State as construction gains pace. Environmental and social impact assessments have been conducted in some areas – explained more fully below – but assessment teams have been prohibited from conducting assessments on Maday Island and other areas,⁹³ and the assessments remain undisclosed. It remains unclear what, if any, actions the companies have taken to mitigate likely impacts, including land seizures and forced evictions.

Despite significant adverse impacts on local communities and the environment, to EarthRights International’s knowledge, the companies involved have not engaged in meaningful consultation with affected communities, nor have the affected communities provided Free, Prior, and Informed Consent (FPIC) on any project-related decisions, including resettlements. EarthRights has confirmed through confidential sources that CNPC conducted a social impact assessment (SIA) for the gas pipeline.⁹⁴ The SIA involved a survey that began after construction already commenced in western Burma, and it was primarily a needs assessment of a random sampling of local villages in 12 townships along the pipeline route in advance of socio-economic programs by the company.⁹⁵ CNPC did not request that survey teams obtain the free, prior, and informed consent of affected villages, and the Burmese authorities likewise never sought to obtain villagers’ consent.⁹⁶

FPIC and the related principle of Meaningful Consultation, a practice found in the International Financial Corporation’s Performance Standards and World Bank rules and other multi-party industry standards,⁹⁷ reflect the increasingly accepted principle that indigenous peoples must play a pivotal role in decision-making at each stage of projects that will affect their lands or territories.⁹⁸ These standards place particular emphasis on FPIC during project preparation to best understand the communities’ wishes and gain support for project-related decisions from representative institutions of the communities’ choosing.⁹⁹ FPIC is particularly important when connected with resource extraction, as it is in this situation.

Burma’s failure to require pipeline companies to meaningfully consult with local and indigenous people and gain their consent is inconsistent with the commitment to FPIC embodied in its endorsement of the Declaration on the Rights of Indigenous Peoples; it may also violate Burma’s legal commitments under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), to which it is a party.¹⁰⁰

The Burmese government is not the only entity with responsibility to ensure that the rights of indigenous groups in Burma are respected. As Prof. John Ruggie, the U.N. Special Representative of the Secretary-General on Human Rights and Business, has written, home states should

⁹¹ Interview #047-2010 in Kyaukpyu, Burma.

⁹² Interviews #004-2010, #007-2010, #008-2010, #009-2010, #014-2011 in Kyaukpyu, Burma.

⁹³ Interview, Jan. 4, 2010.

⁹⁴ See Impact Assessments and Due Diligence, *infra* at 15.

⁹⁵ *Id.*

⁹⁶ EarthRights Interview, Jan. 4, 2010; Confidential assessment document obtained by EarthRights, 2010.

⁹⁷ See International Finance Corporation, *Performance Standards on Social & Environmental Sustainability* at 19-20, 29-31, Apr. 30, 2006, available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf); 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.

⁹⁸ 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>; U.N. Declaration on the Rights of Indigenous Peoples, art. 32, available at www.un.org/esa/socdev/unpfii/en/drip.html.

⁹⁹ *Id.*

¹⁰⁰ See Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* ¶ 4(d), available at <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument>.

take steps to ensure that the companies they support through export promotion policies do adequate due diligence to avoid human rights abuses.¹⁰¹ In fact, there is a strong argument that companies' home states like South Korea and China aid and abet Burma's potential violation of the CERD by knowingly financing the Shwe consortium without taking adequate steps to secure indigenous groups' right to FPIC.

Social License to Operate

"We're happy there is gas in the ground. Let's keep it there for now."

- Ethnic Arakan resident of Arakan State, Burma¹⁰²

A social license to operate exists "independently of a corporation's legal obligations under the laws of the state of their incorporation or operation" and instead arises "from the set of customary norms that define the expectations of corporations and their stakeholders."¹⁰³ According to John Ruggie, the social license explicitly involves the corporate responsibility to respect human rights: "Governments define the scope of legal compliance, but the broader scope of the corporate responsibility to respect human rights is also defined by social expectations—as part of what is sometimes called a company's social license to operate."¹⁰⁴

While the social license to operate lacks standardized elements, investors and other project stakeholders have widely accepted its importance as a way for companies to avoid costly obstacles or delays and as an imprimatur of responsible business practices. Increasingly, project stakeholders consider whether a company has a social license to operate when they evaluate a

project's risks and benefits.

EarthRights has found the companies involved in the Burma-China pipelines have not gained a social license to operate. The companies have not addressed the expectations of impacted communities and local sentiment is overwhelming opposed to the Burma-China Pipeline projects at this time, with a widespread desire for projects that improve sustainable development of communities.¹⁰⁵ "I don't want to see all the company men on our island. They know only their business. They didn't think about our lives and our paddy fields. I don't want the gas to be sold to them. If we can have the right to use gas, we want to use it in our state,"¹⁰⁶ said one farmer. Another local farmer added, "I don't agree to sell our gas to the foreign companies but we have no rights to tell them."¹⁰⁷ Yet another said, "For me, I don't agree on gas selling to foreign companies. If it's possible, we want to use it in our country. But we have no chance to speak our opinions in our country. The Burmese government is very powerful in our country."¹⁰⁸

V. Access to Remedies

The rule of law and an independent judiciary are largely absent from Burma; the courts remain a tool of the regime to silence and punish dissent.¹⁰⁹ Therefore, people affected by the Shwe project – for example, villagers who were not compensated for their land or for damage to their crops, and who were beaten by security officers or denied access to their traditional fishing areas – have no place to turn to redress these wrongs inside Burma. As one villager in western Burma put it, "We are poor farmers. They are powerful and rich. They can do what they want in our island. We have no chance to stop their actions in our island. Anytime they can do anything and we have no rights except following it."¹¹⁰ Numerous villagers repeatedly expressed similar sentiments to EarthRights.¹¹¹

¹⁰¹ John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* ¶ 39, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/8/5&Lang=E>.

¹⁰² Field Report, Aug. 2005, Arakan State, Burma.

¹⁰³ Larry Cata Backer, *Corporate Governance and the Social License to Operate*, Law At the End of the Day (Blog), June 08, 2010, available at <http://lcbackerblog.blogspot.com/2010/06/corporate-governance-and-social-license.html> (last visited March 4, 2011).

¹⁰⁴ Remarks by SRS John Ruggie, International Institute for Conflict Prevention & Resolution, Corporate Leadership Award Dinner, New York, 2 October 2008 available at <http://198.170.85.29/Ruggie-speech-to-CPR-2-Oct-2008.pdf>. (last visited March 4, 2011).

¹⁰⁵ EarthRights interviews and field reports (2005-2011).

¹⁰⁶ Interview #008-2010 in Kyaukpyu, Burma.

¹⁰⁷ Interview #012-2010 in Kyaukpyu, Burma.

¹⁰⁸ Interview #020-2010 on the Bangladesh-Burma border.

¹⁰⁹ See Scott Leckie & Ezekiel Simperingham, *supra* note 45 at 9.

¹¹⁰ Interview #010-2010 in Kyaukpyu, Burma.

¹¹¹ See e.g. Interviews #004-2010, #005-2010, #010-2010 in Kyaukpyu, Burma.

At present, the ILO's forced labor complaint mechanism offers a non-judicial remedy for labor rights violations. However, filing complaints often poses serious risks that the Burmese authorities will persecute complainants, deterring the use and usefulness of this mechanism.

The companies operating the Burma-China pipelines have an opportunity to protect labor rights by promoting the mechanism in their project areas, by promoting the ILO's presence in Burma, by facilitating complaints of forced labor to the ILO, and by using their influence with the Burmese authorities to protect complainants from persecution by the regime. The ILO has initiated "facilitation" trainings for a variety of actors in Burma, including representatives of the private sector, during which participants learn how to facilitate local villagers' complaints of forced labor to the ILO.

In 2008, aware of the limited remedies available in Burma, EarthRights and its partners filed a specific instance complaint with the Korean National Contact Point (NCP) for the Organization for Economic Cooperation and Development (OECD) against Daewoo International and KOGAS concerning the Shwe gas project. The complaint alleged that the two companies had breached at least six OECD Guidelines by failing to practice due diligence to prevent negative human rights and environmental impacts of the Shwe Project.¹¹² The Korean NCP, however, sided with Daewoo International and KOGAS and dismissed the complaint.¹¹³ EarthRights continues to work with its partners to identify potential avenues for redress outside of Burma, including extra-territorial application of Korea, China and India's domestic law to the respective Shwe pipeline company's complicity in abuses.

In zones of weak governance and conflict, where access to remedies are

not available, Professor Ruggie has recommended that companies like those participating in the Burma-China consortium assume an independent responsibility to "observe internationally recognized human rights."¹¹⁴ This "independent responsibility" becomes more acute as pipeline construction proceeds through conflict-affected areas, where the number and severity of human rights abuses is likely to increase.

VI. Impact Assessments and Due Diligence

Environmental and Social Impact Assessments (EIA/SIA) of large-scale natural resource extraction projects serve to introduce environmental and social considerations into stakeholders' decision-making regarding whether a project should proceed, and, in the event it proceeds, how to mitigate adverse impacts. When conducted according to international best practice, impact assessments are done before, during, and after project completion and involve dialogue between operating companies and local communities that may experience adverse impacts. In weak or repressive governance zones,



PHOTO: Pipeline construction near Irrawaddy River, Magway Division (Feb. 2011)

¹¹² 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.

¹¹³ EARTHRIGHTS INTERNATIONAL AND THE SHWE GAS MOVEMENT, A GOVERNANCE GAP: THE FAILURE OF THE KOREAN GOVERNMENT TO HOLD KOREAN CORPORATIONS ACCOUNTABLE TO THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES REGARDING VIOLATIONS IN BURMA, at 13 (June 2009) available at www.earthrights.org/publications.

¹¹⁴ John Ruggie, Draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy Framework', at 19-20 (Nov. 2011) available at <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>.

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impact assessments sometimes represent a community's best hope at meaningful participation in development decisions that affect their lives.

Burma has legal obligations regarding environmental impact assessments. Burma ratified the Convention on Biological Diversity, which requires that it introduce appropriate procedures requiring an EIA of its projects where there is likely to be a significant impact on biodiversity.¹¹⁵ Burma has also ratified the Agreement of the Association of South-East Asian Nations (ASEAN) on Conservation of Nature and Natural Resources, which provides that state parties must require an EIA "for proposals for any activity which may significantly affect the natural environment" before the proposals are adopted.¹¹⁶ Article 206 of the 1982 United Nations Convention on the Law of the Sea was ratified by Burma in 1996 and requires that state parties conduct an EIA when planned activities under their jurisdiction or control may cause pollution or significant and harmful changes to the marine environment.¹¹⁷

Beyond Burma's international legal obligations, impact assessments are a standard practice by corporations operating in the energy sector. They are a minimum element of corporate responsibility. The OECD requires EIAs, including assessments covering social aspects, of companies from member countries, which includes South Korea-based Daewoo International, KOGAS, and POSCO.¹¹⁸

China, South Korea, and India have domestic laws requiring impact assessments for projects that will have significant impacts within their borders,¹¹⁹

but the application of these requirements to overseas investments is less well defined. In 2009, however, China's Ministry of Environmental Protection (MEP) and the Ministry of Commerce completed draft Chinese Overseas Direct Investment Environment Protection Guidelines that await approval from relevant governmental authorities.¹²⁰ The draft requires that Chinese investors conduct EIAs and follow Chinese environmental standards if they are higher than those of the host country, as well as adhere to international environmental treaties signed by China and host countries.¹²¹ Negotiations among the concerned ministries are still ongoing and the final form of these Guidelines remains in doubt.

The Daewoo International-led consortium has indicated it commissioned an EIA for offshore gas exploration and production in western Burma, although it has never produced this document in public or to local communities. In a 2008 meeting with EarthRights, the Shwe Gas Movement and the Korean House for International Solidarity (KHIS), Daewoo assured EarthRights and its partners that it had conducted an EIA and agreed to share the document and make it public, per international standards.¹²² In response to the specific instance request filed by to the Korean NCP for the OECD Guidelines, Daewoo informed the NCP that it had conducted an EIA, as required by the OECD Guidelines. The NCP then affirmed that Daewoo had conducted an EIA despite Daewoo's failure to produce the document.¹²³ Subsequent attempts by EarthRights to obtain the EIAs conducted by Daewoo for the Shwe project have been unsuccessful and to date there is no physical or local testimonial evidence of an impact assessment. No villagers interviewed by

¹¹⁵ *Convention on Biological Diversity*, art. 14, (June 1992) available at <http://www.cbd.int/convention/text/>.

¹¹⁶ ASEAN Agreement on the Conservation of Nature and Natural Resources, Art. 14, available at <http://www.aseansec.org/1490.htm>.

¹¹⁷ Third United Nations Conference on the Law of the Sea: Final Act, Oct. 21, 1982, art. 206, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf...>

¹¹⁸ Section V.3 of the OECD Guidelines for Multinational Enterprises requires companies located in or from OECD-member countries to conduct environmental impact assessments when "proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority." OECD Guidelines for Multinational Enterprises, (June 200), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

¹¹⁹ Annie Donnelly, et al., A DIRECTORY OF IMPACT

ASSESSMENT GUIDELINES, at 73, 74-75, 82, Int'l Inst. for Environ. & Development (1998).

¹²⁰ Ding Qingfen, *Green norms for overseas investment soon*, CHINA DAILY, June 9, 2010, available at http://www.chinadaily.com.cn/cndy/2010-07/09/content_10084524.htm.

¹²¹ *Id.*

¹²² EarthRights meeting with Daewoo, notes, Oct. 28, 2008, Seoul, Korea.

¹²³ EARTHRIGHTS INTERNATIONAL & THE SHWE GAS MOVEMENT, A GOVERNANCE GAP: THE FAILURE OF THE KOREAN GOVERNMENT TO HOLD KOREAN CORPORATIONS ACCOUNTABLE TO THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES REGARDING VIOLATIONS IN BURMA, June 15, 2009, at 13, available at www.earthrights.org/publications.



PHOTO: Project signage in Gonchun Village, Kyaukpyu Township, Arakan State (Feb. 2011)

EarthRights in Arakan State, Magway Division, or Mandalay Division claim to have had any discursive interactions with any company working on behalf of Daewoo regarding environmental impacts, nor do they claim to have any knowledge of impact assessments.¹²⁴

EarthRights has confirmed through multiple sources and confidential documents that CNPC commissioned and carried out a quantitative Social Impact Assessment (SIA) in portions of the pipeline route. There were reportedly 3,600 households surveyed in 12 townships along the pipeline route. The houses were selected by stratified random sampling, with 40 villages selected in each township.¹²⁵ This is a positive and welcomed development.

Nevertheless, the assessment involved a survey that was marked by methodological flaws inherent to military-ruled Burma, beyond the control of survey teams. For example, the Ministry of Energy had to approve every village to be included in the survey; access to some villages, including those on Madaay Island, was denied to survey teams. EarthRights confirmed that areas restricted to the survey team correlate with areas where land confiscation and other abuses had taken place in connection to the project.¹²⁶ In villages where the regime granted access, the Burmese authorities

chaperoned the survey teams during the assessment process, which compromises the study's objectivity, response rate, and the security of participants. It is unknown at the time of writing how many stages are envisioned in the assessment process. A source close to the company's process claimed the assessment teams were unaware if the assessment was envisioned as a one-off or a continuous process.¹²⁷

Sources also indicate that the SIA began after project construction had already started. One document prepared as part of the assessment and obtained by EarthRights says simply there are "little to no incentives for terminating the project," but the document failed to elaborate on reasons for or against the project.¹²⁸ These facts would indicate that the assessment was not intended to help stakeholders determine whether the project should proceed, or even how it would proceed. Instead, the assessment was, according to one source, primarily a tool to understand villagers' perceptions of the companies and the pipeline, and the ways the companies could improve socio-economic conditions. Thus, the "impact assessment" was a needs assessment. While this is welcomed in today's Burma, where communities' socio-economic needs are neglected by the state, it should not be confused with an impact assessment for the pipeline.

¹²⁴ EarthRights interviews in Arakan State, Burma, 2005-2011.

¹²⁵ EarthRights interviews with confidential sources.

¹²⁶ *Id.*; EarthRights interviews, 2008-2011.

¹²⁷ EarthRights Interview, Jan. 4, 2010; EarthRights communications with confidential source.

¹²⁸ Confidential assessment document obtained by EarthRights, 2010..

The documents that EarthRights obtained and sources it consulted confirm that the assessments did not specifically address potential impacts of the Burmese Army in connection to the project, and the assessments did not address the pipelines' potential contribution to civil war or armed ethnic conflict.¹²⁹ One document explicitly recommended CNPC work directly with the Army and Regional Commanders in aspects of potential social programs.¹³⁰

Moreover, the confidential SIA assessment document obtained by EarthRights cites the abovementioned quantitative survey in claims that communities in the area of the project welcome the company's presence and see social and economic opportunity in the company's presence.¹³¹ This finding contradicts information collected by EarthRights. In interviews from 2005-2011, EarthRights has not recorded a single interview with a local person in favor of the project. In interviews, villagers expressed strong and in some cases fearful opposition to the project, with numerous first-hand testimonials explaining abuses they have suffered in connection to the project.¹³²

Despite the limitations of the non-public impact assessments, there are redeeming qualities to the documents and information obtained by EarthRights. One aspect of the assessment encourages CNPC to alert communities to adverse environmental impacts; to engage in sustained dialogue with villagers; and to allow independent auditing of its social impact.¹³³ The document maintains CNPC's presence in Burma cannot be neutral, and specifically invokes human rights issues as of special concern, such as land confiscation and forced labor. It also recommends that CNPC refer complaints of forced labor to the International Labour Organization (ILO). These are highly encouraging aspects.

Nevertheless, if impact assessments lack transparency and are shrouded from public scrutiny, such as those conducted for

the Burma-China pipelines, a core function of the assessment – to alert the host society to potential impacts – is diminished. Without external pressure, and with little oversight in Burma, the companies involved may be less motivated to conduct adequate due diligence and install the management systems and on-the-ground resources to meaningfully mitigate negative impacts.

VII. Increasing Ethnic Tensions: Business in a Conflict Zone

According to EarthRights' sources, the route of the pipelines is in the direct path of politically contested territory in northern Shan State. In that area, the route runs from Hsipaw, to Namtu, Maimaw, Maiwee, and Namkhan.¹³⁴ This crosses territory of the Kachin Independence Army's (KIA) 4th Brigade, the Kachin Defense Army (KDA), and the Shan State Army-North (SSA-N).¹³⁵ Since early 2011, the SSA-N has divided into a Border Guard Force (BGF) faction, comprised of the 3rd and 7th brigades, and a non-BGF faction, comprised of the 1st Brigade.¹³⁶ The BGF is a strategy advanced by the Burmese authorities to transition ceasefire ethnic armed groups into "border guard forces" under the direct control of the Burmese Army.¹³⁷ The SSA-N 1st brigade refused the proposal and is now a member of the Committee for the Emergence of a Federal Union, an umbrella group of armed ethnic forces calling for political dialogue toward a federal union, and agreeing to reinforce each other militarily should the Burmese Army attack any one of the groups.¹³⁸ The Committee also includes several other ethnic armed groups, including the Karen National Union and the Kachin

¹²⁹ EarthRights Interview, Jan. 4, 2010; Confidential assessment document obtained by EarthRights, 2010.

¹³⁰ Confidential assessment document obtained by EarthRights, 2010.

¹³¹ *Id.*

¹³² See Documented Human Rights Impacts and Applicable International and Domestic Legal Standards, *supra* at 7.

¹³³ Confidential assessment document obtained by EarthRights, 2010.

¹³⁴ TRANSNATIONAL INSTITUTE, NEITHER WAR NOR PEACE; THE FUTURE OF THE CEASE-FIRE AGREEMENTS IN BURMA (July 2009), available at <http://www.tni.org/sites/www.tni.org/files/download/ceasefire.pdf>; Recent updates from EarthRights' sources in Shan State, including Ta'ang Youth Organization (TSYO).

¹³⁵ *Id.*

¹³⁶ Sai Zom Hseng, *Cease-fire Groups Wary as Burmese Army Buildup Continues*, THE IRRAWADDY, Mar. 2, 2011, available at http://www.irrawaddy.org/article.php?art_id=20862.

¹³⁷ Confidential document detailing instructions given by Lt. General Ye Myint and other senior Burmese Army officials to ethnic ceasefire groups regarding the group's transition to a border guard force under the control of Burmese armed forces, April 28, 2009.

¹³⁸ Saw Yan Naing, *Ethnic Alliance Vows to Strive for Federal Union*, THE IRRAWADDY, Feb 21, 2011, available at http://www.irrawaddy.org/article.php?art_id=20792.

Independence Organization (KIO), which is the political arm of the KIA.¹³⁹

There has already been violent conflict in the vicinity of the project between the SSA-N and the Burmese Army, and between the ethnic Kokang armed group and the Burmese Army, which in 2009 led to an influx of over 30,000 refugees into China.¹⁴⁰ Moreover, the KIA is currently bracing for attacks from the Burmese military regime.¹⁴¹ Decades-long ceasefire agreements with several armed ethnic groups, including the KIO, are in jeopardy of collapse. The impacts of increased conflict for local communities would be severe.

The Burmese regime's use of forced labor in the pipeline area in Shan State has also contributed to ethnic tensions there. A senior representative of the KIA told EarthRights how villagers in the pipeline area in northern Shan State were being trained to fight. "Now the Burmese Army is trying to train whatever ethnic nationalities are [in the pipeline route] in order to control this area. . . . The idea is that the Kachin will fight against each other, and when there is no KIA movement, then those people will continue to safeguard this area."¹⁴²

The Chinese authorities have reportedly been involved in a dialogue between the KIA and the Burmese regime. "Chinese officials encouraged both sides to talk while counseling them to exercise restraint."¹⁴³ When asked about attempts by the Chinese authorities to speak to the KIA and the Burmese authorities about averting conflict, however, the KIA representative was dismissive; he expressed that the Burmese Army conscripting local villagers to fight was a sign that the Burmese regime lacked regard for meaningful political dialogue. "The Chinese know very well," he said, "they talk first, we say no [to the military regime's final demand that the KIA

surrender], and then there is this [forced militia] kind of thing, so there's no need to talk."¹⁴⁴ This official remained cautious, however, about commenting on what would happen upon full pipeline construction through the area, stating, "Whatever I answer the question at this time is of no use."¹⁴⁵

While the conflicts in Shan State are complicated and longstanding, and pipeline construction has not yet commenced there, there is little doubt that the pipelines are now a non-neutral factor. According to a New York Times interview, General Gam Shawng Gunhtang of the KIA said, "The pipeline will be a tool and an opportunity for the [Burmese regime] to eliminate the armed groups."¹⁴⁶

In light of the ongoing conflicts, and the risk that the pipelines could contribute to greater instability and violence, EarthRights strongly advises companies against moving forward with pipeline construction through Shan State at this time. If the companies insist on moving forward, they must take concerted and demonstrable steps to avoid contributing to ethnic conflict. The companies are on notice of the risks associated with this project and have an obligation to conduct their operations in a responsible manner, including using their unique position to influence the actions of their state partners and security forces.

VIII. Revenue Production and Management

"Enormous amounts of revenue are expected to be generated from pending natural gas sales to China through the Shwe gas pipeline. . . . These funds need to be included in the Government's budget and managed transparently with proper checks and balances."

– Tomás Ojea Quintana,
U.N. Special Rapporteur
on the situation of human
rights in Myanmar¹⁴⁷

¹³⁹ *Id.*

¹⁴⁰ BROKEN ETHICS, *supra* note 86 at at 27.

¹⁴¹ Dennis Gray, *Myanmar's ethnic minorities prepare for war*, THE WASHINGTON POST, Nov. 2, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/02/AR2010110201037.html>.

¹⁴² Interview #080-2010 in Bangkok, Thailand.

¹⁴³ International Crisis Group, *China's Myanmar Strategy: Elections, Ethnic Politics, and Economics*, Sept. 21, 2010, at 4-5, available at <http://www.crisisgroup.org/~media/Files/asia/north-east-asia/B112%20Chinas%20Myanmar%20Strategy%20%20Elections%20Ethnic%20Politics%20and%20Economics.ashx>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Thomas Fuller, *Ethnic Groups in Myanmar Want Peace but Gird for a Fight*, NEW YORK TIMES, May 10, 2009.

¹⁴⁷ Tomás Ojea Quintana, *Progress report of the Special Rapporteur on the situation of human rights in Myanmar*, at 16, A/HRC/16/59, Mar. 7, 2011.

EarthRights International has obtained confidential documents detailing the structure of signing and production bonuses that CNPC is contracted to pay to MOGE officials with regard to offshore exploration blocks unrelated at present to the Burma-China pipelines. These contracts, however, include information EarthRights believes to be common to all contracts between MOGE and foreign oil companies. Accordingly, at this stage in the Burma-China pipelines, the companies' pre-production payments to MOGE would total in the tens of millions of dollars.¹⁴⁸ The documents obtained by EarthRights reveal that oil companies are required to pay to MOGE officials U.S. \$10 million as a "signing bonus," an amount that is not recoverable from costs, as is standard practice for other up-front expenses the companies incur prior to production.¹⁴⁹ This is in effect money paid by the energy companies to operate in Burma's territory. The whereabouts and the Burmese regime's use of the signing bonus money remains unknown.¹⁵⁰

EarthRights has also discovered details of "production bonuses" CNPC is contractually obligated to pay to MOGE on a graduated basis in correlation to the amount of natural gas production. The contracts require that the companies pay: U.S. \$1 million "after approval of the Development Plan for a commercial Discovery of Natural Gas"; U.S. \$2 million when production over any consecutive 90 day period reaches 150 million cubic feet per day; U.S. \$3 million when it reaches 300 million cubic feet per day over any consecutive 90 day period; U.S. \$4 million when it reaches 600 million cubic feet per day over any consecutive 90 day period; U.S. \$5 million when it reaches 750 million cubic feet per day over any consecutive 90 day period; and U.S. \$10 million when it reaches 900 million cubic feet per day over any consecutive 90 day period.¹⁵¹

¹⁴⁸ Confidential production sharing contracts obtained by EarthRights, 2010.

¹⁴⁹ *Id.* at 31; see also 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, §9.4 at <http://www.earthrights.org/sites/default/files/documents/1002.pdf>.

¹⁵⁰ EarthRights has previously documented the Burmese regime's mishandling of revenues from Burma's gas sector. *Id.* *supra* note 2.

¹⁵¹ Confidential production sharing contracts, *supra* note 1 at 31-33.

Burma does not practice revenue transparency nor require it of companies operating in its territory. The state recently passed a "Special Funds" law that authorizes the military chief to access a special fund with no oversight or accountability from the rest of the military-dominated government. The law allows the military Commander-in-Chief to use the money "to safeguard national sovereignty and protect the disintegration of the union" and explicitly provides that the military chief "shall not be subject to questioning, explanation, or auditing by any individual or organization" regarding use of the funds.¹⁵² The National League for Democracy and others have recently criticized the military regime for its management of revenue in Burma.¹⁵³

Revenue and contract transparency in the extractive industries has become the focus of increasing international attention in efforts to promote responsible management of natural resource wealth. Both mandatory and voluntary initiatives have increased greatly in the past several years, including the United States' recent passage of legislation requiring the majority of internationally operating oil, gas, and mining companies to disclose their payments to governments on an annual and project-by-project basis.¹⁵⁴ For Burma, this will capture payments made by Total, Chevron, and the Chinese National Offshore Oil Company (CNOOC), among others. The European Union¹⁵⁵ and South Korea¹⁵⁶ have proposed similar laws. The Hong Kong stock exchange also recently began requiring all companies currently listed, and those applying for listing, to be

¹⁵² *Myanmar Democracy Group Slams Military Fund*, ASSOCIATED PRESS, March 4, 2011, available at http://news.yahoo.com/s/ap/20110304/ap_on_re_as/myanmar_opposition_1;PoliticiansDecryMilitaryBudget, DEMOCRATIC VOICE OF BURMA, March 7, 2011, available at <http://www.dvb.no/news/politicians-decry-military-budget/14619>.

¹⁵³ *Id.*

¹⁵⁴ See Dodd-Frank Wall Street Reform and Consumer Protection Act, §1504, available at <http://www.transparency-usa.org/documents/FinancialReformReconciliation.pdf>.

¹⁵⁵ PWYP International, *New Transparency Laws Could Help Millions, says Publish What You Pay*, press release, Feb. 20, 2011, available at <http://www.publishwhatyoupay.org/en/resources/new-transparency-laws-could-help-millions-says-publish-what-you-pay>.

¹⁵⁶ 해외자원개발법 개정안 [Amendment to Overseas Resource Development Business Act] (introduced December, 2010); see http://www.newjinbo.org/xs/?document_srl=938133&mid=bd_news_comment (Korean).

transparent in payments to host country governments, including taxes, royalties, and other significant payments on a country-by-country basis.¹⁵⁷

Additionally, the Extractive Industries Transparency Initiative (EITI), a voluntary effort involving governments and oil, gas and mining companies, is gaining traction in its efforts to standardize a framework for revenue transparency in the energy and mining sectors.¹⁵⁸ However, voluntary transparent resource management is unlikely under the current regime in Burma. EarthRights confirmed through sources engaged with Burma's Energy Minister Lun Thi that the Minister appears unfamiliar with EITI and is unlikely to advance it.¹⁵⁹ Additionally, EITI "validation" requires a free functioning civil society that participates in the revenue management process, which is something that even western oil executives in Burma's energy sector privately agree is not viable at this time. Moreover, NGOs operating with government approval in Burma cannot focus on the management of the country's gas wealth in any meaningful way without compromising their security.¹⁶⁰

The lack of revenue transparency in Burma underscores the importance for extractive companies to operate responsibly and promote transparency. Despite EarthRights' and its partners' private encouragement to Daewoo to promote EITI in Burma, the company claimed it is "hard" for them to raise the issue of revenue transparency with the host government.¹⁶¹ Daewoo's Senior Vice-President Chae Moon Rim was unconcerned about transparency and added, "I believe the Myanmar Government will utilize all the profits earned from this project to benefit

the people of Myanmar."¹⁶² Daewoo also claimed that it signed a production sharing agreement that prohibited transparency in Burma, although the executives present did not furnish evidence to support their claims.¹⁶³

Based on publically available and leaked production sharing contracts between international energy companies and MOGE, EarthRights believes such confidentiality requirements are absent and companies are free to disclose payment information.¹⁶⁴ The relevant clauses in CNPC's and Total's contracts with MOGE stipulate in identical language that the companies are required to "to maintain in strictest secrecy and confidence all data and information purchased or acquired from MOGE as well as during the course of operations in [Burma]."¹⁶⁵ These contracts say nothing of a requirement to maintain secrecy in a company's own data regarding payments made to MOGE. Only the most creative interpretation would conclude companies operating in Burma are contractually prohibited from practicing revenue transparency. Moreover, in 2009, Total disclosed that their project contributed U.S. \$254,000,000 to the Burmese authorities in 2008.¹⁶⁶ The MOGE or other state authorities have taken no known legal action against Total; further evidence of the legality of payment disclosures in Burma.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See EarthRights International, The Yadana Pipeline, available at <http://www.earthrights.org/campaigns/yadana-pipeline> (providing links to Yadana Pipeline contracts).

¹⁶⁵ *Id.*; Confidential production sharing contract, *supra* note 1 at 64.

¹⁶⁶ Total, *Our Response to Allegations Contained in the ERI Report* (Oct. 2009), at 11, available at http://burma.total.com/en/publications/Total%20in_Myanmar_update.pdf.

¹⁵⁷ Revenue Watch Institute, *Hong Kong: Stock Exchange to Require Greater Transparency*, May 28, 2010, available at <http://www.revenuewatch.org/news/news-article/china/hong-kong-stock-exchange-require-greater-transparency>.

¹⁵⁸ Extractive Industries Transparency Initiative, www.eiti.org.

¹⁵⁹ Communication with confidential source from an international financial institution, 2011.

¹⁶⁰ EarthRights email and phone communications with the Executive Director of a Rangoon-based NGO, 2010-2011. The consensus is that most NGOs operating legally in Burma are naturally pleased that other groups are focusing on issues of revenue transparency and management, but they will not focus on it due to security concerns.

¹⁶¹ Internal notes from meeting with senior executives from Daewoo International, Oct. 28, 2008, Seoul, Korea.

IX. Recommendations

To the Burmese Authorities

- Permit independent, impartial, and credible investigations of human rights violations, without delay.
- Adopt and enforce laws that require environmental, social, and human rights impact assessments in relation to any natural resource exploitation project that stands to have significant impacts.
- Adopt and enforce laws requiring 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.
- Ratify the United Nations Convention Against Corruption, which Burma signed December 2, 2005.
- Adopt and enforce laws to ensure a fair land compensation process, public participation in development decisions, and public access to information, including impact assessments, land compensation policies and procedures, and disclosures related to project revenues and social payments.
- Enact a moratorium on development in 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.



To Companies Participating in the Burma-China Pipeline Projects

- Conduct independent, objective, and verifiable third-party environmental and human rights impact assessments over the entire length of the pipeline before, during, and after the project life cycle. Include the full and free participation of local people and make the entire assessments publicly available in English and local languages.
- 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.
- Work collaboratively with locally affected communities and civil society inside and outside of the country and respond to concerns of investors and others concerned.
- Provide adequate compensation to all locally affected individuals and communities for land and livelihood impacts related to the projects.
- Immediately cease all project-related work until adequate safeguards are in place, particularly through sensitive areas including Shan State.

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To Companies Considering Participating in the Oil, Gas, Mining and Hydropower Sectors in Burma

- Cease new investments or project construction in these sectors in Burma until negative human rights and environmental impacts can be adequately mitigated and prevented.
- Companies that choose to continue investments or construction in these sectors in Burma should at a minimum follow the recommendations listed herein with regard to the Shwe companies.



To International Banks and Monetary Authorities

- Perform Know-Your-Customer due diligence and suspicious activity reporting and response, in accordance with applicable law and international best practice.
- Refuse to allow politically exposed persons from Burma to maintain bank accounts if there is reason to believe the accounts contain illicit proceeds in accordance with anti-corruption and money laundering policies.



To the International Community

- Coordinate policies within and between national governments and the private sector to prevent corruption and money laundering of Burma's natural resource wealth with particular emphasis on intelligence gathering, sharing of information, and effective preventative action.
- Deny politically exposed persons from Burma and their known associates and entities access to international capital markets, with a particular emphasis on persons or entities associated with the extractive industries.



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' legal obligations, or ethical or environmental guidelines for investment.
- Ensure that domestic law provides clear rules governing extraterritorial corporate activity and that remedies are available in home states to victims if a credible forum is not available locally.



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 credible, 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 promote: human rights, environmental protection, and the rule of law; transparency and anti-corruption policies; 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.



A brief by EarthRights International
Washington, D.C. | Chiang Mai

www.earthrights.org

The Shwe gas onshore pipeline will run across Madaya Island, Arakan State, where oil port and storage facilities are currently under construction for the Chinese National Petroleum Corporation's oil transport pipeline project. In a few instances, we refer to only the Shwe gas project when we should have referred to both projects, or to the Shwe gas project when we should have instead referred to the oil transport pipeline. EarthRights International regrets any confusion this may have caused.

EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of 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.